



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

Case no: **D3052/2024**

In the matter between:

APM TERMINALS BV

APPLICANT

and

TRANSNET SOC LIMITED

FIRST RESPONDENT

**INTERNATIONAL CONTAINER TERMINAL
SERVICES INC**

SECOND RESPONDENT

COSCO SHIPPING PORTS LIMITED

THIRD RESPONDENT

DP WORLD LIMITED

FOURTH RESPONDENT

GLOBAL PORTS SERVICES PTE LIMITED

FIFTH RESPONDENT

RED SEA GATEWAY TERMINAL

SIXTH RESPONDENT

MMC PORT HOLDINGS SDN BHD

SEVENTH RESPONDENT

TERMINAL INVESTMENT LIMITED

EIGHT RESPONDENT

REMGRO LIMITED

NINTH RESPONDENT

Coram: Mossop J

Heard: 4 December 2024

Delivered: Utilising the parties' representative's email addresses, this judgment was handed down electronically at 09h00 on Wednesday, 11 December 2024 and was contemporaneously released to SAFLII.

ORDER

The following order is granted:

1. The second respondent's application for condonation for the late delivery of its application to amend its notice of application for leave to appeal is granted and there shall be no order as to costs.
2. The second respondent's notice of application for leave to appeal is amended to reflect that the second respondent relies upon s 17(1)(a)(i) and s 17(1)(a)(ii) of the Superior Courts Act 10 of 2013 in seeking leave to appeal.
3. The second respondent's application for leave to appeal is dismissed with costs, such to include the costs of two counsel and which costs are to be taxed on scale C.

JUDGMENT

MOSSOP J:

Introduction

[1] This is an application for leave to appeal against an order that I granted on 9 October 2024 after hearing argument in an opposed urgent application (the opposed application). Despite the applicant in that application identifying nine respondents in its founding papers, the only respondents that participated in the opposed application were the first, second, and eighth respondents.

[2] To avoid confusion, when referring to a party in this judgment, I shall refer to them as they were referred to in the founding papers in the opposed application. The consequence of this approach is that, counterintuitively, the applicant in this application for leave to appeal shall be referred to as 'the second respondent' and the respondent in this application shall be referred to as 'the applicant'.

The notice of motion

[3] The applicant's notice of motion in the opposed application was divided into Part A and Part B. Part A was an interim interdict that was sought pending the final determination of a review. The review itself formed the subject matter of Part B. I was only required to determine the relief sought in Part A.¹

The order granted

[4] After hearing argument over two days, I granted the following order (the order):

- '1. The application is regarded as urgent and the applicant's failure to comply with the Uniform Rules of Court and the Practice Directives of this division is condoned.
2. The question of law raised by the eighth respondent in accordance with the provisions of Uniform rule 6(5)(d)(iii) is dismissed with costs, such to include the costs of two counsel and to be taxed on scale B.
3. Pending the final determination of Part B of this application, the first respondent is interdicted from:
 - 3.1 taking any steps, alternatively any further steps, to implement the decision taken by it on 1 March 2024 to award the tender Request for Proposal: Durban Container Terminal Pier 2 (DCT2) (RF Number TCC/PSP/2022/0003/RF) (the tender) to the second respondent;
 - 3.2 negotiating or concluding any contract with the second respondent or any third party; or
 - 3.3 implementing, or further implementing, as the case may be, any such contracts, in relation to the tender.
4. The first and second respondents are directed to pay the applicant's costs, jointly and severally, the one paying the other to be absolved, including the costs of two counsel where so employed, to be taxed on Scale C.
5. To the extent necessary, the parties are granted leave to approach the Judge President, alternatively the senior civil judge, in order to make representations concerning a preferent date being allocated for the hearing of Part B of this application.'

[5] Save for the addition by me of paragraphs 2 and 5 to the order, the remainder of the order conformed with the relief sought in Part A of the applicant's notice of motion. Paragraph 2 of the order related to a question of law raised by the eighth

¹ See *Hix Networking Technologies CC v System Publishers (Pty) Ltd and another* [1996] 4 All SA 675 (A) at 681 for the requirements for an interim interdict.

respondent, while paragraph 5 of my order invited the parties to approach the Judge President of this division to arrange a preferent date for the hearing of Part B of the application, if so advised. I did not require such an approach to occur, but merely smoothed the path for the parties if they wished to seek preference from the Judge President.

