



**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 number: 3627/2024

In the matter between:

TAU PELE INFRASTRUCTURE (PTY) LTD

Applicant

And

UNIVERSITY OF THE FREE STATE

1st Respondent

CECIL NURSE (PTY) LTD

2nd Respondent

HEARD ON: 12 JULY 2024

JUDGMENT BY: DANISO, J

DELIVERED ON: This judgment was handed down in court and electronically by circulation to the parties' legal representatives *via* email and release to SAFLII on 06 August 2024. The date and time of hand-down is deemed to be 09H30 on 06 August 2024.

- [1] The applicant, (Tau Pele) seeks an urgent interim interdict (PART A of the Notice of Motion) to restrain the respondents (the University) and (Cecil

Nurse) from implementing **Project No 83772-901: Sasol Library Level 3 & 8 New Furniture, Bloemfontein Campus** (the tender) awarded by the University to Cecil Nurse pending review proceedings (PART B of the Notice of Motion) that Tau Pele as an aggrieved tenderer intends to institute to declare the University's decision to award the tender to Cecil Nurse invalid.

- [2] It is common cause that the University is an organ of state as envisaged in section 239 of the Constitution and is accordingly subject to the provisions of section 217 (1) of the Constitution which direct that:

"When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective."

- [3] The application is opposed by the University.
- [4] On 18 April 2024, Tau Pele submitted a tender in response to the University's tender invitation for the supply, delivery and installation of furniture for the University's library. The tenderers were required to price their offers per unit of furniture and for delivery and installation of the furniture. Five bids were submitted including that of Tau Pele and Cecil Nurse. Tau Pele and Cecil Nurse went through to the tender assessment to determine the successful bidder.
- [5] The tender closed on 19 April 2024. However, by 7 June 2024 Tau Pele had not received a response with regard to its tender as a result, Tau Pele's representative (Mr Van Zyl) contacted Ms Belinda Qhesi, the University's project manager and enquired about the outcome of its tender. Ms Qhesi's response was simply that she could not divulge such information as it was a "sensitive topic."¹ Information then came to Tau Pele's attention from an anonymous "whistle blower" that the tender had been awarded to Cecil Nurse prompting Tau Pele's attorney (Ms Pienaar) to also address a letter

¹ Annexure "TP3" of the applicant's founding affidavit is Mr van Zyl's confirmatory affidavit in that regard.

to the University on 10 June 2024 in the quest to obtain confirmation of whether the tender had been awarded and if it was awarded, reasons for the rejecting Tau Pele's tender were also requested in terms of section 5 of the Promotion of Administrative Act (PAJA).² In its response dated 20 June 2024, the University stated that Tau Pele's tender was rejected on the basis of functionality as a criterion. The University further explained that since the nature of Tau Pele's business is road construction and rehabilitation, the University in the exercise of its discretion in the evaluation of the tenders awarded the tender to Cecil Nurse as it specializes in manufacturing, supply and installation of furniture. About a week later on 1 July 2024, the University transmitted an email to Tau Pele containing additional reasons stating that Tau Pele's tender was also rejected based on pricing.³

- [6] Tau Pele is aggrieved by the University's decision to reject its tender and submits that the decision was arrived at arbitrarily, it was procedurally unfair, irrelevant considerations were considered; relevant considerations were disregarded. The decision was influenced by an error of law.⁴ Tau Pele contends that it is clear that the reasons provided by the University are simply conjured up as an afterthought because, functionality was not part of the tender criteria. The finding that Tau Pele specialises in road construction only is factually incorrect and the pricing was not considered because Tau Pele outscored Cecil Nurse. In the submitted tender, Tau Pele scored 87,774 preferential points higher than Cecil Nurse's 87,668, therefore the tender should have been awarded to the highest scoring bidder if pricing was considered. The purported retained discretion in the evaluation of the tender was not exercised properly against Tau Pele, because functionality was not part of the tender criteria.

² Act 3 of 2000.

³ Annexures "TP4.2 to TP4.4."

⁴ S6(2)(a)(i), (c), (d), (e) (i)(ii)(iv)(vi), (f),(h), (i) PAJA.

- [7] It is Tau Pele's contention that the award of the tender to Cecil Nurse without any competitive bid pursuant to the disqualification of Tau Pele was based on unlawful reasons it is accordingly invalid and reviewable.
- [8] As regards the urgency of the matter, Tau Pele contends that reviews of this nature are by their very nature urgent. The University has refused to provide an undertaking that the tender will not be implemented until Tau Pele's grievances have been determined through the review process, and if the University and Cecil Nurse are not interdicted from implementing the tender, Tau Pele will suffer irreparable harm as it would not obtain full redress at the hearing which flows from the ordinary process of the Court. The public purse will be eroded too by the double payment that will result when the impugned decision is ultimately set aside.
- [9] On the other side, University submits that Tau Pele has failed to show why it will not be able to obtain substantial redress at a hearing in due course because, section 8 of PAJA grants the review court wide powers to fashion an equitable relief which may include any damage that Tau Pele is able to prove as a result of alleged irregular award of the tender, the application must thus be struck off due to lack of urgency.
- [10] In terms of rule 6(12) of the Uniform Rules of Court, the court may permit an applicant to bypass the rules applicable to ordinary adjudication in relation to forms and service as contemplated in rule 6(5)(a)(b)(iii).⁵ The

