



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Case No. **056819/2024**

(1) REPORTABLE: NO	
(2) OF INTEREST TO OTHERS JUDGES: NO	
(3) REVISED	
	21 JUNE 2024
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SIGNATURE	DATE

RMS JOINT VENTURE CC t/a RADDS TRANSPORT

First Applicant

RADHALAL, SUREN

Second Applicant

SI TRUCKING (PTY) LIMITED

Third Applicant

RADHALAL, ISHAARA

Fourth Applicant

and

THE NATIONAL TREASURY

First Respondent

MINISTER OF FINANCE

Second Respondent

TRANSNET SOC LIMITED

Third Respondent

This judgment is prepared and authored by the Judge whose name is reflected as such and is handed down electronically by circulation to the parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for handing down is deemed to be 21 June 2024.

JUDGMENT

RETRIEF J

INTRODUCTION

[1] The first and third applicants [Radds and SI Trucking] have been supplying material handling equipment services to the third respondent [Transnet] Port Terminals for approximately a decade or more. Radds since 2005 and SI Trucking since 2015. In terms of Public Finance Management Act [PFMA] SCM Instruction No. 03 of 2021/22 [Instruction note] a supplier, including its directors, can be restricted from doing business with organs of state for a specific period and the first respondent [National Treasury] in turn, can place the supplier's details on a list and/or database of restricted suppliers. This is exactly what occurred to Radds, SI Trucking and their respective directors [the applicants].

[2] In consequence, this application came before this Court by way of urgency. The applicants now seek urgent interim relief pending a review to be instituted. The interim relief which is sought is to suspend the decision taken by National Treasury and/or Transnet to include the applicants' names on the list and/or database of restricted suppliers maintained by National Treasury and, interdictory relief directing National Treasury to effectively reverse their decision to place the applicants' details on the list and/or database of restricted suppliers [interim relief] [impugned decision]. The applicants intend to launch the Judicial review to set aside the impugned decision within 1 (one) month of this order [the review].

[3] In terms of prayer 5 of the relief sought, the applicants state that should they not institute the review within 1 (one) of the order the interim relief will lapse, and, in

such circumstances, they tender the costs. National Treasury nor the second respondent [Finance Minister] have opposed the application, nor filed a version, nor filed a notice to abide. Transnet on the other hand, opposes the application in respect of urgency and on the merits.

BACKGROUND

[4] The possibility of the impugned decision being taken, the consequences thereof and Transnet's opposition to the relief sought in this application was foreshadowed by, *inter alia*, the order and reasoned judgment handed down on 19 April 2024 by Potterill J under case number 038072/2022 [tender review]. Potterill J in the tender review found that Transnet had unlawfully sought to exclude Radds from tender 628/TPT and accordingly reviewed and set aside Transnet's decision in 2022 to exclude Radds from the tender. The Court substituted Transnet's decision by awarding the tender to Radds.

[5] Potterill J, in her judgment, had this to say about the restrictive process initiated by Transnet, at that material time:

“[48] The common cause facts show that there was no expediting of the restriction process. Transnet had thus also failed to adhere to its own process to expedite the restriction process as required. National Treasury on 14 February 2021 instructed that Transnet commence with the restriction of Radds immediately (first respondent / own emphasis). The restriction notice was addressed on 28 April 2022. Only on 22 November 2022 did TPT's Acting Chief Procurement Officer recommend that Radds be restricted. Transnet's Group Governance Department is considering the restriction. Absolutely no reasons are forthcoming as to why this restriction process has not been expedited from 14 February 2021 to date of hearing 30 January 2024, 3 years.”

[6] Transnet's failure to adhere to its own process is a complaint which persists in this application in respect of the prescriptive process prescribed in the Instruction note. To expand, according to National Treasury's database, the applicants have been restricted from 12 April 2024 – 13 April 2034 from doing business with the state as a result of collusion and fronting. This exclusion period is according to a screenshot of National Treasury's database which was annexed to the applicants' founding papers. The applicants however in their papers record an incorrect exclusion period of 13 April 2024 to the 14 April 2034. The applicants too, incorrectly refer to and apply Instruction note No. 03 of 2016/2017 in their founding papers instead of the applicable Instruction note No. 03 of 2021/22. This they try and salvage in reply and in their heads of argument and during argument. Reference thereto will be made by this Court hereunder.