The invitation accepted

[6] The parties availed themselves of that invitation and approached the Judge President. Part B has now been set down for argument as a special opposed motion in Durban to be heard over two days, namely 12 and 13 March 2025. The date of this hearing appears from a notice of set down which has found its way into the court file, and which is dated 27 November 2024.

Participation in this application for leave to appeal

[7] The first respondent, Transnet SOC Ltd, being the party that was interdicted from proceeding with the implementation of its tender by the order, has elected not to seek leave to appeal. The same applies to the eighth respondent, which has chosen not to seek leave to appeal paragraph 2 of the order.

[8] The only party, therefore, that has sought leave to appeal is the second respondent.

[9] In my view, the fact that the first respondent has not chosen to seek leave to appeal the order is of some significance to this application.

The application for leave to appeal

[10] The second respondent delivered its notice of application for leave to appeal on 30 October 2024, prior to delivery of the notice of set down for Part B. Upon receiving the notice of set down, which indicated that the review would be heard on 12 and 13 March 2025, it appeared unlikely to me that, in the event of leave to appeal being granted, the appeal process would be finalised before the first of those dates.

[11] I accordingly wrote to the parties on 29 November 2024 to ascertain whether the application for leave to appeal would be persisted with, given the preferent date of hearing allocated for Part B. I received a written reply from the second respondent's attorneys indicating that the application for leave to appeal would proceed, as scheduled, on Wednesday, 4 December 2024.

The amendment

[12] In its notice of application for leave to appeal, the second respondent initially confined its application for leave to appeal to the provisions of s 17(1)(a)(i) of the Superior Courts Act 10 of 2013 (the Act).² That limitation was noted and commented upon by the applicant in its heads of argument. On the same day that I wrote to the parties, Friday, 29 November 2024, a notice of amendment was delivered indicating that the second respondent intended amending its application for leave to appeal to also place reliance on s 17(1)(a)(ii) of the Act. At the insistence of the applicant, an application for condonation was delivered by the second respondent on 2 December 2024.

[13] Having considered the application for condonation, the fact that it will occasion no prejudice to any party and that the condonation application has not been opposed by the applicant, I was, in the circumstances, disposed to grant it and did not find it necessary for Mr Stein SC, who appears for the second respondent together with Ms Palmer, to address me on the issue when the matter was called.

[14] The second respondent's notice of application for leave to appeal will consequently be amended to reflect that the second respondent also relies on s 17(1)(a)(ii) of the Act in seeking leave to appeal.

Is the order appealable?

² Section 17(1)(a) reads as follows:

'(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that:

(a)(i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration'.

[15] Given that the order granted is clearly interlocutory in its nature, the obvious question that arises before all others is whether the order is appealable. As may be anticipated, the second respondent claims that it is, while the applicant claims that it is not.

[16] In general, interlocutory orders are not appealable. From its terms, the order is to only endure until such time as Part B of the application has been determined and it is, therefore, temporary in its nature and will only be in place for a limited period. The date upon which the determination of the review is to commence is now known and has been fixed by the notice of set down to which I previously referred.

[17] The *locus classicus* on the topic of appealability of interim orders is *Zweni v Minister of Law and Order*,³ where the then Appellate Division ruled against the appealability of an interim order made by the court of first instance. It tested the interim order against (i) the finality of the order; (ii) the definitive rights of the parties; and (iii) the effect of disposing of a substantial portion of the relief claimed in the main application.

[18] The approach advocated in *Zweni* has been gradually modified over time. In *Philani-Ma-Afrika and others v Mailula and others*,⁴ the Supreme Court of Appeal held that the interests of justice were paramount in deciding whether orders were appealable, with each case being considered upon its own facts. The development of the law in this direction is further demonstrated in *National Treasury and others v Opposition to Urban Tolling Alliance and others*,⁵ where the Constitutional Court stated that whether leave to appeal will be granted in respect of interim orders is based upon the interests of justice, requiring a weighing up of circumstances, including whether the interim order has a final effect. In *Tshwane City v Afriforum and another*,⁶ the Constitutional Court stated that:

³ *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A); [1993] 1 All SA 365 (A) (*Zweni*) at 532I-533A.

