



Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Regional Magistrates:	YES / NO
Circulate to Magistrates:	YES / NO

**IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape Division, Kimberley)**

Saakno / Case number: **898 / 2016**
Datum aangehoor / Date Heard: **19 / 05 / 2016**
Datum gelewer / Date delivered: **25 / 05 / 2016**

In the application of:

JODAN CONSTRUCTION (PTY) LTD

Applicant

and

THE PREMIER OF THE NORTHERN CAPE

First Respondent

**THE MEC FOR NC DEPARTMENT OF
ROADS AND PUBLIC WORKS**

Second Respondent

DOWN TOUCH INVESTMENTS (PTY) LTD

Third Respondent

Coram: Erasmus, AJ

JUDGMENT

ERASMUS, AJ

INTRODUCTION:

[1] The applicant (“Jodan”) lodged an urgent application against first and second respondents (“the Premier” and “the Department” respectively) for an interim interdict

prohibiting the handing over of a road construction site, to wit the gravel section of MR947 road between Rusfontein and Laxing, Phase 2 ('the tender'), pending the finalisation of the review of the award of the contract under the tender to the third respondent ("Down Touch").

- [2] The third prayer in the Notice of Motion is not in dispute and pertains to the furnishing of the minutes and other documentation relating to the proceedings, the decision and reasons for the decision to award the contract to Down Touch. At the date of hearing of this application the Department was in the process of delivery or had already delivered the record to the Registrar of this Court.
- [3] The fourth prayer pertains to the review and ancillary relief pertaining to the decision of the Department.

BACKGROUND:

- [4] Jodan and Down Touch both submitted tenders for the contract under the tender, which was to be awarded based on the highest ranked scoring, subject to certain conditions.

- [5] At a public meeting held during January 2016, the total bid price of the tenderers was disclosed to those in attendance and Jodan was ranked first on the criterion of the total bid price, approximately R6 million lower than its closest competitor.
- [6] The award of the contract had to take place by no later than 28 April 2016. On 20 April 2016, when perusing a certain website, Jodan noticed that the contract under the tender had been awarded to Down Touch. As at 3 May 2016, the date on which the founding affidavit was deposed to, Jodan had not yet been informed that its tender was unsuccessful. In terms of clause F.3.16.2 of the tender document, the Department was, after having notified the successful tenderer, obligated to inform the other tenderers that their offers had been unsuccessful.
- [7] Having become aware of the award of the contract to Down Touch, Jodan's attorneys addressed a letter to the Department on 21 April 2016. The Department was informed that Jodan had enjoyed the most favoured bid status and that it was intending to launch an application to have the decision to award the tender to Down Touch reviewed and set aside. Jodan sought an undertaking that the site would not be handed over to Down Touch. The Department did not respond to the letter.

- [8] Jodan's attorney contacted the head of the legal department of the Department and informed him of the contents of the letter dated 21 April 2016. It was communicated to the attorney that the site would be handed over to Down Touch within seven to fourteen days. Jodan's attorney was told to proceed with its application.
- [9] On 29 April 2016 the Department informed Jodan's attorney that there was no further progress. Jodan then lodged the urgent application on 3 May 2016. On 6 May 2016 it was postponed to 19 May 2016.
- [10] The Premier gave notice that it would abide by the decision of this Court. The Department had initially opposed the application, but later withdrew its opposition. It consented to the relief for the interim interdict and the delivery of the record to the Registrar, but insisted that an additional paragraph be included in a draft order, to wit that Jodan '*file a review application within 15 days from the date of the information so furnished*'. It also insisted that the costs of the urgent application be costs in the review application. Jodan agreed to the proposed draft order.

[11] Down Touch opposes the application although no relief was claimed against it.

[12] Down Touch did not pursue the issue of urgency and the merits of the application for the interim interdict was argued before me.

THE JOINDER OF DOWN TOUCH:

[13] It is stated in the founding affidavit that the applicant was advised that it was not imperative to cite Down Touch in the urgent application as it does not have a direct and substantial interest, i.e. a legal interest, in the outcome of the urgent proceedings.

[14] Adv. Vlok, on behalf of Jodan, submitted that the relief sought in the urgent application before me had been settled between Jodan and the Department. It was submitted further that, as Jodan did not claim any relief against Down Touch, there is no *lis* between the parties.

[15] Down Touch opposes the application on the basis that it has a direct interest in the outcome of the application as it is the successful contract. According to the deponent to the answering affidavit, Down Touch had already had an

agreement with the Department and it had taken several steps to execute upon the contract. It had expended vast amounts of money and would be severely prejudiced if the implementation of a valid tender process were to be hindered or delayed indefinitely.