[7] Be that as it may, to return to the impact of the tender review judgment on this application. When the tender review judgment was handed down on 19 April 2024, Potterill J accepted that the restrictive process had not been completed and noted that a restriction would only apply to future business.

[8] On the facts, the published restrictive period commenced before the judgment was handed down. Transnet's decision in respect of tender 628/TPT taken in 2022 was set aside and substituted in favour of Radds, as per order on 19 April 2024. The applicants raise concern on the papers and expand in argument that the execution of Radds' obligations in terms of the tender 628/TPT would be hampered by the implementation of the impugned decision. Transnet argues that it has every intention of honouring its obligations in respect of the tender. This it does without due consideration of the possible conundrum for Radds' execution of the tender, for the second applicant and the effectiveness of the tender review order.

[9] Transnet in argument confirmed that the impugned decision only effected future business, and reaffirmed its commitment to honouring the tender 628/TPT. In this way trying to solve the conundrum by utterance. This confirmation however was only forthcoming after the institution of this application. In fact, the confirmation advanced by Transnet is in conflict with the content of their own respective 'initiation

of process of restriction' notices [notices] which were received by the applicants in April and May 2022 respectively.

[10] According to an extract from such notice relied on in the answering affidavit at paragraph 49:

“49. In this restriction notice, Transnet expressly communicated its intention to place the first applicant and its directors on National Treasury’s database as follows: “Transnet therefore intends to place RADDs and its directors on National Treasury’s data of restricted suppliers NTDRS for a period of ten years for collusion (not collusion and fronting - own emphasis) despite signing the independent bid determination documents as part of its bid. The effect of the exclusion is that your company and its creditors will be prohibited from doing business with Transnet and all other organs of state during the period of exclusion (own emphasis). Please note that this exclusion will also extend to any future companies which may be created by the directors and/or entities during the period of exclusion.”

[11] The notice refers to the restriction of doing business with Transnet and any other organ of state during the “*period of exclusion*”. On the evidence, such period of exclusion commenced from 12 April 2024. How such ‘period of exclusion’ will apply and affect tender 628/TPT is arguably open to interpretation if not clarified. To expand, the obvious interpretation is that it includes future business dealings from 12 April 2024 with organs of state. However, what if such future business dealings originate from an existing tender prior to the 12 April 2024? This may occur as a result of the very nature of business dealings originating from a single tender. What then of tender 628/TPT? Without certainty, the answer is unclear on the papers. This position remains so notwithstanding Transnet’s commitment. This is because Transnet can’t speak for other organs of state. It is for this reason, amongst other concerns, that Radda and the second applicant seek the interim relief on an urgent basis pending the review.

[12] Considering this argument, a reasonable apprehension of immediate and substantial prejudice, as a result loss in relation to existing contracts too and not only future business speaks to Radds and the second applicants' need for immediate substantial redress.

URGENCY

[13] Transnet argues that the applicants bear the onus to justify the urgent indulgence they seek and contend that the applicants delayed in asserting their rights. In this regard Transnet invited the Court to consider the matter of Public Servants Association of SA and Another v Minister of Home Affairs and Others¹ where the established principle that an applicant must demonstrate that the urgency they claim is not the result of their failure to approach the Court at the first available opportunity.

[14] The respondents attack of delay was on two fronts, namely, their failure to approach the Court already on 17 May 2022 when the applicants, through Transnet's notice knew of Transnet's intention to recommend the restriction and did nothing about it and, the applicants' failure to give an explanation for their delay in waiting to launch this application on 22 May 2024 when they knew of the imposed restriction and consequences on 29 April 2024.

[15] As to the first attack, there appears to be no merit in it, in that the notice did not affect the applicants' rights nor have final effect, triggering a need in law to protect. In fact, at that stage of the process, Transnet was well within its procedural statutory purview and any attack a futile exercise.

[16] With regard to the second attack which speaks to delay to assert rights, because Transnet failed to demonstrate that it informed the applicants of the impugned decision, the applicants had to try and obtain the facts themselves. This

¹ **Public Servants Association of SA and Another v Minister of Home Affairs and Others** [2016] ZALCJHB 439 para 12-18.

they did through corresponding with Transnet's attorneys after 29 April 2024, the date of knowledge of the impugned decision.