⁴ *Philani-Ma-Afrika and others v Mailula and others* [2009] ZASCA 115; 2010 (2) SA 573 (SCA) para 20. See also *S v Western Areas Ltd and others* 2005 (5) SA 214 (SCA) paras 25 and 26; *Khumalo and others v Holomisa* [2002] ZACC 12; 2002 (5) SA 401 (CC) (*Khumalo*) para 8.

⁵ *National Treasury and others v Opposition to Urban Tolling Alliance and others* [2012] ZACC 18; 2012 (6) SA 223 (CC) para 25.

⁶ *Tshwane City v Afriforum and another* [2016] ZACC 19; 2016 (6) SA 279 (CC).

[40] ...Unlike before appealability no longer depends largely on whether the interim order appealed against has final effect or is dispositive of a substantial portion of the relief claimed in the main application. All this is now subsumed under the constitutional interests of justice standard. The overarching role of interests of justice considerations has relativised the final effect of the order or the disposition of the substantial portion of what is pending before the review court, in determining appealability...

[41] ... If appealability or the grant of leave to appeal would best serve the interests of justice, then the appeal should be proceeded with no matter what the pre-Constitution common-law impediments might suggest...' (Footnotes omitted.)

[19] The second respondent contends that the order is final in its effect. It states in its notice of application for leave to appeal that:

'The Order is final in effect. It is not susceptible to alteration by the court of first instance. It is definitive of the rights of the parties in Part A of the proceedings. It has the effect of disposing of the entire Part A relief.'

[20] As Mr Maenetje SC, who appears for the applicant together with Mr Gwala, states in the applicant's heads of argument, that submission does not conform to the test defined in *Zweni*. The third and final requirement of the test postulated in *Zweni* holds that what must be disposed of is a substantial portion of the relief claimed in the main proceedings, not the relief claimed in the interim interdict. That criticism is valid, in my opinion.

[21] As to whether an interim order is to be viewed as having final effect, the mechanism for assessing this was considered in *City of Cape Town v South African Human Rights Commission*.⁷ The court found that:

'The first enquiry is to ascertain whether the orders granted by the high court have a final effect. For this it is necessary to compare the orders granted in respect of Part A and the orders sought in Part B, to ascertain to what extent they overlap.'

[22] To perform this exercise, it is necessary to consider the relief claimed in Part A and Part B. The relief set out in Part A has already been considered when the order granted was discussed. The relief claimed in Part B is as follows:

⁷ *City of Cape Town v South African Human Rights Commission* [2021] ZASCA 182 para 12.

- ‘1. The decision of the first respondent made on or about 1 March 2024 to award the Tender to the second respondent and to proceed to finalise the contract award is reviewed, set aside, and declared invalid (“Impugned Decision”).
2. It is declared that the applicant is the preferred bidder as contemplated in the Tender.
3. The first respondent is directed to forthwith implement the declaration in paragraph 2 as contemplated in the Tender.
4. *Alternatively to 2 and 3 above*, the matter is remitted back to Transnet for reconsideration.
5. The costs of Part B of this application shall be paid by any respondent opposing any part of the relief sought, including the costs of two counsel.’

[23] None of the relief sought in Part A is final in effect in my view and no irreparable harm or grave injustice will occur should Part A remain in place until Part B is determined.