[16] It is trite that the test as to whether it is necessary to join a party in proceedings depends upon the manner in which or the extent to which a court's order may affect the interests of the third party. A party will have a legal interest in the subject matter of the litigation if the party will be affected prejudicially by the judgment or by any order the court might make, or if such an order cannot be sustained or brought into effect without prejudicing that party.¹

[17] In this instance the contract was awarded to Down Touch and in terms thereof it is entitled to be handed the site. Any decision which suspends or prohibits the handing over of the site will necessarily prejudice Down Touch. This being so, Jodan was correct in joining Down Touch in the proceedings. Down Touch has a direct and substantial interest in the outcome of the interim application and further litigation. As a party to the

¹ *Standard Bank of South Africa Ltd v Swartland Municipality* 2011 (5) SA 257 (SCA) par [9]; *Collin v Toffie* 1944 AD 456 at 464; *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 661

proceedings it is entitled to oppose the relief sought in these proceedings before me.

THE INTERIM INTERDICT:

[18] The relief sought in this instance is a temporary measure which would preserve the status quo pending the final determination of the rights of Jodan and Down Touch.

[19] The requirements for an interim interdict are well established.² The applicant must show:

- 19.1 a *prima facie* right, even though open to some doubt;
- 19.2 a well-grounded apprehension of irreparable harm if the interim relief is not granted;
- 19.3 that the balance of convenience favours the granting of the relief; and
- 19.4 the absence of another remedy adequate in the circumstances.

[20] An interim interdict is a discretionary remedy. The exercise of the discretion entails judicial assessment of

² *Setlogelo v Setlogelo* 1914 AD 221

the requirements and more specifically the prospects of success in the main application and the harm or prejudice that a party may suffer, pending the outcome thereof.³ I must seek to ensure, as far as is reasonably possible, that the party who ultimately succeeds in the review application will receive adequate relief.⁴

[21] The difficulties facing a court having to exercise its discretion in circumstances similar to these before me was eloquently summarized by Harms DP in **MOSEME ROAD CONSTRUCTION CC v KING CIVIL ENGINEERING CC**⁵:

“...Courts (including this court) are swamped with unsuccessful tenderers that seek to have the award of contracts set aside and for the contracts to be awarded to them. The grounds on which these applications are based are many. Sometimes the award has been tainted with fraud or corruption, but more often it is the result of negligence or incompetence or the failure to comply with one of the myriad rules and regulations that apply to tenders. Sometimes the successful tenderer is to be blamed for the problem but then there are cases where he is innocent. Many cases are bedevilled by delay, whether in launching the application (and also because the facts were not readily available or easily ascertainable) or because of delays and suspensions inherent in the appeal procedure. If the applicant succeeds the contract may have to be stopped in its tracks with possibly devastating consequences for the government or the successful tenderer or both. Conversely, if the works are allowed to be completed, the tenderer that should have been awarded the tender would unjustly be deprived of the benefits of the contract. There are also cases where the final judgment issues only after completion of the contract. It is not necessary to adumbrate further. Tendering has become a risky business and courts are often placed in an invidious position in exercising their administrative discretion – a discretion that may be academic in a particular case, leaving a wronged tenderer without any effective remedy.”

³ *Knox D’Arcy Ltd v Jamieson* 1996 (4) SA 348 (SCA)

⁴ *Pikoli v President and Others* 2010 (1) SA 400 (GNP) at 403-404

⁵ (385/2009) [210] ZASCA 13 (15 March 2010) par [1]

PRIMA FACIE RIGHT

[22] In respect of the question whether an applicant has established a *prima facie* right, Conradie J in **CORIUM (PTY) LTD AND OTHERS v MYBURGH PARK LANGEBAAN (PTY) LTD AND OTHERS**⁶ summarized the position as follows:

“It is not simply the right to bring the review proceedings. It is the expectation of securing relief which, if it prima facie appears to be legitimate, is entitled to protection.”

[23] This Court is required to consider the merits and prospects of success of the contemplated review proceedings. Should such prospect of success exist, a court should be inclined to exercise its discretion to grant interim relief.⁷

[24] As stated by Smalberger JA in **SIMON NO v AIR OPERATIONS OF EUROPE AB AND OTHERS**:⁸

“The accepted test for a prima facie right in the context of an interim interdict is to take the facts averred by the applicant, together with such facts set out by the respondent that are not or cannot be disputed and to consider whether, having regard to the inherent probabilities, the applicant should on those facts obtain final relief at the trial. The facts set up in contradiction by the respondent should then be considered and, if serious doubt is thrown upon the case of the applicant, he cannot succeed.”

