IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, EAST LONDON CIRCUIT COURT)

CASE NO: 1544/2024

Date heard : 16th September 2025
Date Delivered:30thSeptember 2025
(electronically)

In the matter between:

SKG AFRICA (PTY) LTD	**1st Applicant**
HEMIPAC INVESTMENTS (PTY) LTD	**2nd Applicant**
And	
BUFFALO CITY METROPOLITAN MUNICIPALITY	**1st Respondent**
ROKEWOOD INVESTMENT GOLDINGS (PTY) LTD	**2nd Respondent**
GRAND SELECT 150 (PTY) LTD	**3rd Respondent**
MAJANGAZA PROPERTIES (PTY)LTD	**4th Respondent**

JUDGMENT

ZONO AJ:

Introduction

[1] The applicants approached this court on urgent basis for a relief in the following terms:

> *"1. That the application be heard as one of urgency in accordance with the provisions of Rule 6(12) (a) and the non- compliance with the usual forms, time limits and procedures as envisaged in terms of rule 6(5), including the requirement for service via the sheriff of this court, be condoned;*
>
> *2. That the first respondent be interdicted and restrained from proceeding with the evaluation and adjudication of the tender process with tender number: CE 610 for office accommodation for the first respondent ("**CE 610**");*
>
> *3. That the first respondent be interdicted and restrained from making an award in CE610, alternatively, if an award has been made by the time this application is heard and adjudicated, that first respondent be interdicted and restrained from implementing or further implementing the award, and in particular from concluding any contract of lease or otherwise with the successful bidder and from relocating to the building offered by the successful bidder, pending the finalization of the review application brought by the first applicant under case number EL890/2025 ("**review application");***
>
> *4. That the aforesaid interim interdict remains in operation until the finalization of the review application or any appeal thereof;*
>
> *5. That the first respondent, alternatively the first respondent and any respondent opposing this application jointly and severally, be ordered to pay the costs of this application, alternatively, that the costs of this application be reserved for determination in the review application;*
>
> *6. That such further and/ or alternative relief as the court deems for be granted*" (sic).

[2] The interim relief is sought to be in full operation pending finalization of the review application or any appeal that may follow a decision in the review application. The review application was

instituted on 15th May 2025 under **Case No EL 890/2025** in which the applicants seek *inter alia* that the first respondent's decision to (i) change the tender requirements of CE569, (ii) cancel CE569 and (iii) issue a new tender for office accommodation (CE610) with the changed tender requirements and all related administrative action to be declared unlawful, reviewed and set aside. Apparently, the review application is opposed.

[3] This application is opposed by the first respondent (BCM); and in so doing the BCM delivered its notice to oppose and opposing affidavit accompanied by the annexures, to which the applicants have replied. Both parties had delivered their respective heads of argument. The matter is opposed both on the basis of alleged lack of urgency *(in limine)* and merits. I propose to anterially deal hereinafter with the point *in limine* and the facts germaine for its determination.

Urgency and facts relating thereto

[4] Rule 6(12) of the URC provides for the abridgment of the times for the service and filing of process and documents prescribed by the URC, and the departure from the established sitting times of the court. The Rule provides:

> *"6(12) (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 shall set forth explicitly the circumstances which it is averred render the*

> *matter urgent and the reasons why the applicant claims that applicant could not be afforded substantial redress at a hearing in due course."*

[5] To qualify for an audience in the urgent court, there is a test that an applicant has to meet. Thus, the test for urgency when an audience is sought in the urgent court is two-fold:

(a) whether the applicant brought the application with the requisite degree of urgency.

(b) Whether, not hearing the application on the basis of urgency will deny the applicant substantial redress in due course. Where a matter lacks urgency, the court may, for that reason alone, strike the application from the roll[1].

[6] In *East Rock Trading 7*[2] Notshe AJ had the following to say:

> *"6. The import thereof is that the procedure set out in rule 6(12) is not there for taking. An applicant has to set forth explicitly the circumstances which he avers render the matter urgent. More importantly, the Applicant must state the reasons why he claims that he cannot be afforded substantial redress at a hearing in due course. The question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of absence of substantial redress in an application in due course. The rules allow the court to come to the assistance of a litigant because if the latter were to wait for the normal course laid down by the rules it will not obtain substantial redress."*

[7] Pursuant to BCMS's advertisement of a tender process during October 2024 under tender number: **CE569** for the provisions of office accommodation, the first applicant (SKG Africa) submitted its bid in

[1] ***Marce Projects (Pty) Ltd v City of Johannesburg Metropolitan Municipality*** and another 2020 (2) SA ALL SA 157 (GJ) Para 33.