[24] The second respondent submits further that it is in the interests of justice that it be granted leave to appeal. I was referred to several decisions in which the interests of justice were considered and applied. However, in *TWK Agriculture Holdings (Pty) Ltd v Hoogveld Boerderybeleggings (Pty) Ltd and others*,⁸ a matter decided in 2023, Unterhalter AJA observed that:

‘Recent decisions of this court that may have been tempted into the general orbit of the interests of justice should now be approached with the gravitational pull of *Zweni*.’⁹

[25] In *United Democratic Movement and another v Lebashe Investment Group (Pty) Ltd and others*,¹⁰ the Constitutional Court acknowledged that if all the *Zweni* requirements were not met, leave to appeal could still, nonetheless, be granted if it was in the interests of justice to do so. Thus, Unterhalter AJA acknowledged in *Polokwane Municipality v Double Four Properties and another; Broadlands Home Owners Association NPC v Double Four Properties and another*,¹¹ that if ‘[t]he *Zweni* test is not satisfied, and no consideration relevant to the interests of justice tilts the

⁸ *TWK Agriculture Holdings (Pty) Ltd v Hoogveld Boerderybeleggings (Pty) Ltd and others* [2023] ZASCA 63; 2023 (5) SA 163 (SCA).

⁹ *Ibid* para 30.

¹⁰ *United Democratic Movement and another v Lebashe Investment Group (Pty) Ltd and others* [2022] ZACC 34; 2023 (1) SA 353 (CC) paras 45 and 46.

¹¹ *Polokwane Municipality v Double Four Properties and another; Broadlands Home Owners Association NPC v Double Four Properties and another* [2023] ZASCA 158 para 16.

balance in favour of the applicants', then the test for appealability has not been made out.

[26] In my view, the order does not dispose of anything that is still to be determined in the review application nor is it definitive of the rights of the parties. The relief claimed in Part A is therefore not final in effect. It appears to me that on a proper application of the test formulated in *Zweni*, the matter is therefore not appealable. In addition, I cannot conceive that it would be in the interests of justice to permit an appeal against an interim interdict where the party that was primarily interdicted has not itself sought leave to appeal that order and is content to have it in place until Part B is heard in approximately three months' time, as agreed to by all the participating parties.

[27] I conclude, therefore, that the order that I granted, as seen against the factual matrix of this matter, is not appealable.

[28] I may, however, be incorrect in coming to that conclusion. Acknowledging that, I must, in the circumstances, consider the specific grounds raised by the second respondent in its notice of application for leave to appeal.

The grounds advanced in support of the application for leave to appeal

[29] In total, there are eight grounds upon which I am alleged by the second respondent to have misdirected myself in granting the order. As pointed out by the applicant in its heads of argument, the second respondent's notice of application for leave to appeal is a substantial document, being comprised of over 100 paragraphs spread across some 37 pages. I do not intend trawling through every one of the many allegations made therein but shall confine myself to briefly considering the principal allegations.

[30] In doing so, I do not spend time on the test applicable when considering an application for leave to appeal. It is a matter of common legal knowledge that the standard has been elevated and I need not involve myself in revisiting the test. The test has, in any event, been fully and correctly summarised in the heads of argument

prepared by Mr Maenetje. I continue to bear the test in mind when considering the grounds of appeal.

The first ground of appeal

[31] It is alleged that I made findings against the second respondent which were not borne out by the evidence adduced. Specifically, the second respondent has identified certain statements, words, and descriptions that I employed in my judgment with which it does not agree. I consider a few of them.

[32] I indicated in my judgment that the second respondent could not 'in good conscience' submit that its response to the solvency ratio calculation required by the provisions of the tender was true or accurate, because by knowingly changing the inputs into the prescribed calculation, the second respondent had 'perverted' the solvency ratio calculation crafted by the first respondent and it could not be verified as being correct.

[33] It was never in dispute that the second respondent did not complete the solvency ratio calculation prescribed by the first respondent in the manner intended by the first respondent. The second respondent changed the prescribed calculation by using a value in the equation that was not prescribed. The solvency ratio calculation had therefore not been calculated as required by the first respondent and, because of that fact, no third party could verify that what had been calculated was correctly calculated. The calculation was thus changed from what it was meant to be to something that the second respondent wanted it to be.¹² Based on my understanding of the word 'pervert',¹³ the meaning of which is considered as a footnote below, that conduct amounted to an act of perversion by the second respondent. I therefore described it as such.

¹² The second respondent used the value of its market capitalisation instead of the value of its total equity when completing the solvency ratio calculation.

¹³ 'Pervert: To change something so that it is not what it was or should be...'. Cambridge Online Dictionary: <https://dictionary.cambridge.org/dictionary/english/pervert>.