⁶ 1993 (1) SA 853 (C) at 856C; See also *Ladychin Investments (Pty) Ltd v South African National Roads Agency Ltd* 2001 (3) SA 344 (N)

⁷ *Searle v Mossel Bay Municipality* (1237/09) [2009] ZAWCHC 9 (12 February 2009) para [6]

⁸ 1999 (1) SA 217 (SCA) at 228G-H

[25] Jodan, in its founding affidavit, alleged that it had scored the highest number of points in terms of the preferred scoring method. There was no provision in the terms and conditions of the tender which had precluded or disqualified it from being awarded the tender and that it stood to have been awarded the contract. The founding affidavit contains several references to the procurement document. The deponent indicated that, although not attached to the founding affidavit because of the volume thereof, it would be available during the hearing of the application. The bound and paginated document forms part of the application papers.⁹

[26] It is Down Touch's case that the applicant failed to establish that it has a *prima facie* right to the relief, as it had submitted a non-responsive bid. It was submitted that the applicant was disqualified because it had not disclosed other business interests, as provided for in clause 2.10 of the tender document. In support, it had attached copies of the reports on the departmental bid evaluation committee meetings held on 4 and 7 April 2016 (Annexures 'JC6' and 'JC7'¹⁰), which were obtained from the Department on approximately 5 May 2016.

⁹ VOL 1: P 30 – 101 and VOL 2: P 102 - 219

¹⁰ VOL 3: P 256 and P 263

- [27] Jodan stated in reply that it became aware that the Department had adjudicated the bid as being non-responsive on perusal of Annexures 'JC6' and 'JC7', to the answering affidavit. Jodan explained that it had indicated correctly that it did not have any interests in other related companies and that this was evident from clause 2.10 from the procurement documents, referred to earlier.
- [28] Mr. Grobler submitted that Jodan had to make out its case in its founding affidavit. It could and should have obtained the minutes of the bid evaluation committee meetings before having lodged the application. He submitted that the evidence advanced in the replying affidavit should be disregarded and, if not, Down Touch should be given an opportunity to deal with it in a second set of answering affidavits.
- [29] Although it is trite that an applicant should make out its case in its founding affidavit, this is subject to certain exceptions. The Department had not informed Jodan of the outcome of the tender process. This application was lodged on an urgent basis after the Department had refused to accede to the request for undertaking not to hand over the site to Down Touch and having informed Jodan to proceed with its application. The purpose of the application was not only for the interim interdict but also to obtain the record of the decision making process for

purposes of the review application. Jodan was not in possession of the record and thus not aware of the reasons for its unsuccessful bid at the time the founding affidavit had been deposed to.

[30] Jodan's explanation in respect of the bid having incorrectly been declared non-responsive, appears to be acceptable. It stated that it did not have other business interests to declare and that it had indicated so in the tender documents. This explanation was in response to the issue raised in the answering papers. Jodan proceeded with the application when the handing over of the site was imminent even though it was not in possession of the relevant documentation at that stage.

[31] From the papers, Jodan's bid, calculated on the preferred scoring method contained in the terms and conditions of the tender, appears to have been the lowest in respect of price. There is no indication in the papers of any other factor which precluded or disqualified it from being awarded the tender.

[32] In my view no serious doubt has been placed on Jodan's case. There is also nothing inherently improbable in its version before me.

[33] The Department, the organ of State clothed with the decision-making powers in this instance, withdrew its opposition and agreed to the interim interdict being granted. It is thus not a clear instance where judicial restraint against the exercise of such powers is required ahead of final adjudication of the case.¹¹

[34] On the facts currently before me I conclude that Jodan should obtain final relief. I am thus satisfied that it has established a *prima facie* right, although open to some doubt.

REASONABLE APPREHENSION OF IRREPARABLE HARM

[35] Irreparable harm or loss may be defined as the loss of property or money in circumstances where recovery would be impossible or improbable.¹²

[36] Mr. Grobler submitted that the contract is re-measurable and as such, Jodan can, if the contract is eventually awarded to it, simply start where Down Touch had left. The problem facing Jodan then would be that, due to the passing of time, it might become impracticable to set aside the decision to award the tender to Down Touch. It could also mean that Jodan will not be paid for the work

¹¹ *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC)

¹² Erasmus: Superior Court Practice D6-19 to D6-20

already completed by Down Touch.¹³ There can be no doubt that it will then be improbable, if not impossible for Jodan to recover any damages suffered as a result thereof.

THE BALANCE OF CONVENIENCE

[37] This requirement is closely linked to the other requirements set out above. It is trite that a court must weigh the prejudice to an applicant if the interlocutory interdict is refused against the prejudice to a respondent if it is granted. This Court is called upon to consider not only the interests of parties, but also those of the general public whose members may be affected.