[17] It was only on the on 13 May 2024, that the attorneys for Transnet provided formal notice of restriction and responded *inter alia* as follows:

“7.1 *This correspondence hereby constitutes a formal communication and/or confirmation by Transnet that the restriction of your clients has been recorded on the list of recorded suppliers maintained by National Treasury.*

7.2 *There is no right of internal appeal available to your clients.”*

[18] The applicants' delay is simply from 13 May 2024 when they were appraised of which action to take in that no internal appeal process was available. This translates into a delay of 6 (six) Court days. Transnet's complaint unwarranted as the delay was not unreasonable in the circumstances.

[19] From the background facts illustrating a need for substantial redress and from the applicants' actions to approach this Court at the first opportunity after appraising itself of their procedural options, it becomes clear that this matter is urgent and in consequence this Court deals with it on that basis.

[20] A consideration of the applicants' *prima facie* right to approach a Court to review the impugned decision requires scrutiny.

PROSPECT OF SUCCESS, THE REVIEW

[21] The source of power to take the impugned decision is the Instruction note as relied on by Transnet in answer and by the applicants in reply is the Instruction note. The Instruction note sets out the process which must be followed to restrict a supplier, like the applicants, from doing business with organs of state. The applicants contend that Transnet nor National Treasury followed the Instruction note

prescripts and as such the procedure was unfair and the impugned decision materially influenced by an error of law and reviewable under section 6 of Promotion of Administrative Justice Act 3 of 2000 [PAJA].

Was the procedure followed unfair?

[22] Applying the steps according to the applicable Instruction note, the correspondence between Transnet and National Treasury, a clear picture emerges. The picture illustrates that Transnet must notify the applicants of their intention to restrict, the grounds of restriction relied on, and the intended period must clearly be set out. This allows the applicants to be fully apprised of the state of play and to be provided with a right to make proper representation within a period setting out why they should not be restricted. The restriction a weighty sanction to be imposed.

[23] The written notices, the content thereof and the fact that the applicants responded thereto is common cause. The departure is Transnet's compliance of a fundamental procedural step, namely, to notify the applicants of the impugned decision which affected them and the reasons set out in the notice.

[24] The Instruction note as the applicable instrument was applied and correctly referred to by Transnet during the restrictive process from time to time, but not all the time. Transnet's failure to immediately inform the applicants after National Treasury had informed them that the restriction, as against the applicants, was not done. This fact was bolstered by Transnet's attorneys who in their letter of 13 May 2024, alluded to above, confirmed that such letter constituted notice albeit after the complaint or lack thereof.

[25] Transnet is silent on providing the applicants with notice of the restriction and silent on whether they, in terms of their own Preferential Procurement Regulations of 2020 [PPR 2020], are absolved from notifying suppliers like the applicants. The applicants' contention that Transnet's failure to do so was procedurally unfair having regard to the facts, is apparent and thus at this stage, reviewable as a ground in terms of PAJA.

[26] The applicants also rely on the fact that a disconnect between the reasons for the restriction in the notice provided to them and the reasons published on the database exists. The published database records the reason for the impugned decision as collusive practices and fronting whilst the notice merely refers to collusion. The disparity created by the disconnect, contends the applicants, is procedurally unfair as such failure has resulted in their failure to be able to address reasons why they should be restricted for fronting. Transnet perpetrated this same disconnect in its letter to National Treasury dated 24 January 2024, only informing National Treasury of its intention to restrict as a result of collusive practices and not fronting. Yet, National Treasury assess the restriction on the basis of collusion and fronting. This letter is dealt with in detail below.

[27] Transnet's argument that the applicants were indeed informed of fronting as a reason is incorrect and their argument misses the point entirely. In their answer, Transnet refers to the notice of collusion and fronting as published on National Treasury's website, annexures SR8.1 and SR8.2 to the applicants' founding papers. This is a notice after the impugned decision had already been taken. In consequence, the basis for a ground of review based on procedural fairness on these facts too, at this stage possess merit.

Was the impugned decision influenced by an error of law?

[28] Which law? This question relevant in that the applicants in their founding papers relied on the incorrect Instruction note in support of their argument. This they however attempt to rectify in reply and did so with reference to the applicable Instruction note and applied that to the facts in Transnet's answer. The outcome, in principle the same, namely that the impugned decision was materially influenced by an error of law and in consequence still supporting their reliance on section 6(2)(b) of PAJA.