[34] The second respondent also takes issue with my mentioning that Sycip Gomes Velayo and Company (SGV) of Makati City, Philippines, was an accounting firm that had provided verification of the second respondent's solvency statements and was:

'... apparently a member firm of EY, one of the four big accounting firms'.

The complaint is that the use of the word 'apparently' allegedly has an innuendo attaching to it, suggesting a 'pretence' created by the second respondent.

[35] The complaint, in my view, is both imagined and strained. There was no requirement that an entity providing the verification of a bidder's solvency had to be a member of the big four accounting firms. No member of SGV deposed to an affidavit in the matter and its membership of EY has accordingly not been conclusively established. In truth, the status of SGV was not an issue in the determination of the application. The information that SGV was '[a] member firm of Ernst and Young Global Limited', was gleaned by me from the smallest of fine print at the base of SGV's letterhead. Two examples of that letterhead appear in the indexed papers.¹⁴ Mr Stein very helpfully ascertained during argument that a positive averment of this fact is also contained in the second respondent's answering affidavit. Accepting at face value what is stated on the letterhead, SGV is, indeed, apparently a member of EY. No innuendo attaches to that statement nor was any intended.

[36] A further point taken by the second respondent is that I stated that had the second respondent applied the solvency ratio calculation as the first respondent had intended it to be applied, and as it was understood and applied by all the other bidders, it would have fallen 'dismally short' of the prescribed outcome of 0.4 or above, and by adapting and varying the calculation, as it admitted that it did, it achieved a 'spectacular' outcome of 1.26. The use of the words 'dismally' and 'spectacular' is the target of a further complaint by the second respondent.

[37] The second respondent acknowledged that had it calculated the solvency ratio calculation as the other bidders did, it would have achieved a solution of 0.24. That was substantially below the required outcome of 0.4. In my view, that solution

¹⁴ See, for example, indexed pages 1039-1042 and indexed pages 1397-1398.

fell dismally short of what was required. The second respondent may not approve of my use of the word ‘dismally’, but it is a word that I chose to use, and it is apposite.

[38] As regards the ‘spectacular’ result achieved by calculating the solvency ratio calculation the way that it did, the second respondent argues in its heads of argument that:

‘... such a conclusion could not have been reached as there was no evidence about the respective scores of any of the other bidders on which to conclude that ICTSI’s score was “spectacular” in any way.’

[39] This argument has two fundamental shortcomings, in my view. Firstly, no other party calculated the solvency ratio calculation the way the second respondent did. No meaningful comparison is therefore capable of being performed with regard to other bidders. And, secondly, as the first respondent’s internal audit team’s report stated:

‘An equity-to-assets ratio above one (1) should have been a red flag for the CFAT, as it is impossible.’

Obtaining a result that is impossible merited the description that I gave it.

[40] I have spent some time dealing with some of the complaints raised by the second respondent over, essentially, my vocabulary in this ground of appeal. In doing so, it is evident that this ground of appeal is entirely frivolous. In truth, I need not have spent time on this exercise because these complaints relate to the reasoning that I adopted in coming to the conclusion that I reached and do not arise out of the order that I granted.

[41] In *Absa Bank Limited v Mkhize*,¹⁵ the Supreme Court of Appeal confirmed that an appeal lies only against an order of a court and not against the reasons for that order. This approach was confirmed in *Lebea v Menye and another*,¹⁶ where the Constitutional Court stated that:

‘It must also be remembered that there is no appeal against reasons for a judgment and an appeal lies only against an order.’

¹⁵ *Absa Bank Ltd v Mkhize and Two Similar Cases* [2013] ZASCA 139; 2014 (5) SA 16 (SCA) para 64.

¹⁶ *Lebea v Menye and another* [2022] ZACC 40; 2023 (3) BCLR 257 (CC) para 29.

The second ground of appeal

[42] I am alleged by the second respondent to have failed to recognise that the applicant had challenged the incorrect decision, it being alleged that the decision that ought to have been challenged was the decision to shortlist the second respondent as the preferred bidder and not the decision to finally award the tender to it and to conclude the final contract with it (the contract).