⁵ 6 (5) (a): "Every application other than one brought ex parte must be brought on notice of motion as near as may be in accordance with Form 2(a) of the First Schedule and true copies of the notice, and all annexures thereto must be served upon every party to whom notice thereof is to be given.

(b) In a notice of motion the applicant must—

(iii) set forth a day, not less than 5 days after service thereof on the respondent, on or before which such respondent is required to notify the applicant, in writing, whether respondent intends to oppose such application, and must further state that if no such notification is given the

applicant must satisfy the court that the matter is so urgent that if the applicant had to wait for the next motion court day, the applicant would not receive substantial redress at the hearing in due course.

- [11] There is no merit to the University's contention that an award of damages that Tau Pele could obtain in the event the tender is set aside constitutes the presence of substantial redress. It is trite that a compensatory order is not an absolute remedy to an aggrieved tenderer. The relief is granted only in exceptional circumstances at the judicial review of the matter.⁶
- [12] The application was launched without delay on 2 July 2024 as soon as it became clear that the University and Cecil Nurse intended to proceed with the implementation of the tender despite being requested not to implement the tender pending a review. I am thus satisfied that the provisions of rule 6(12) have been met, the matter qualifies to be enrolled and heard as an urgent application.
- [13] With regard to the merits of the application, Tau Pele states that it will suffer irreparable harm if the interdict is not granted as the continued performance of the works under the unlawful tender will diminish the remedy available to it on review and since damages are not readily feasible in respect of works already performed, Tau Pele will also be deprived redress for not performing in terms of the tender itself. The balance of convenience also favours Tau Pele as no irreparable harm will ensue to the University and Cecil Nurse if the interim relief is granted. According to Tau Pele's information, the agreement following the award has not been concluded, as a result Cecil Nurse may have not started with manufacturing and/or delivering any of the furniture however, in the event that the tender is ultimately awarded to Tau Pele and there is proof of expenses incurred by Cecil Nurse for the purchase

application will be set down for hearing on a stated day, not being less than 10 days after service on the said respondent of the said notice:..."

⁶ Section 8(1)(c) (ii)(bb) of PAJA; *Olitzki Property Holdings v State Tender Board and Another* 2001 (3) SA 1247 (SCA) para 24 to 31.

of the material, Tau Pele tenders to purchase the said material from Cecil Nurse. As regards the inconvenience which may befall the students due to the suspension of the works. Tau Pele argues that the students' discomfort cannot trump the provisions of PAJA. The fact that the application was launched on truncated time periods will also result in the resolution of the dispute in a very short period of time. The good prospects of success at the review and the absence of another satisfactory remedy pending review tips the scales in favour of the granting of the interim relief.

- [14] The University insists that due to the fact that Tau Pele is in the business of civil engineering and the tender called for entities who manufacture, supply and install furniture, it accordingly applied its discretion in favour of awarding the tender to Cecil Nurse as it is in the business manufacturing, supply and installation of furniture. The University avers that an award to a tenderer without a demonstrable functionality would be irrational and risky.
- [15] It is conceded that despite the reasons provided to Tau Pele for rejecting its tender, functionality was not part of the tender criteria and indeed Tau Pele also outscored Cecil Nurse.
- [16] It is however denied that the balance of convenience favour Tau Pele. The University states that it has already issued a purchase order to Cecil Nurse to commence with the works and as on 10 June 2024, Cecil Nurse had incurred over R300 000.00 for the manufacturing of the furniture items and due to the unique design and specification of the furniture, it would be difficult if not impossible for Cecil Nurse to recoup its costs if the implementation of the tender is halted.
- [17] The supporting affidavit deposed by Cecil Nurse details the status of the furniture manufacturing process. The explanation is that the required wooden panels and the fabrics have been procured and are in the process of being cut. The upholsterers are in the process of building the relevant

frames in anticipation of receiving the fabric, the required hardware such as doors, handles, drawers, lights and edging have been ordered.

