

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

CASE NO: 1815/2024

Reportable	YES/NO
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In the matter between:

TYEKS SECURITY SERVICES

APPLICANT

and

**MEMBER OF THE EXECUTIVE COUNCIL
FOR DEPARTMENT OF PUBLIC WORKS AND
AND INFRASTRUCTURE**

FIRST RESPONDENT

**KHWANXISA GENERAL TRADING
RESPONDENT**

SECOND

GOLDEN SECURITY SERVICES

THIRD RESPONDENT

JUDGMENT

CENGANI-MBAKAZA AJ:

Introduction

[1] On 14 May 2024, the applicant approached this court, on urgent basis, seeking an interdictory relief which is couched in the following terms:

‘PART A

1. The applicant’s non-compliance with the rules of the above Honourable Court as regard to service and forms be and is hereby condoned to the extent

necessarily and that this matter be heard on an urgent basis in terms of rule 6(12) of the above Honourable Court.

2. A rule nisi be and is hereby issued by the above Honourable Court that, pending the finalization of the review applications set out in Part B hereof, the following order be granted namely:

2.1 That the First Respondent is hereby interdicted and restrained from implementing the decision to award tender number SCMUS-23/24-0048 in respect of cluster 3 and 8.

2.2 That paragraph 1 above operates as an interim interdict pending the finalisation of PART B of this application.

2.3 That the costs of the application in terms of PART A be reserved for decision in respect of the relief sought in PART B.'

[2] Part B only relates to review proceedings and does not constitute issues for determination by this court. In its founding affidavit, the applicant presented its grounds supporting the urgency of the matter. The applicant asserts that there are significant prospects of success in the review application (Part B), arguing that the successful tenderer (the second respondent) does not appear on the list of bids receiver's register, no records of bid submission. Consequently, it is contended that the second respondent should not have been awarded the tender. The applicant further asserts that the decision to exclude the applicant was inadequate and flawed, as the bid evaluation committee mistakenly believed that the applicant had tendered an amount of 2 million instead of 22 million rand plus, which is an amount reflected in the closing register. The applicant submits that if the interim relief sought in Part A of the application is not granted, it may result in an undesirable outcome where, even if the relief sought in Part B succeeds, the judgment in the applicant's favour would be rendered hollow.

[3] The application is opposed by the first respondent and in so doing it has delivered an answering affidavit. The first respondent raises three *points-in-limine*: self-created urgency, failure to exhaust internal remedies and the applicant's failure to prove the requirements of an interim interdict. The second and third respondents filed no opposing papers.

The factual Background

[4] In August 2023, the first respondent published a request for bid (RFB) under tender SCMU5-23/24-0048 (the tender) seeking security service for various clusters. The objectives of the tender were to, *inter alia*, appoint service providers to provide security services for safeguarding of the premises, including all assets and personnel for 24 hours a day.

[5] The applicant participated in the tender process and submitted its bid for clusters 3 and 8. The tenders were awarded around 13 March 2024. The second respondent was awarded the tender for cluster 3, while the third respondent was awarded for cluster 8. The applicant's bid was unsuccessful. For cluster 3, the applicant ranked 6th out of 30 responsive bidders and under cluster 8, it was non-responsive.

[6] On 22 March 2024, the applicant's attorney wrote a letter (referred to as 'the first letter') to the first respondent demanding documents relevant to the tender process. This was their first communication. These were bid evaluation committee reports, bid adjudication committee minute and outcomes as well as a rejection letter of the applicant's bid and the reasons for the rejection (the relevant documents). On 25 March 2024, a second letter was dispatched to the first respondent with the following extracts:

‘7. We demand this information on or before 28 March 2024.

8. In the interim, we urge you to suspend the implementation of the tender award pending your provision of the above requested information and consequent review proceedings.

9. We further request that you tender us with a written undertaking that you will so suspend the implementation by no later than end of business 26th March 2024.

10. In the event that no such undertaking is provided by your good selves, we will approach Court and seek relief on urgent basis together with costs against yourselves.’ (my underlining)

[7] On 28 March 2024, the first respondent through Mr T.L Manda wrote a detailed letter ('the first response') outlining the reasons why the applicant was not successful in the tender process. On the same date the applicant responded with a third letter seeking all the relevant documents stating that it would approach the court on an urgent basis had they failed to provide the relevant information. On 08 April 2024, the applicant wrote a fourth letter requesting the same information. In its second response dated 08 April 2024, the first respondent advised the applicant to seek the information in terms of Promotion of Access to information Act (the PAIA) and outlined the necessary procedures. On 09 April 2024, the applicant wrote a fifth letter indicating that the information sought is not premised under PAIA but under sections 3 and 6 of (Promotion of Administration of Justice Act) PAJA. The applicant also expressed that the delay tactics were prejudicial and that it would approach the court urgently for appropriate relief. In its third response the first respondent reiterated that the information required is held by the department and that PAIA is applicable, advising the applicant to follow the PAIA procedures. After the first respondent's last response, the applicant took approximately 16 days before it could approach the court for the relief sought.