[43] I deferred the resolution of that issue to the court hearing the review application. I was not entitled to come to any findings that might serve to bind the court hearing the review application and this was an issue that I believed should be considered by the court hearing the review application. The best that I could do was to take a ‘peek’ at the issues in the review application.¹⁷

[44] In my view, on the evidence before me, it was clear that the shortlisting decision was not a final decision, a fact accepted by the first respondent, which designed the tender. Indeed, the first respondent’s legal representatives, acting on its behalf, on several occasions expressed that view in writing, urging the applicant not to commence legal proceedings because the process of shortlisting did not amount to a final decision. Of relevance in this regard is the first respondent’s legal representatives’ letters to the applicant’s legal representatives dated 2 November 2023, 8 November 2023, and 4 March 2024, in which this position was unequivocally expressed. That correspondence has been put up and forms part of the record.

[45] The first respondent accepted that the decision to finally award the tender to the second respondent and to conclude a contract with it, referred to as ‘the 1 March decision’, which description I shall also use, amounted to an administrative action on its part, as contended for by the applicant. In my view, it clearly was. The final award and the conclusion of the contract were accordingly capable of being interdicted pending the decision to review the award of the tender. It appeared to me that the correct decision had been identified by the applicant, namely the 1 March decision.

¹⁷ *Economic Freedom Fighters v Gordhan and others* [2020] ZACC 10; 2020 (6) SA 325 (CC); 2020 (8) BCLR 916 (CC) para 42.

[46] In pressing this ground of appeal, the second respondent appears to lose sight of the fact that I was not required to determine anything finally. I was required merely to consider whether interim relief should be granted pending the final determination of all the issues in dispute without trespassing into the merits of the review application itself.

The third ground of appeal

[47] It is alleged by the second respondent that I incorrectly regarded the application as urgent, when I ought not to have come to such a finding. Moreover, I concluded that urgency was to be assessed with effect from the 1 March decision, instead of the date upon which the second respondent was shortlisted as the preferred bidder.

[48] In finding the matter to be urgent, I exercised the discretion that I was granted by the Uniform Rules of Court.¹⁸ That discretion is a wide discretion. That simply meant that I was entitled:

‘... to have regard to a number of disparate and incommensurable features in coming to a decision.’¹⁹

[49] Having concluded that the matter was urgent, I then heard the application, which, as previously stated, was fully argued over a period of two days. The fact that I have a discretion, and my subsequent exercise of that discretion, cannot simply be wished away, nor can the consequences of that decision. The direct consequence of that discretion being exercised is that the application was heard. The issue of urgency is, therefore, essentially moot because the matter has been comprehensively and completely dealt with. If I understood him correctly, Mr Stein agreed in argument that this was the case.

[50] A decision to treat a matter as urgent does not finally determine the rights of any of the parties nor does it dispose of a substantial portion of the relief claimed in

¹⁸ Uniform rule 6(12)(a) reads as follows: ‘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.’

¹⁹ *Knox D’arcy Ltd and others v Jamieson and others* 1996 (4) SA 348 (A); [1996] 3 All SA 669 (A) at 361H-I.

the main proceedings, or, in fact, any of that relief, as required by *Zweni*. It simply amounts to a procedural ruling that the matter is to be considered as being urgent and is to be dealt with accordingly. It is, in other words, not an appealable outcome.²⁰

The fourth ground of appeal

[51] It is alleged that I approached certain legal questions on the basis that they could be resolved as if they were factual issues. Several allegations fall under the umbrella of this ground.

[52] The first allegation appears to be that because the first respondent did not dispute that the 1 March decision amounted to an administrative action, I simply found that to be the case. Factually, this is incorrect, and I did no such thing. The 1 March decision confirmed the second respondent as being the successful bidder. It was on that date that the first respondent informed the applicant that it would conclude the contract with the second respondent. Objectively, on the face of it, this was sufficient evidence to establish that date as the date upon which the administrative action was finalised. That had nothing to do with the first respondent's own subjective belief as to when the administrative action was taken.

