IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: ***NO***
(2) OF INTEREST TO OTHER JUDGES: ***NO***
(3) REVISED:

Date: ***8th October 2019*** Signature: _____

CASE NO: 2019/32080
DATE: 8TH OCTOBER 2019

In the matter between:

KWNEL EMPIRE (PTY) LIMITED Applicant

and

ESKOM HOLDINGS SOC LIMITED Respondent

JUDGMENT

Adams J:

[1]. This is an opposed urgent application by the applicant for interim interdictory relief against the respondent ('Eskom'). Pending the determination of final relief sought in part B of the notice of motion, the applicant seeks an order interdicting and restraining the respondent from adjudicating and / or

implementing any tender for the supply, delivery and off-loading of fuel oil to all Eskom Coal Fired Power Stations on an as and when required basis for a period of five years, from refineries and / or blenders and / or manufacturers.

[2]. In part B of the application the applicant applies for the review and the setting aside *inter alia* of the respondent's decision on the 12th of February 2019 to cancel the tender issued on the 11th of May 2018 for the supply, delivery and off-loading of heavy fuel oil ('HFO') to all Eskom's Coal Fired Power Stations. The applicant also applies for a review and setting aside of the respondent's decision to deviate from its strategy from a decision to develop as many Black suppliers to a decision to procure the supply, delivery and off-loading of HFO to all Eskom's Coal Fired Power Stations from refineries / manufacturers / blenders directly on the basis that this would save costs as per the board meeting of the 30th of January 2019.

[3]. The urgent application is founded on the tender issued on the 11th of May 2018. There is a dispute relating to the tender / RFP numbers allocated to the various tenders implicated in this application. However, for purposes of this judgment it is not necessary for me to concern myself with these disputes. The applicant participated in the tender of the 11th of May 2018 and in terms of a Bidders' report dated the 19th September 2018, the applicant was evaluated as one of the nine out of twenty six qualifying bidders. However, on the 12th of February 2019 the respondent cancelled this tender due to material irregularities.

[4]. According to the applicant, this cancellation, it being the second cancelation of the tender for the supply, delivery and off-loading of fuel oil to Eskom, was invalid and unlawful as the cancellation did not have the requisite prior approval of National Treasury. This is disputed by the respondent, but again this is an issue with which I do not have to concern myself at this stage. It is an issue which the applicant will require to be adjudicated during the review application in part B of the application.

[5]. By all accounts the applicant by the 13th of February 2019 had become aware of the fact that the respondent had cancelled the tender in question. By

then the applicant was also well aware of the fact that the reason for the cancellation of the tender was a change in strategy relating to the procurement of services relating to the supply, delivery and off-loading of fuel oil to Eskom's Coal Fired Power Stations. By then the applicant had also formed the view that the cancellation was unlawful and invalid and had resolved not to accept the cancellation. It intended taking the decision to cancel the bid on review and this was made clear to Eskom in a letter dated the 13th of February 2015. In that letter the applicant demanded that the respondent furnishes an undertaking not to issue a new tender process in respect of the goods and services as under the cancelled tender. This undertaking was never forthcoming. All the same, the demand for an undertaking confirms that the applicant as far back as the 13th of February 2019 realised the exigency of the matter and the need to take action against the applicant.

[6]. I am of the view that the applicant, when the respondent failed and refused to furnish the undertaking which they demanded, should have realised that the respondent intended commencing with a new tender process. Applicant, upon this realisation, should then have proceeded with the issue of the urgent application. Additionally, on the 23rd of April 2019 the respondent issued to the public a request for information. The applicant therefore became aware or ought reasonably to have become aware that Eskom intended to proceed with a new tender process in respect of the supply of fuel oil to Eskom's Coal Powered Stations. Still the applicant took no action to obtain an interdict.

[7]. This urgent application was only issued on the 12th of September 2019. The explanation for the delay in the issue of the urgent application in sum is that the applicant was awaiting the reasons for the decision to cancel the tender.

[8]. At the commencement of the hearing of the urgent application, I requested the parties to address me on the issue of urgency, which they did. I had deemed this course necessary in the circumstances of the matter.

[9]. There are two difficulties which the applicant faces relative to the issue of urgency. The first related to the fact that during February 2019 they became

aware of the fact that the tender had been cancelled and that their right to participate in the bid was no longer extant. At that stage, on the applicant's own version, there was a need for the applicant to interdict the respondent from the issue of a new tender. By then, it would have been crystal clear to the applicant that it had to take action in order to protect its alleged right to participate in the bidding process, lest the respondent decides to commence a new bidding process as it clearly was intending on doing. The applicant did nothing. Instead, it did the necessary preparation for its review application to set aside the decision to cancel the tender. In my judgment, there is no explanation, let alone an acceptable one why the applicant did nothing between February and September 2019 to protect its alleged rights to participate in the tender process.

[10]. The second difficulty relates to the fact that even after the applicant received all of the required information from the respondent on the 3rd of July relating to the impugned decision to cancel, it adopted a rather laid back approach to the matter.

[11]. It is the respondent's contention that the alleged urgency of the matter is self-created and that there was non-compliance with the provisions of rule 6(12). It was submitted on behalf of the respondent that despite the fact that the applicant was aware as far back as February 2019 that the respondents had cancelled the tender, the applicant failed to issue its application soon thereafter.

[12]. Rule 6 (12) (b) of the uniform rules of court reads as follows that:

'(b) In every affidavit or petition filed in support of the application under para (a) of this sub-rule, the applicant shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he would not be afforded substantial redress at a hearing in due course.'

[13]. On behalf of the applicant it was submitted that application is urgent because it was only when it was announced that a new bid would be awarded on the 17th of September 2019 that the exigency of the matter dawned on the applicant. There is no merit in this contention.

[14]. I am of the view that the urgency of this application is self – created. In my view, the applicant should have launched this application as soon as the

respondent made it clear to it that they stand by their decision to cancel the tender. If they did so, urgency would not have been an issue now. It was incumbent on the applicant to as soon as possible after February 2019 to launch proceedings for an order interdicting the applicant. There is no explanation as to why the applicant waited for so long before deciding to take action. Even then they delayed in launching the urgent application.

[15]. I am not convinced that the applicant has passed the threshold prescribed in Rule 6(12)(b) and am of the view that the application ought to be struck of the roll for reasons given above.

Costs

[16]. The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so, such as misconduct on the part of the successful party or other exceptional circumstances. See: *Myers v Abramson*, 1951(3) SA 438 (C) at 455.

[17]. I can think of no reason why I should deviate from this general rule

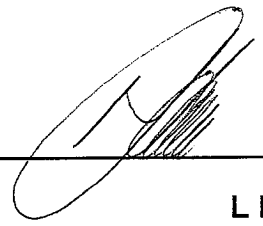
[18]. Accordingly, I intend awarding costs in favour of the respondent against the applicant.

Order

Accordingly, I make the following order:-

(1) The applicant's urgent application be and is hereby struck from the urgent court roll due to lack of urgency.

(2) The applicant shall pay the respondent's cost of this urgent application.



L R ADAMS
Judge of the High Court
Gauteng Local Division, Johannesburg

HEARD ON:	4th October 2019
JUDGMENT DATE:	8th October 2019
FOR THE APPLICANT	Adv Paul Carstensen SC
INSTRUCTED BY:	Tshisevhe Gwina Ratshimbilani Incorporated
FOR THE RESPONDENT:	Adv L J Mboweni
INSTRUCTED BY:	Renqe FY Incorporated