[8] On 30 April 2024, this court issued the following directive:

'Having read the papers filed of record, I hereby issue the following directive(s) with regard to the hearing and further conduct of the matter:

1. The papers be served upon the Respondents on 2 May 2024;
2. The Respondents file a notice of opposition, if any, on or before 6 May 2024;
3. The Respondents file answering affidavits, if any, on or before on 09 May 2024; and
4. The Applicant file its replying affidavit, if any, on or before 11h00 on 13 May 2024; and
5. The matter be set down for hearing on 14 May 2024. The date and time for hearing is subject to a further directive from the duty Judge.'

[9] The first respondent was served with the papers on 06 May 2024 and not 02 May 2024 as directed by the court. The applicant opted to file no replying affidavit in

the proceedings. The parties advanced their legal submissions both on the issue of urgency and the merits of the case.

Urgency

[10] Before addressing the merits of the matter, I believe it would be plausible in assessing whether the application is urgent to the extent that the court should treat it as such. In this exercise, one must tread carefully because the issues of urgency and the merits of the interim interdict are to some extent interconnected. Uniform Rule 6(12) of the Uniform Rules of court requires an applicant to explicitly set forth the circumstances which render the matter urgent and the reasons why it could not be heard in the ordinary course.¹ The correct test to be applied in urgent applications is whether the applicant will be afforded substantial redress in future.

[11] Our courts have consistently refused to grant urgent relief in cases where the urgency relied upon is self-created. In *Dynamic Sisters Trading (Pty) Limited and Another v Nedbank Limited*² the court held:

‘Consistency is important in this context as it informs the public and legal practitioners that rules of court and practice directives such as the actual need for urgency as prescribed by rule 6(12) should never be ignored.’

¹ Uniform Rule 6(12) of the Uniform Rules of Court provides that:

(a) In urgent applications the court or a judge may dispense with the forms and service provided for in these rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these rules) as it deems fit.

(b) In every affidavit filed in support of any application under paragraph (a) of this subrule, the applicant must set forth explicitly the circumstances which is *[sic]* averred render *[sic]* the matter urgent and the reasons why the applicant claims that applicant could not be afforded substantial redress at a hearing in due course.’; see also Rule 12(a)(ii) of the Joint Rules of Practice for the High Courts of the Eastern Cape.

² (081473/2023) [2023] ZAGPPHC 709 (21 August 2023) at paragraph 18; Case Number 1076/2021 Garth Merrick Voigt N.O and Another v Egh IP (PTY) LTD and Another, judgment delivered on 04 May 2021 (unreported) (see paragraph 28).

An applicant cannot create its own urgency by simply waiting till the normal rules can no longer be applied.³ If there is some delay in instituting the proceedings on an urgent basis, the applicant must explain the reasons for the delay and why despite the delay he claims that he cannot be afforded substantial redress at the hearing in due course. Strydom J in *Roets N.O. V SB Guarantee Company (RF) Pty Ltd*⁴, held: ‘Urgency which is self –created in a sense that an applicant sits on its laurels or take time limits to bring an urgent application can on its own lead to a decision that a matter is struck off the roll. It would of course depend on the explanation provided but if the explanation is lacking and does not cover the full period from when it was realised, or should have been realised, that urgent relief should not be obtained. If this criteria to strike a matter from the roll is not available to a court, a court would be compelled to deal with an urgent application where for instance nothing was forthcoming for weeks or months and a day or two before an event was going to take place, a party who wants to stay that event can approach a court and argue that if an order is not immediately granted such party would not obtain substantial redress in due course. If this is the approach to be adopted by the court, there exists no reason why any explanation for the delay should be provided at all. An applicant only has to show that should interim relief not be granted it will suffer irreparable harm.’

[12] In his body of work *V De Wit*⁵,

‘..... harm does not found urgency. Rather, harm is a mere precondition to urgency. Where no harm has, is, or will be suffered, no application may be brought, since there would be no reason for a court to hear the matter. However, where harm is present an application to address harm will not necessarily be urgent. It will only be urgent if the applicant cannot obtain redress for that harm in due course. Thus: harm is an antecedent for urgency, but urgency is not a consequence of harm.’