[53] A further complaint raised by the second respondent is that I erred in not finding that the final decision was, in fact, the shortlisting of the second respondent by the first respondent as the preferred bidder. This submission fails to appreciate that, on the first respondent's own version, it did not automatically follow that the preferred bidder would ultimately be the entity with which it would conclude the contract. There were further steps through which the second respondent had to first proceed before the decision to appoint it became final. As much was said by the first respondent's attorneys in their correspondence to the applicant's attorneys mentioned earlier in this judgment.

[54] Finally, under this ground of appeal, it is argued that I erred in concluding that the solvency ratio calculation was prescriptive. I found that it was mandatory. There was nothing in the bid document to indicate that it was not. Given the financial demands of the project, the demonstration of the financial power of the successful

²⁰ *Lubambo v Presbyterian Church of Africa* 1994 (3) SA 241 (SE) at 242H.

bidder was essential and it had to be demonstrated at the outset to permit a bidder to progress deeper into the tender process. The first respondent defined, as it was entitled to do, how that financial capacity was to be established. In a tender where the emphasis was on financial strength, the solvency ratio calculation was mandatory.

The fifth ground of appeal

[55] The second respondent asserts that I incorrectly interpreted the financial criteria and the solvency ratio requirement in my judgment. In particular, it is alleged that I erred in treating the minimum financial criteria as a basis for exclusion and I failed to consider the issue of materiality. As with some of the other grounds of appeal, this ground has three subsets of complaint. I deal with each of them sequentially.

[56] Firstly, it is alleged that I erred in not recognising that solvency could be established by the second respondent adapting the solvency ratio calculation as it did. The difficulty for the second respondent on this issue is that it was required to complete the bid documentation as the first respondent wanted it completed, not in a fashion that best suited itself. Moreover, the RFQ bid document made it clear that the solvency ratio calculation was to be completed by using information taken from a bidder's financial statements which had to be submitted. Market capitalisation does not appear in financial statements nor was its use in calculating the solvency ratio calculation offered as an alternative to bidders by the first respondent. It was therefore not a permissible variable that the second respondent was at liberty to use. The second respondent was required to establish its solvency in the way that the first respondent prescribed.

[57] Secondly, it is suggested that obtaining a result of 0.4 when solving the solvency ratio calculation was not mandatory. That flies in the face of the equation itself which is clearly stated to be as follows:

'1. Solvency is equal to or exceeds 0.4, as calculated by the following formula:

Financial Minimum Criteria 1: Solvency: $\frac{\text{Total Equity}}{\text{(Total Assets)}}$ equal to or exceeds 0.4'

[58] Mr Stein submitted in argument that the second respondent was entitled to interpret the solvency ratio calculation in the way that it did (by substituting 'Total Equity' with 'Market Capitalisation'). The test when engaging in the interpretation of a document is set out in the well-known case of *Natal Joint Municipal Pension Fund v Endumeni Municipality*²¹ and requires giving effect to the plain language of the document, objectively ascertained within its context. That being the case, I remain unconvinced that there is merit in Mr Stein's submission.

[59] Thirdly, it is submitted that I erred in interpreting section 5.2(d) of the RFQ document. That section dealt with a bidder's minimum financial criteria and included the solvency ratio calculation. It provided that the minimum value of 0.4 had to be attained when calculating the solvency ratio calculation. I do not foresee any other possible interpretation of that section being possible other than the one to which I came.

The sixth ground of appeal

[60] The second respondent asserts that I erred in finding that non-compliance with the solvency ratio calculation would be a proper basis to exclude the second respondent from further participation in the tender.

[61] I found it to be mandatory for the solvency ratio calculation to be answered as the first respondent required it to be answered. The consequence of not answering it in the prescribed fashion was the possibility of exclusion from the bid process. This was the view, as well, of the first respondent's own internal audit team when asked to express a view on the way the second respondent adopted the solvency ratio calculation. Exclusion for want of compliance with the minimum financial criteria is rendered more likely, in my view, in a tender such as this where it was essential that the first respondent was able to identify a prospective business partner that had the appropriate financial credentials.

The seventh ground of appeal

²¹ *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA); [2012] 2 All SA 262 (SCA).

