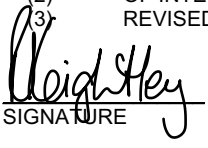


REPUBLIC OF SOUTH AFRICA



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

CASE NO: 7438/2022

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
	<u>5, 4, 2022</u>
SIGNATURE	DATE

In the matter between:

REELIN INVESTMENTS (PTY) LTD

Applicant

and

TRANSNET SOC LIMITED

First respondent

MINER ENTERPRISES

Second respondent

THE MINISTER OF TRADE, INDUSTRY AND COMPETITION

Third respondent

THE MINISTER OF FINANCE

Fourth respondent

J U D G M E N T

KEIGHTLEY, J:

1. This is an urgent application for an interdict pending the outcome of judicial review proceedings instituted under Part B of the Notice of Motion against a decision of the first respondent, Transnet Soc Limited (Transnet), to award a tender to the second respondent, Miner Enterprises (Miner). The third and fourth respondent are cited, but have played no active role in this urgent application.
2. The applicant seeks an order interdicting Transnet and Miner from 'proceeding with any contract or supply of goods' pursuant to the award of the tender to Miner. In the review application under Part B of the Notice of Motion, the applicant seeks a review and setting aside of the tender awarded to Miner. In addition, it seeks an order substituting it as the successful tenderer.
3. The applicant is Reelin Investments (Pty) Ltd (Reelin). It is a South African company that, inter alia, produces and sells freight wagon components. Miner is a company based in the United States of America. It also produces and sells freight wagon components.
4. The tender in question arose out of a request by Wagon Maintenance (a division of Transnet Engineering, or TE) to Rolling Stock Maintenance on July 2020 for the supply of draft gear, also known as draw gear, required for wagons. 'Draw/draft gear' is a generic term used for any equipment on railway vehicles which provides cushioning in the longitudinal direction to protect the vehicle and the lading or passengers from forces and shocks during train compilation and movement. They are part of the coupling system of wagons and require replacement based on maximum service intervals and functional condition as prescribed in the wagon build specification as well as the relevant maintenance plan. Transnet says that it is important that TE has a contract in place to ensure the availability of draft gears in order to execute factory production and maintenance plans efficiently and effectively

to minimise turnaround time and in turn ensure fleet availability and reliability to its clients. Further, although they are relatively small components, Transnet says that the importance of draft gears cannot be overstated. This is because of the protective function that draft gears play in the safety and optimum operation of Transnet's fleet of wagons. Transnet says that TE has a constant and perpetual need for draft gears.

5. The tender for the supply of the draft gears in question was issued on 2 March 2021. It was for a period of one year. The tender process was closed, meaning that only approved suppliers were requested to bid. Reelin and Miner being the only two approved suppliers, they were the only two entities bidding for the tender. Miner was the erstwhile only approved supplier until prior to the tender being issued.
6. The outcome of the tender process was that Miner was the successful bidder. It was issued with a Letter of Award (the LoA) on 6 July 2021, which was counter-signed by Miner on 7 July 2021. The LoA made provision for the subsequent signing of a contract between the parties. However, it expressly stated that: *'In the interim, the Parties have mutually agreed that the Supplier shall in terms of this Letter of Award ... provide the Goods and Services to Transnet, parallel to finalisation and execution of the contract between the Parties.'* The LoA then went on to set out the terms of the interim agreement, including the contract price, terms of payment, delivery terms etc. It is common cause that the final contract envisaged has not been concluded. However, it is quite clear that terms of the LoA constitute a contractual agreement that binds the parties in the interim.
7. Reelin received its letter of regret on 20 July 2021 informing it that: *'(Reelin) ranked 02 as a result of Price and B-BBEE evaluation. Your score was 87% and the successful bidder's score was 90%for the Price and B-BBEEE (sic) evaluation'*. It recorded, in addition, that should *'your company have any material concern*

regarding the RFP process, please refer to the RFP TENDER: TE21 — M,P — 05G —11035 for further details on the process to be followed to lodge a complaint with the Transnet Procurement Ombudsman’.

8. On 27 July 2021, Reelin lodged a complaint relating to the award of the tender to Miner with the Transnet Procurement Ombudsman. Its first ground of complaint was described in summary as follows:

‘... based on the aforesaid historical relationship between Transnet and Miner, it is therefore submitted that the incorrect evaluation methodology was used because:

- a. Miner's price was not quoted in South African Rand;
- b. This price does not include VAT;
- c. Does not include the freight, customs and transport costs that would have to be paid by Transnet;
- d. Did not facilitate a like-for-like comparison between bidders e. Was a deviation from the pricing schedule and should have therefore being declared non-responsive.’

9. The second ground of complaint related to the promotion of local production and content under the Preferential Procurement Regulations, 2017. Reeling submitted in this regard that: *‘It is common cause that given the fact that Miner will be supplying the finished products directly to Transnet, little if not, no local jobs will be created. It is submitted therefore that the award is contrary to the aforesaid preferential procurement regulations and Government Policy as set out in the aforesaid Section 13-Job Creation Schedule.’*

10. Reelin says that it is common cause that after lodging its complaint it was sent from pillar to post. It was advised on 29 July 2021 that the Ombudsman’s operations were suspended at that time, so the complaint could not be investigated. Reelin’s attorneys wrote letters to Transnet addressing concerns about the delay and Reelin’s prejudice. Eventually, on 23 September 2021, Transnet confirmed that an independent investigator had been appointed.