[2] ***East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and others*** (11/33767) [2011] ZAGPTHC 196, (23 September 2011) Para 6.

respect of the Trust Centre Building, East London. First Applicant's bid was submitted in November 2024. Second and Third respondents submitted their bids too. First and Second applicants (SKG Africa and Hemipac) are related companies in the same group of companies known as SKG Properties.

[8] Before an award was made, the BCM cancelled the tender process under tender number **CE569** (CE569). On 28th March 2025 such cancellation was published in the daily dispatch. On 02nd April 2025, SKG Africa requested from BCM urgent provision of relevant information pertaining to the cancellation of CE 569, which information was not provided on 07th April 2025, which was the deadline.

[9] On **25th April 2025** the BCM advertised a new tender under tender number: **CE 610 (CE610)** for the same BCM office accommodation. The applicants contend that CE610 should be reviewed and set aside for various reasons.

[10] On 09th May 2025, before the institution of the review application. SKG Africa demanded a written undertaking from the BCM that it would not proceed with CE610 pending the finalization of the review application, which undertaking was requested to be given on or before **12th May 2025,** and the same was not given on the due date. On the 09th May 2025, SKG Africa envisaged in its letter to BCM that an urgent application would be brought if no written undertaking is

provided that the BCM would not proceed with tender process CE610. It is apposite to quote the relevant portion of the urgent demand:

> *"8. In an attempt to avoid the need for an urgent application, we have been instructed to demand that you provide us with a written undertaking that you will not proceed with tender CE610, pending the finalization to our client's review application, which undertaking is to reach us by no later than 17h00 on Monday 12th May 2025"*(sic).

[11] Indeed, a review application impugning CE 610 was duly instituted on 15th May 2025. On the same date of advert of CE610, SKG Africa caused a letter to be penned to the BCM, in which it intimated to the fact that SKG Africa reserves its rights to bring an interdict application against the new tender (CE610). In the letter the author thereof intimated to the fact that the matter is urgent as at that date and it contemplated urgent proceedings.

[12] It is common cause that the review application was instituted on 15th May 2025. I reiterate that SKG Africa sought to review and set aside BCM's decisions cancelling CE569 and a decision to issue **CE610.** When review application was instituted, the BCM had not made an undertaking not to proceed with **CE610.** When the review application was launched it was unequivocal that the BCM had failed to give the requested undertaking. In the review application SKG Africa invoked the provisions of Rule 53 of URC in that it should be provided with the record of the decision in both **CE 569** and **CE610.** The record was given only on 25th July 2025, notwithstanding that the due date was 06th June 2025.

[13] SKG Africa asserted that the information in the record received on 25th July 2025 prompted urgency of this application. No application was made on urgent basis soon after this date. Curiously, SKG Africa, having realised that the matter is urgent, only reiterated its demand for the suspension of CE610, which request was expressely refused on 06th August 2025 by the BCM, through its attorneys. On 07th August 2025, having understood BCM'S refusal to suspend CE610, caused a further correspondence to be transmitted to BCM in which a demand for suspension of CE610 was repeated. BCM's attorneys promised to come back to SKG Africa with a response once they had consulted with their client on 15th August 2025, which they did not do until 20th August 2025 when the instant application was prepared. We know that this application was filed on 21st August 2025 at 10:32:52.

[14] Thereanent to the point *in limine*, the issue for determination is whether this application has lost its urgency or the urgency is self-created. It is well established that the applicant cannot create its own urgency by simply waiting until the normal rules can no longer be applied[3].

[15] In *Spilkin*[4] Lowe J had the following to say:

> *"15 An Applicant cannot create its own urgency by simply waiting till the normal rules can no longer be applied.*
>
> *16. If the above is satisfied other issues come to be considered, some of which are:*

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[3] ***Ngquma and another v Staats President; Damons NO v State President; Jooster v State President*** 1988 (4) SA 224 at 243 D; ***Sokhani Development and Consulting Engineer's (Pty) Ltd v Alfred Nzo District Municipality (***1254/2024) [2024] ZAECMKHC 44 (26 April 2024) Para 12-14.