[62] The second respondent alleges that I erred in finding that the three letters put up by three of the second respondent's bankers constituted ex post facto verification of the second respondent's financial capacity. The argument in this regard is premised on the fact that the first respondent was entitled to carry out a due diligence inspection on the second respondent and the provision of the three letters formed part of the exercise of that entitlement.

[63] It seems to me that this proposition is misconceived. Before a due diligence could be conducted, the second respondent had to first satisfy the minimum financial criteria. It did not do that, yet it was given an opportunity later to do so. Its financial strength ought to have been established at the commencement of the bid process, not towards the end of that process.

The eighth ground of appeal

[64] It is alleged that the essentialia of an interim interdict were not established by the applicant and that I erred in concluding that they had been. I have reconsidered the judgment, and I am not persuaded that I erred in concluding as I did.

Conclusion

[65] Ignoring for a moment my conclusion that the order is not appealable on the principles established in *Zweni*, I am unpersuaded that the grounds of appeal taken by the second respondent would entitle me to grant it leave to appeal. I am of the view that there is no reasonable possibility that another court would come to a different decision. That being the case, I must, nonetheless, still consider whether there is a compelling reason why an appeal should be allowed.²² That would entail a consideration of whether there is:

‘... an important question of law or a discreet issue of public importance that will have an effect on future disputes.’²³

I discern neither of these to be present in this matter. The question of law that arises in this matter is a common one that has been dealt with in several judgments and the law on the issue is well developed and certain. The mere fact that the tender ultimately will involve large sums of money does not make it an issue of pressing

²² *Ramakatsa and others v African National Congress and another* [2021] ZASCA 31 para 10.

²³ *Ibid.*

public importance. I consider there not to be any compelling reason why leave to appeal should be granted.

[66] In assessing whether it is in the interests of justice to otherwise permit an appeal, each case must be assessed in the light of its own peculiar facts.²⁴ In this matter, the duration of the interim interdict is not an unknown imponderable stretching into the distance, but dates have already been agreed to and fixed for the determination of the final relief. And those dates are but three months away. Also to be considered and weighed up when assessing the interests of justice is the fact that the first respondent, which is the party interdicted and restrained by the order, has not itself sought leave to appeal. In the light of these facts, I conclude that it is not in the interests of justice to permit an appeal.

[67] I conclude therefore that the application for leave to appeal must accordingly be dismissed.

Costs

[68] Dealing firstly with the issue of condonation, the applicant did not oppose the second respondent's application, and I can accordingly see no reason why any costs order should therefore be made. As regards the merits of the application for leave to appeal, this was a matter of some complexity and considerable importance to the parties. Both the second respondent and the applicant have each employed two counsel to bring and resist this application, respectively. That is, perhaps, a good indication of the difficulty of the matter and its importance to each of them. Costs must follow the result and must therefore include the costs of both counsel, to be taxed on scale C.

The order

[69] I accordingly grant the following order:

1. The second respondent's application for condonation for the late delivery of its application to amend its notice of application for leave to appeal is granted and there shall be no order as to costs.

²⁴ *Nova Property Group Holdings Ltd and others v Cobbett and another* [2016] ZASCA 63; 2016 (4) SA 317 (SCA) para 9.

2. The second respondent's notice of application for leave to appeal is amended to reflect that the second respondent relies upon s 17(1)(a)(i) and s 17(1)(a)(ii) of the Superior Courts Act 10 of 2013 in seeking leave to appeal.
3. The second respondent's application for leave to appeal is dismissed with costs, such to include the costs of two counsel to be taxed on scale C.

MOSSOP J

APPEARANCES

Counsel for the first respondent: Mr A Stein SC and Ms T Palmer

Instructed by: Bowman Gilfillan Incorporated
Sandton
Johannesburg

Locally represented by:

Bowman Gilfillan
Ground Floor
Compendium House
5 The Crescent
Westway Office Park
Harry Gwala Road
Westville
Durban

Counsel for the applicant: Mr N H Maenetje SC and Mr M Z Gwala

Instructed by: Webber Wentzel
90 Rivonia Road
Sandton
Johannesburg

Locally represented by:

Johnston and Partners
2nd Floor, 81 Richefond Circle
Ridgeside Office Park
Umhlanga Rocks