³ Enx Group Limited v Spilkin (2296/2022) [2022] ZAECQHC at paragraph 15.

⁴ (36515/2021 [2022] ZAGPHC 754 (06 October 2022).

⁵ V de Wit’ The correct approach to determining urgency’ [2021] 21 (2) without prejudice 12 at 13.

[13] In the exercise of its discretion in dispensing with the outlined formalities and procedures, the court has to take a proper account on whether the respondent can adequately present its case in the time given, prejudice to the respondent and the administration of justice as well as the strength of the applicant's case. In *Nelson Mandela Metropolitan Municipality & Others v Greyvenouw CC and Others*⁶, Plasket AJ (as he then was) said the following:

'37 it is trite that Applicants in urgent applications must give proper consideration to the degree of urgency and tailor the notice of motion to that degree of urgency. It is also true that when Courts are enjoined by Rule 6(12) to deal with urgent applications in accordance with procedures that follow the Rules as far as possible, this involves the exercise of a judicial discretion by a court 'concerning which deviation it will tolerate in a specific case.'

[14] During arguments, I invited the applicant's counsel to account for the delay before the institution of the application under consideration. Counsel argued that the first respondent contributed to the delay, in that, he failed on numerous occasions to furnish the relevant documents. The first respondent's counsel on the other hand submitted that a detailed response outlining the applicant's failure to succeed in the bid was dispatched to the applicant. It was further advised of the correct procedure to follow in order to obtain the relevant documents. It ought to have followed the PAIA procedures or request for the impugned record in terms of Uniform Rule 53 of the Uniform Rules of court, so the argument continued.

[15] I acknowledge the sentiments raised by Notshe AJ in *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others*⁷, where he held the following in relation to urgency:

'(8) In my view the delay in instituting proceedings is not on its own a ground for refusal to grant the matter urgent. The court is obliged to consider the circumstances of the case and the explanation given. The delay might be an indication that the matter is not as urgent as the applicant would want to

⁶ 2004 (2) SA 81 (SE) [37], [38] AND [40]; *Enx Group Limited v Spilkin* (2296/2022) [2022] ZAECHC at paragraph 13.

⁷ 2011 JDR 1832 (GSJ) at paragraph 8.

believe. On the other hand, delay might have been caused by the fact that the applicant has attempted to settle the matter or collect some facts with regard thereto.'

In the matter under consideration, the first respondent raised a point *in limine* regarding self-created urgency, which was not properly addressed by the applicant in the papers filed. Although the applicant threatened to initiate legal proceedings from 22 March 2024, it was only able to do so on 30 April 2024. There was a delay of about 16 days from the day the applicant received the last response until it decided to bring the matter to court. Despite being directed to serve the first respondent with papers on 09 May 2024, there was unaccounted delay of about four days before the first respondent was served with papers. Additionally, the applicant was provided with detailed reasons for its failure in the bid and was advised of the remedies available to obtain the relevant documents. Given these facts, the argument that the first respondent contributed to the delay in bringing the matter before the court lacks merit.

[16] It is observed that the applicant's urgency's arguments primarily concern the success of the second and third respondents in the bid process. The core of the applicant's complainant is that the first and second respondent should not have been awarded the bid. Regarding the strength of the applicant's case, it was argued that the first respondent's evaluation committee mistakenly believed the applicant bid an amount of 2 million instead of 22 million. This discrepancy is reflected in the first respondent's response where the applicant's failure to succeed in the bid was explained. The first respondent's counsel highlighted that this was an administrative capturing error that could not be accounted for in the answering affidavit due to time constraints and urgency of the matter. I accept this explanation, especially in light of the fact that all the documents filed in the RFB reflect an amount of 22 million plus which was the amount that the applicant bided. Fortified by *Roets's* case above, I conclude that this is a typical case of self-created urgency. The applicant's failure to serve the first respondent with the papers as directed by the court created prejudice, in that the first respondent had little or no time to canvass some of the issues raised in the founding affidavit. In my considered opinion, it would be prejudicial to the first respondent if the matter were to be heard on an urgent basis.

[17] Considering the observations made above, it would be futile to even traverse on the merits of the application for interim interdict.

Order

[18] The following order is issued:

1. The matter is struck off the roll for want of urgency.
2. The applicant shall pay the wasted costs, in accordance with scale A as contemplated in Rule 69 of the Uniform Rules of Court.

N CENGANI-MBAKAZA
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

APPEARANCES:

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Date heard :14 May 2024

Date delivered

:24 May 2024