[4] ***ENX Group Limited v Spilkin*** (2296/2022) [2022] ZAECQBHC 42 (8 November 2022) Para 15-16.

> *16.1 Whether Respondent can adequately present its case in the time given;*
>
> *16.2 Other prejudice to Respondent and the administration of justice;*
>
> *16.3 The strength of Applicant's case and any delay in asserting its rights (self-created urgency)".*

Dilatory conduct in bringing the application or that urgency was self- created is a relevant factor to be taken into account in urgent applications[5].

[16] There is interconnectedness between the instant application and the review application. It is because of that interwoveness that considerations herein will be made with reference to the review application launched under case No EL 890/2025. The relief sought herein is subject to the outcome of the review application. That being said, the facts giving rise to the present application are more or less the same facts that are implicated in the review application. I will come back to this later in this judgment when dealing with the institution of the review application.

[17] Firstly, the tender process CE569 was cancelled on 28th March 2025. At that time, it was clear to the SKG Africa that it harboured a view that the cancellation is unlawful and it would be followed by a review challenge. What was further clear to SKG Africa is that the cancellation is an affront to its rights. It is unthinkable that those rights were unidentifiable at that stage.

[5] ***Nelson Mandela Metropolitan Municipality v Greyvenouw CC*** 2004 (2) SA 81 (SE) Para 14 C-D.

[18] Of fundamental importance is the publication of the new CE610 tender process on 25th April 2025 which, according to SKG Africa it impermissibly and unlawfully amended the conditions of CE569 to suit the specific needs of a particular tenderer or bidder. It dawned on the same day of 25th April 2025 that BCM'S conduct is offensive to SKG Africa's rights to a fair, transparent and competitive tender or procurement process[6]. For purpose of interim or temporal interdict a right to be set up must be *prima facie* established though open to some doubt[7]. I am fortified by the contents of the letter penned on 25th April 2025 at the instance of SKG Africa to BCM, portion of which reads as follows:

> *"This conduct is highly prejudicial to our client and our client reserved the right to interdict the new tender process. In this regard we urge you to furnish us with the requested information by close of business today, but by no later than close of business on 2nd May 2025, failing which our client reserves the right to, make this correspondence available in any court proceedings, required for the protection of our client's rights"* (sic).

[19] It is discernible from this correspondence that SKG Africa was aware of the kind of prejudice that had befallen it. Secondly, it was always in SKG Africa's contemplation that an urgent application is warranted under the circumstances. Curiously, when the deadline arrives on 02nd May 2025, SKG Africa did not bring urgent application in accordance with its contemplation. On 09th May 2025, after outlining the kind of inequity and unfair conduct of BCM which apparently lacked transparent and competitive features, SKG Africa caused a further letter to be penned to BCM.

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6 Section 217 of the Constitution.

7 ***Webster v Witchell*** 1948 (1) SA 1186 (W) at 1189.

[20] The relevant portions of the letter of 09th May 2025 are worded as follows:

> *"7. Our client contends that tender CE610 accordingly suffers of reviewable irregularities. We have been instructed to seek a review of the relevant, impugned administrative action and to otherwise protect our clients interest which may include an urgent application for appropriate relief.*
>
> *8. In an attempt to avoid the need for an urgent application, we have been instructed to demand that you provide us with a written undertaking that you will not proceed with tender CE610, pending the finalization of our client's review application, which undertaking is to reach us by no later than 17h00 on Monday, 12 May 2025*" (sic).

[21] The written undertaking requested on 09th May 2025 was not given on the 12th May 2025, but SKG Africa in its founding affidavit expressely stated that the undertaking was refused. Surprisingly, SKG Africa did not bring this application upon refusal by BCM to make a written undertaking to suspend tender process CE610. It is my considered view that all subsequent letters insisting on written undertaking were not necessary in the light of the refusal by the BCM to furnish same. This application should have been instituted at this stage.