[29] The applicants' argument is to be understood with reference to Transnet's version namely their reliance on National Treasury's letter of 26 April 2024 as its

indication that their request to restrict the applicants was approved by National Treasury. In other words, the 26 April letter, Transnet's notification of approval.

[30] The applicants conversely contend that the National Treasury's letter of 26 April 2024 was in response to Transnet's letter of 24 January 2024. The letter of 24 January 2024 was a call for National Treasury's view in terms of paragraph 6.2(b) of the Instruction note and not a call for notification of approval, as relied on.

[31] Turning to extracts from the letter of the 24 January 2024, Transnet stated that:

"Transnet, through its forensic investigation unit within the Group, conducted investigations to verify/confirm whether indeed there was collusive practice (own emphasis) between these two entities (the first and third applicants – own emphasis) as identified by TIA. The forensic investigation report confirms the allegation identified by TIA." (See annexure "B"). Annexure "B" was not attached to the papers.

Furthermore, paragraph 6.3 of Public Finance Management Act (PFMA) SCM Instruction note 03 of 2021-22, states that National Treasury must, within 14 days of receipt of the notification envisaged in paragraph 6.2.(b) (own emphasis) submit to the Accounting Authority its view on the intended restriction."

It is against this principle (own emphasis) that Transnet submits the notification for National Treasury to provide its view (own emphasis) on Transnet's intention to restrict RMS Joint Venture T/A RADDs, SI Logistics and Terminals, SI Trucking and its Directors."

[32] From the facts, the letter of 24 January 2024 calls for National Treasury's views (in terms of paragraph 6.3) on Transnet's intention to restrict as a result of the applicants' collusive practices of the Instruction note. Logically, paragraph 6.4 of the Instruction notes chain of obligations must follow namely: Transnet must then, after

considering National Treasury's views, make the decision to restrict and submit such decision and its reasons to National Treasury. It is only then that National Treasury records the restriction armed with the information provided to it by Transnet.

[33] National Treasury's letter of 26 April 2024 can never be seen as a notification of approval as contended by Transnet, and National Treasury has failed to supply a version in support of Transnet's contention.

[34] In fact, National Treasury failed to comply with paragraph 6.4 of the Instruction note in that it did not provide a view, for Transnet's consumption and without waiting for Transnet to respond to such views, it simply made an assessment it could not make itself, to approve the restriction and to expand on the reasons. This is at variance with the Instruction note. National Treasury misses a valuable step in the chain and misinterprets what it is called to do in terms of paragraph 6.3 of the Instruction note as clearly set out in the letter of 24 January 2024.

[35] The applicants' argument in principle, albeit rectified in reply, by it accepting and applying the Instruction note relied on by Transnet, at this interim stage, possess merit. This is apparent from the correspondence between Transnet and National Treasury. Grounds for review in terms of section 6(2)(a)(i), 6(2)(b) and 6(2)(d) of PAJA apparent from the papers

[36] Although the applicants also rely on the grounds of irrationality and bias to bolster the review argument, their Counsel in argument nailed their colours to the mast by arguing grounds based on *ultra vires* and procedural unfairness.

[37] The applicants have sufficiently demonstrated their *prima facie* right to approach a Court to review the impugned decision. It is for this reason that this Court now considers the interim relief.

INTERIM RELIEF

[38] The applicants rely on their right to review requiring preservation *pendente lite*. The preservation they seek, in the interim, is a suspension of and the removal of their details from the list of restricted suppliers.

[39] With regard to the applicants' *prima facie* right to the suspension relief, the applicants, in argument and from the facts gleaned as a whole, relied on section 172 of the Constitution.

[40] In this regard the applicants invited the Court to have regard to the Constitutional Court [CC] matter of Economic Freedom Fighters v Gordhan:²

“[114] The power to suspend the operation of the Public Protector’s remedial action is sourced from section 172(1)(b) of the Constitution. If in a matter like the present, it is considered just and equitable to suspend a remedial action pending a determination of the review in which the validity of the remedial action is impugned, a court may grant the suspension. Guidance for issuing the suspension is derived from considerations of justice and equity.”

[41] Applying the principles of the CC in the Economic Freedom Fighters v Gordhan matter,³ weight is applied to the argument of the possible conundrum and consequential harm to Radds and the second applicant emanating from tender 628/TPT and the applicants' *prima facie* right to approach a Court to review the impugned decision based on a material error of law. It is, at this stage just and equitable to grant the suspension relief pending a final determination of a review application.