- [18] Counsel for the University argues that the interdict will result in wasted resources for both the University and Cecil Nurse. Interdicting the implementation of the tender will also seriously inconvenience the University's students as the furniture is intended for a library which is to be used by the students whereas Tau Pele will suffer no irreparable harm if the interdict is not granted because it can claim damages upon the review and setting aside of the alleged irregular award of the tender. Based on all these reasons, the application must be dismissed with costs on scale B.
- [19] The requirements that must be satisfied by an applicant in applications of this nature are trite: the applicant must establish a *prima facie* right even if it open to some doubt; a reasonable apprehension of irreparable harm that is likely to ensue if the interim interdict is not granted; the balance of convenience favouring the granting of the interdict and the absence of a similar protection.⁷ It has also been pointed out that an interim interdict is a discretionary remedy.⁸
- [20] On the facts germane to this matter, Tau Pele's right is asserted in the University's evaluation of the tender against altered criteria. With regard to the University's contention that Tau Pele will suffer no irreparable harm due to the prospects of an award of damages at judicial review, I have already alluded to the fact that whether Tau Pele will be able obtain compensatory damage at judicial review will be determined on the facts presented at the said forum.

⁷ *Setlogelo v Setlogelo* 1914 AD 221 at 227; *Webster v Mitchell* 1948 (1) SA 1186 at 1186 to 90; *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC) (OUTA) paras 41 to 50.

⁸ *Knox D'Arcy Ltd and Others v Jamieson and Others* 1996 (4) SA 348 (A).

- [21] According to Tau Pele, the continued performance of the works will deprive it of any prospects of performing the works itself arising from an unlawful and invalid administrative action. I agree. The prospects of loss of profit is the type of harm that warrants protection by an interdict. I am persuaded that irreparable harm would ensue to Tau Pele if the interim interdict is not granted.
- [22] Regarding the balance of convenience, on Cecil Nurse's own version, the required materials have been ordered and procured but not yet delivered, the works have thus not commenced. The delay in the commencement of the works has not been explained and it is clear on the papers that the University refused to halt the implementation of the tender for that reason, it cannot be said that the suspension of the implementation of the tender will inconvenience the students. It is also important to note that interim interdicts are meant to maintain the status *quo* pending the resolution of a dispute. They also eliminate or curb the financial loss to an aggrieved tenderer therefore, the discontinuation of the implementation of the tender will also benefit the University.
- [23] On the authority of *OUTA*, in exercising its discretion to weigh up where the balance of convenience rests where an interim order is sought against a state functionary or organ of state:

"the test must be applied cognisant of the normative scheme and democratic principles that underpin our Constitution. This means that when a court considers whether to grant an interim interdict it must do so in a way that promotes the objects, spirit and purport of the Constitution."

The court must also:

"carefully probe whether and to which extent the restraining order will probably intrude into the exclusive terrain of another branch of government. The enquiry must, alongside other relevant harm, have proper regard to what may be called separation of powers harm. A court must keep in mind that a temporary restraint against the exercise of statutory power well ahead of the final adjudication of a claimant's case may be granted only in the clearest of cases and after a careful consideration of separation of powers harm. It is neither prudent nor necessary to define 'clearest of cases'. However, one important consideration would be whether

the harm apprehended by the claimant amounts to a breach of one or more of the fundamental rights warranted by the Bill of Rights.”⁹

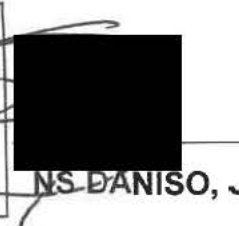
- [24] Good prospects of success in the review play a role in evaluating where the balance of convenience rest in the context of this matter. The complainant relating to the evaluation of a tender against altered criteria violates the provisions of Section 217 of the Constitution which require that tenders must specify clear and certain criteria for that reason, there are reasonable prospects that the review will be successful.
- [25] It is for these reasons above that I conclude that there is no other remedy available to Tau Pele with a similar protection. Having regard to the facts of this matter and the case law to be applied, I am satisfied that Tau Pele has made out a case for the interim relief sought.
- [26] There is no reason why the costs should not follow the result.
- [27] I accordingly make the following order:
1. The matter is heard as one of urgency in terms of the provisions of rule 6(12) of the uniform rules of court and that the applicant's non-compliance with the forms and requirements as to service set forth in rule 6(5) is hereby condoned.
 2. Pending the final determination of the review application in **PART B**, the respondents are interdicted and restrained from implementing, executing on, or taking any further steps pursuant to the awarding of **Project No 83772-901: Sasol Library Level 3 & 8 New Furniture, Bloemfontein Campus** (“the tender”) for the supply, delivery and installation of new furniture for levels 3 and 8 of the Sasol Library, Bloemfontein Campus to the second respondent, such to include the conclusion of an agreement pursuant of the award of the tender and

⁹ Supra fn 7 at paras 45 and 47.

rendering any performance thereunder, in any manner giving effect to the award of the contract, implementing the provisions thereof or permitting the execution thereof.

3. The order in paragraph 2 above shall operate as an interim interdict with immediate effect.
4. The costs of the application for urgent interim relief shall be paid by the first respondent on scale C.

The Honourable Justice
2024 -08- 06
N.S. Daniso



NS DANISO, J

APPEARANCES:

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