[22] In paragraph 105 of the founding affidavit SKG Africa makes the following allegations:

> *"105. The tender document in CE610 (FA10) was made available only on 5 May 2025. On 9 May 2025, SKG Africa expressed concerns regarding the legality of CE610 and its intention to seek a review of CE610. SKG Africa repeated its request for the documents pertaining to CE569 and again demanded a written undertaking by no later than 12 May 2025 that the BCM would not proceed with CE610 pending the finalization of the review (FA11). The BCM refused".*

[23] On 15th May 2025, SKG Africa launched the review application. An unequivocal bizarre occurred when SKG Africa failed to institute this urgent application at that stage. Under normal circumstances and in the interest of expedition and cost-effectiveness, this application should have been incorporated in the review application as Part A. In any event, there is no explanation for SKG Africa's failure to launch this application at least simultaneously with the review application, when an undertaking was refused on or about 12th May 2025. All the information that was necessary for the launch of this application was available to SKG Africa atleast on 15th May 2025 when it was launching the review application, but it was not launched. I do not accept that the urgency in this matter was triggered by the receipt and perusal of the information in the review record. There is no reference to any part of the record in this application that triggered the institution of this application.

[24] At all material times the BCM had always indicated, expressely and by necessary implications that it sought to proceed with tender process CE610. That intention was clear when the tender process 610 was advertised. No contrary intention was ever shown by BCM. I therefore find no difficulty in concluding that the applicants unnecessarily delayed in bringing this application, and that there is no urgency in this matter; if there is any, it is self-created. There is no explanation for applicants' delay in launching this application from atleast the date which the written undertaking was refused. Equally there is no explanation why this application was not simultaneously launched with the review application.

[25] Applicants relied on judgment of *Marce Projects*[8] in the heads of argument which reads as follows:

> *"[49] The corollary to an unsuccessful tenderer's duty to promptly impugn the awarding of a tender, is the duty upon the contracting <u>government entity to promptly engage with it and to accede to its requests for information</u>. Where the City fails in this duty, it is <u>dissembling of the City to contend that the unsuccessful tenderer should not be given an audience in the urgent court because it delayed to approach the court.</u>*
>
> *[50] For its tardiness in responding to Marcè's request for information, <u>the City ought not to benefit from Marcè's delay in bringing the application by having it struck from the roll</u>. It only responded to Marcè after it instituted the application, declining Marcè's PAIA request. Yet it subsequently filed the information as required by Rule 53 (1)."* [emphasis added]

[26] In *Marce* the information that was belatedly furnished to the applicant had a bearing on the urgent interdict applications, hence it was held that the city ought not to benefit from the delay it caused by not timeously giving the information.

[27] *Marce is* distinguishable to this case in a number of respects. Unlike the applicant in *Marce*[9] the applicants herein approached this court without a full and proper explanation for their delay. The applicants should have given full and proper explanation justifying the delay to launch an urgent application[10]. I will cite only two important examples of applicants' failure to explain the delay. When the applicants first learnt that the BCM is refusing to furnish an undertaking not to

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[8] ***Marce Projects (Pty) Ltd v City of Johannesburg Metropolitan Municipality*** 2020 (2) SA ALL SA 157 (GJ) Para 49-50.
[9] ***Marce Projects (Pty) Ltd v City of Johannesburg Metropolitan Municipality and Another*** 2020 (2) SA ALL SA 157 (GJ) Para 42.
[10] ***Dimension Data (Pty) Ltd v Minister of Justice and Constitutional Development and another*** (25737/2016) [2016] ZAGPPHC 842

proceed with the implementation of tender CE610, the applicant failed without justification and good reasons to urgently bring this application. Secondly, when the review application was launched, the applicants failed to simultaneously or immediately thereafter institute the instant proceedings. The applicants consistently failed to explain at least these two failures.

[28] The applicants herein failed to bring this application at the first available opportunity. The first available opportunity, if one is benevolent to ignore the 28th March 2025, 24th April 2025 and 25th April 2025, was on 12th May 2025 when an undertaking was refused. The second available time was on 15th May 2025 or so soon thereafter when the review application was instituted. This application was launched some three months after the institution of the review application.

[29] In the amalgam of all this, this application should be struck from the roll. Contrary to what BCM Counsel submitted, I see no *malafides* on the part of the applicants. I will neither dismiss this application nor mulct the applicants with punitive costs.

Order

[30] In the result I make the following order:

1. **This application is struck off from the roll with costs.**

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A.S ZONO

ACTING JUDGE OF THE HIGH COURT

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Due to the fact that it is recess and that this matter was brought on urgent basis, this judgment was handed down electronically by circulation to the above mentioned legal representatives by email and release to SAFLII. The date and time for hand-down is deemed to be 14h30 on Tuesday 30th September 2025.