[38] The stronger the prospects of success in the review application, the less need for the balance of convenience to favour the applicant. The weaker the prospects of success are, the greater the need for the balance of convenience to favour the applicant.¹⁴

[39] Mr. Grobler submitted that the balance of convenience does not favour Jodan. Down Touch had to incur expenses in anticipation of the site handover and in executing upon the contract. It had to appoint sub-contractors and has committed to the construction period

¹³ Moseme *supra* para [19] – [20]; *Millennium Waste Management (Pty) Ltd v Chairperson of the Tender Board: Limpopo Province & others* 2008 (2) SA 481 (SCA)

¹⁴ *Camps Bay Residents and Ratepayers Association v Augoustides* 2009 (6) SA 190 (WCC)

of 12 months. This is the position any similar tenderer would be in.

[40] Mr. Vlok submitted that the prejudice Jodan is to suffer will be far greater than if Down Touch is allowed to execute in terms of a contract that was not awarded in accordance with the law. Public interest requires that the tender be awarded to the correct tenderer and, in this instance, the lowest bidder.

[41] If the review application does not succeed, Down Touch can proceed with the contract. The only prejudice would have been the delay pending the finalization of the review proceedings. On the other hand, if the interim relief is not granted and the decision to award the tender to Down Touch is set aside on review, Down Touch would have executed and would have been paid in terms of the contract awarded to it by way of an invalid administrative act. Prejudice to Jodan will be irreparable.

[42] I do not agree with Down Touch's contention in its answering affidavit, that there appears to be no willingness to dispose of the review urgently. In this instance Jodan and the Department have acted promptly. There appears to be no reason why the review application cannot be finalized without undue delay.

[43] I am satisfied that the prejudice to Jodan, if the interlocutory interdict is refused, is greater than the prejudice to Down Touch if it is granted and that the balance of convenience therefor favours the granting of the interim relief.

NO SUITABLE OR ADEQUATE ALTERNATIVE REMEDY

[44] This requirement is closely linked with and follows as a natural corollary on proof of irreparable harm. The available alternative remedy must be adequate in the circumstances, be ordinary and reasonable, be a legal remedy and also grant similar protection to a party.¹⁵

[45] The facts and decisions in **MOSEME** and **MILLENNIUM WASTE** *supra* illustrate the difficulties tenderers face in obtaining effective relief to vindicate infringed rights. Given the facts of this application before me, I am satisfied that there is no suitable or adequate alternative remedy available to Jodan.

[46] It is in the interest of all parties and the public at large that the review application should be adjudicated without delay. Courts should, to the extent possible, give priority to matters of this nature and the Registrar should, when

¹⁵ *Martin v Kiesbeampste, Newcastle Afdeling, en 'n Ander* 1958 (2) SA 649 (D) at 654

allocating a date for the review application, take cognisance hereof.¹⁶

I make the following order:

- 1. Pending finalisation of the review proceedings, set out in prayer 4 of the Notice of Application dated 3 May 2016, the first and second respondents are interdicted and restrained from handing over to the third respondent and/or any person or entity the site, being the gravel section of the MR947 Road between Rusfontein and Laxey, Phase 2, the upgrading of which is the subject of tender number DRPW044/2015 issued by the Northern Cape Department of Roads and Public Works ('the tender').**
- 2. The first and second respondents are within 15 (FIFTEEN) days after the date of this order, if it has not yet been done, to furnish to the Registrar of this Court the record of the proceedings and all minutes and other documentation relating to the proceedings, the decision for awarding the contract under the tender, the award of the contract under**

¹⁶ *Millennium Waste supra* para [34]

the tender to the third respondent and reasons for the aforesaid and to notify the applicant in writing when this has been done.

- 3. The applicant may within 10 (TEN) days after the Registrar has made the record available, by delivery of a notice and accompanying affidavit, amend, add to or vary the terms of its notice of application dated 3 May 2016 and supplement the supporting affidavit.**
- 4. Further papers in the review application shall be filed strictly in accordance with the prescribed periods.**
- 5. If the applicant fails to so apply to the Registrar to allocate a date for the hearing of the review application within the appropriate prescribed periods, any respondent may do so immediately upon the expiry of such period and notify the applicant and any other party in writing of the date allocated by the registrar.**
- 6. The costs relating to the proceedings of 6 May 2016 are reserved for later determination.**

7. The costs relating to the proceedings of 19 May 2016 shall be costs in the review application.

ERASMUS, SL
ACTING JUDGE

<u>On behalf of the Applicant:</u>	Adv. J. Vlok (oio Van de Wall & Partners)
<u>On behalf of 3rd Respondent:</u>	Adv. S. Grobler (oio Duncan & Rothman)