[42] As regards the interdictory relief, this Court has regard to what the CC held in the OUTA⁴ matter when it held that:

² **Economic Freedom Fighters v Gordhan** 2020 (6) SA 325 (CC) at par [114].

³ *Ibid.*

⁴ **National Treasury and Others v Opposition to Urban Tolling Alliance and Others** 2012 (6) SA 223 (CC).

“[50] Under the Setlogelo test, the prima facie right a claimant must establish is not merely the right to approach a court in order to review an administrative decision. It is a right to which, if not protected by an interdict, irreparable harm would ensue. An interdict is meant to prevent future conduct and not decisions already made. Quite apart from the right to review and to set aside impugned decisions, the applicants should have demonstrated a prima facie right that is threatened by an impending or imminent irreparable harm. –“

[43] The thrust of the applicants’ argument is that the restriction applies to all organs of state for a period of 10 (ten) years. Once the applicants’ names are published on the database, as they already have, how do the applicants fulfil their existing contractual obligations going forward in that they are restricted from contractually engaging with any other organs of state during the tenure of an exclusion period? Transnet’s papers are silent in this regard, nor did they provide a solution or clarity in argument. It, therefore, at this stage appears reasonable to accept that an apprehension of imminent irreparable harm exists.

[44] The prejudice to the applicants if such apprehension of harm occurs without satisfactory urgent redress favours the balance of convenience for the applicants. This is so as Transnet, although expressing an intention to restrict the applicants in 2022, has failed to express any prejudice it may suffer if the interim relief is granted other than that the interim relief will affect its statutory powers. That may be so, in the interim, but on the papers Transnet and National Treasury have failed to account for the correct exercise of those powers which is a critical factor for consideration.

[45] Furthermore, it is common cause that the applicants do not possess an internal remedy to exhaust, nor for that matter a satisfactory claim for damages without having to rely on fraud, an onerous burden. In consequence, pending the review the interim relief will ‘contain’ the *sequelae*.

[46] The inevitable flows that the application succeeds. What of the costs? The applicants seek party and party costs but failed to address and to substantiate the

necessity of the employment of 3 (three) Counsel. Having regard to that facts and in particular the established facts of the connection between the applicants, the necessity for employment of 3 (three) Counsel is not justified for repetition. The complexity of the matter may warrant the employment of 2 (two) Counsel, such being the same position of Transnet.

[47] There is no reason why costs should not follow the result. However, the applicants in their relief also tender costs in the event that they fail to launch a review. This Court takes cognisance of the relief which was sought and not withdrawn.

[48] In order to give effect to the relief sought this Court makes the following order:

1. The forms and service provided for in the Uniform Rules of Court are dispensed with and the matter is heard as urgent in terms of rule 6(12).
2. Pending the final determination of an application, to review and set aside the decision of the first respondent and/or the third respondent to restrict the first to fourth applicants [applicants] from doing business with organs of state for a period of 10 (ten) years and to place the applicants details on the list and/or database of restricted suppliers maintained by the first respondent ("the review application"), to be institute within 1 (one) month from date of this order:
 - 2.1 the decision taken by the first respondent and/or the third respondent, to restrict the applicants from doing business with organs of state from 12 April 2024 to 13 April 2034 is suspended; and
 - 2.2 the first respondent is, as a consequence of the suspension referred to in prayer 2.1 hereof, directed to remove the applicants' details and information from the list and/or

database of restricted suppliers maintained by the first respondent.

("interim relief")

3. In the event that the applicants fail to institute the review application referred to in prayer 2 hereof within the period of 1 (one) month from date of this order, the interim relief referred to in prayers 2.1 and 2.2 which is granted pending the final determination of the review application, will lapse.
4. In the event that the interim relief lapses as referred to in prayer 3 hereof the applicants will pay the third respondent's costs, including the costs of 2 (two) Counsel if so, employed on scale C in respect of Senior Counsel and on scale B in respect of Junior Counsel.
5. The third respondent is liable to pay the applicants' costs for this application including the costs of 2 (two) Counsel if so, employed on scale C in respect of Senior Counsel and on scale B in respect of Junior Counsel provided the applicants launch the review application within 1 (one) month from date of this order.



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21 June 2024