

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED: ~~YES~~/NO

CASE NUMBER: 2025/067097

2 September 2026

In the matter between:

TRANSNET SOC LIMITED

APPLICANT

And

FIDELITY SECURITY SERVICES (PTY) LTD

RESPONDENT

JUDGMENT

WINDELL J:

[1] The applicant, Transnet SOC Limited ('Transnet') (the first respondent in the court a quo), seeks leave to appeal against my judgment and order delivered on 7 April 2026.

In that judgment Transnet was directed, in terms of rule 53(1)(b) of the Uniform Rules of Court, to dispatch the record of the proceedings sought to be reviewed in the main application.

[2] Transnet contends, principally, that the judgment is inconsistent with the Constitutional Court's decision in *Famous Idea Trading 4 (Pty) Ltd t/a Dely Road Courier Pharmacy v Government Employees Medical Scheme and Others* ('*Famous Idea*'),¹ which was handed down before my judgment. It submits that there are reasonable prospects that another court would reach a different conclusion and that there are, in any event, compelling reasons for the appeal to be heard.

[3] It is necessary to explain why *Famous Idea* was not considered in my judgment. *Famous Idea* was delivered on 11 February 2026, after the hearing of this matter on 26 January 2026 but before judgment was delivered on 7 April 2026. After it was handed down, Transnet's attorneys addressed correspondence to my chambers drawing the judgment to my attention. That correspondence did not come to my attention before judgment was delivered. I therefore did not have the benefit of considering *Famous Idea* when preparing the judgment.

[4] Since the judgment was delivered, there have been material developments. Because the order is interlocutory in nature, its operation and execution were not automatically suspended by the application for leave to appeal. Transnet accordingly

¹ *Famous Idea Trading 4 (Pty) Ltd t/a Dely Road Courier Pharmacy v Government Employees Medical Scheme and Others* (CCT 266/24) [2026] ZACC 5; 2026 (4) BCLR 291 (CC) (11 February 2026).

brought an urgent application in terms of s 18(3) of the Superior Courts Act 10 of 2013 for an order suspending the operation and execution of the order of 7 April 2026 pending the determination of the application for leave to appeal and any ensuing appeal. That application was opposed by Fidelity and was dismissed by Du Plessis J on 2 May 2026.

[5] In dismissing the application, Du Plessis J considered Transnet's reliance on *Famous Idea* and held that the objection raised by Transnet was not the jurisdictional objection with which the Constitutional Court was concerned in that matter. The court also rejected Transnet's contention that disclosure of the record would cause it irreparable harm.

[6] Following the dismissal of the s 18(3) application, Transnet complied with the order of 7 April 2026 and dispatched the Rule 53 record. Fidelity has since delivered a notice of intention to amend its notice of motion, and the main review proceedings are well under way.

[7] These developments raise the question whether there remains a live issue capable of determination on appeal. Section 16(2)(a)(i) of the Superior Courts Act provides that, when at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on that ground alone.

[8] A matter is moot when there is no longer a live dispute between the parties which would be practically affected or resolved by the court's decision. It is also moot where the decision would be of academic interest only. Mootness is not an absolute bar and a court

may nevertheless determine a moot appeal where the interests of justice require it to do so. These principles were recently restated by the Constitutional Court in *Famous Idea*.²

[9] An appeal can no longer prevent the disclosure which Transnet sought to avoid, nor can it restore the position which existed before the record was produced. The question whether Transnet should have been compelled to produce the record therefore no longer presents a live controversy capable of producing any practical effect between the parties.

[10] Transnet submits that the appeal should nevertheless be entertained because it raises important questions concerning the proper application of Rule 53 and *Famous Idea*.

[11] I am not persuaded that the interests of justice require an appeal in this matter. The legal principle upon which Transnet relies has already been authoritatively determined by the Constitutional Court in *Famous Idea*. There is therefore no uncertainty in the law requiring resolution by an appeal court in this matter.

[12] There is, moreover, an important distinction between *Famous Idea* and the present matter. In *Famous Idea*, GEMS expressly challenged the review jurisdiction of the High Court. It contended that it was not an organ of state, was not exercising public power when it made the impugned decision and that its decision was therefore not susceptible

² At paras 36 and 37; *Centre for Child Law v The Governing Body of Hoërskool Fochville* [2015] ZASCA 155; [2015] 4 All SA 571 (SCA); 2016 (2) SA 121 (SCA) para 11; *Laser Transport Group (Pty) Ltd and Another v Elliot Mobility (Pty) Ltd and Another* (835/2018) [2019] ZASCA 140 (1 October 2019); *Police and Prisons Civil Rights Union v South African Correctional Services Workers' Union* [2018] ZACC 24 para 44; *Normandien Farms (Pty) Ltd v South African Agency for Promotion of Petroleum and Exploitation (SOC) Ltd* [2020] ZACC 5 paras 47-48.

to review. The parties expressly agreed that the jurisdictional issue should be determined before the application to compel production of the record.

[13] The Constitutional Court held that where the jurisdiction of the court to determine a review is contested, that issue must be determined before the court makes other orders in the review. It also held that a Rule 6(5)(d)(iii) notice is competent in Rule 53 proceedings and may be used to raise a dispositive legal question at the outset.

[14] That was not the issue before this Court. Transnet did not contend that this Court lacked jurisdiction to review its tender process, that Transnet was exercising private power, or that the tender decision was, by its nature, incapable of review under PAJA. Its case was that the particular decision identified by Fidelity — that its bid had been adjudicated as non-responsive or disqualified — did not exist.

[15] It was common cause that Fidelity's bid had been evaluated and that the tender had not been awarded to it. The dispute concerned whether the decision was properly characterised as a disqualification or non-responsive decision, or as an outcome reached at a later stage of the evaluation process. I accordingly found that the dispute concerned the proper characterisation of the decision taken within the tender process, rather than the existence of administrative decision-making susceptible to review.

[16] *Famous Idea* is also distinguishable in another respect. It concerned procurement by a medical scheme which was found to involve a commercial decision and the exercise of private power. The Court in that matter expressly distinguished private procurement from a public procurement process, where tenderers know that their information may be

disclosed should the decision be reviewed. The present matter concerns a public tender conducted by Transnet.

[17] These distinctions are also relevant to Transnet's reliance on the disclosure of competing tenderers' information as a reason why the appeal should nevertheless be heard. That concern was raised in the s 18(3) proceedings and was found insufficient to establish irreparable harm. More importantly, the disclosure has now occurred. Whatever confidentiality interest Transnet sought to protect by withholding the record cannot now be restored through an appeal.

[18] In these circumstances, the requirements of section 17(1) of the Superior Courts Act have not been met. Leave to appeal should therefore be refused.

[19] In the result the following order is made:

1. The application for leave to appeal is dismissed.
2. The applicant is ordered to pay the costs of the application for leave to appeal, including the costs of senior counsel, where so employed, on Scale B.



L. WINDELL

JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Delivered: This judgement was prepared and authored by the Judge whose name is reflected 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 hand-down is deemed to be 2 September 2026.

APPEARANCES

For the applicant:	M J Ramaepadi SC K. Kgatla
Instructed by:	Mkhabela Huntley Attorneys
For the respondent:	S Grober SC
Instructed by:	Dirk Kotze Attorneys INC.
Date of hearing:	21 July 2026
Date of judgment:	2 September 2026