11. Reelin was furnished with an executive summary of the investigator's report on 9 November 2021. It rejected the complaints. On the VAT exclusion complaint, the investigation found that there was no legal basis for the argument. On the second ground of complaint regarding local content, it found that there was no merit because Miner had received a 60% exemption on local content requirements from the Department of Trade and Industry.
12. Reelin rejected the correctness of the summary findings by the independent investigator. On 10 November 2021, its attorneys addressed a letter to Transnet in which it recorded this and further recorded that Reelin had never been provided with Miner's successful bid price as prescribed in Section 4 paragraph 1 of the tender document. This information was requested. Miner's price bid was provided to Reelin on 7 December 2021. Reelin says that until this revelation, it *'could only speculate about how Miner had quoted a price cheaper than it'*.
13. Yet a further letter was addressed to Transnet by Reelin's attorney. It included a complaint about the process and conclusion of the independent investigator. It further recorded that: *'Reelin is particularly disturbed that Transnet has clearly not followed the established rules of Procurement and has wrongly favoured Miner over Reelin despite its price being cheaper and it has a better BBBEE level status.'* The letter went on to say the following:

'It is therefore most disappointing that Reelin has been forced into a situation where it has no option but to approach your offices seeking relief to what appears to be a failure by Transnet to adhere to its own Procurement Policies. ... It is with this in mind, that we have decided to address this letter to you in the last ditch of hope, that you may intervene in the matter so as to avoid any unnecessary legal proceedings that will have to follow arising out of the aforementioned conduct of Transnet, hence we are urgently requesting the award made to Miner be set aside. ... It is therefore our sincere hope that with your intervention in this matter, an urgent resolution to the aforementioned can be found. ... We thank you and await to receive your urgent response in order to find an amicable resolve in this matter by the close of business on the 14th December 2021.'

14. The final interaction between the parties before the application was instituted occurred on 25 January 2022 when a conference call was held between representatives from Reelin and Transnet. Reelin says that it was only then that it became clear to them that they would have to approach the Courts for relief, as this is what Transnet advised on the conference call.
15. The Notice of Motion in the matter was issued on 22 February 2022, almost one month after the conference call. In respect of Part A, being the urgent application for an interdict pending the review of the tender, the respondents were initially given until 28 February to file their answering affidavits. However, once it became clear that they would oppose the urgent application, the timelines were extended by agreement between the parties.
16. Given the chronology of events outlined above, the obvious issue that arises, and which was highlighted by both respondents in their opposition to the application for an interim interdict, is that of urgency.
17. Transnet contends that Reelin fails to establish any urgency in applying for an interim interdict, alternatively, any urgency is self-created. It says that there was nothing in fact or law that prevented Reelin from seeking relief once it knew that it had failed to secure the tender on 20 July 2021. It submits further that when one has regard to the timeline of events, the delay in bringing the urgent application is unreasonable. This is because the contract is in its final stages of performance. According to Transnet 99.48% of the contract value has been ordered by Transnet from Miner, with 38% having been fully performed and the remaining portion either in production or in transit to South Africa from the supplier. Transnet also points out that the contract period is only for one year, with a significant portion of that period already having expired.

18. Miner, too, contends that Reelin has not approached the court for relief as soon as it was reasonably possible to do so and that the delay by Reelin is inordinate and unexplained. It says that Reelin has failed to explain why it allowed the tender to be executed since July 2021 and only seeks an interdict in March 2022. If there is any urgency in the matter, Miner contends that it is self-created.
19. Both of the respondents sought that the application be struck from the Roll with costs for want of urgency.
20. In its founding affidavit Reelin's case for urgency was premised on the assumption that the implementation of the tender had been suspended while the complaint to the Ombudsman was under way. It submitted that if the review were to proceed in the ordinary course, the performance of the obligations under the tender would be at an advanced stage and the litigation would be rendered moot.
21. Its second basis for urgency relates to what I will refer to as Reelin's local content complaint. Under the heading of urgency in its founding affidavit, the deponent to the affidavit, Mr Naidoo, averred that he had recently become aware the Miner was not meeting the local content requirement of the tender. This contention was based on Mr Naidoo's own knowledge of the manufacturers of the 'shoe' component of draft gears in South Africa. He indicated that he had conducted inquiries with three such manufacturers and had received letters in response which indicated that they had not been requested by Miner to provide it with shoes to fulfil its orders under the tender. It is apparent from the letters attached to the founding affidavit that the inquiries by Mr Naidoo were conducted in February, with the latest letter dated 16 February 2021. Accordingly, Reelin concludes that Miner is in breach of its obligation to supply draft gears containing shoes manufactured in South Africa.

This, it says is prejudicial not only to Reelin but to local investment and industry in general.

22. On being challenged on the issue of urgency in the answering affidavits, Reelin give the following responses in its replying affidavit:

22.1. It averred that it could not implement its review or application for an interdict sooner because it did not have the information required to do so, particularly as regards Miner's bid price, which was only received on 7 December 2021.

22.2. Reeling pointed out that it had correctly sought to exhaust its internal remedies by approaching the Ombudsman for a decision before implementing review proceedings.

22.3. It contended that because most of the orders under the tender were already placed in July 2021, its delay in instituting the proceedings was irrelevant.

22.4. Reelin said that there had been no delay between November 2021 and its institution of the application because it continued to engage with Transnet in the ensuing months. In its written and oral submissions Reelin submitted that it had acted reasonably in trying to reach a settlement of the matter with Transnet without rushing to litigation. In doing so, it was complying with its duty to avoid litigation if possible to take appropriate steps before launching the review.

23. On the local content issue, Mr Naidoo averred that there were rumours that Miner was not complying with its obligation to supply draft gears comprising of shoes manufactured in South Africa. He did not say how long these rumours had been in circulation or give any further details of them. What he did say is that it was only in February 2022 that he had been able to confirm these rumours when he received

the letters from his identified possible manufacturers of shoes. He stated that: *'This was a pivotal consideration to this application being launched urgently.'*

24. This line of argument was strongly pursued by Counsel for Reelin at the hearing of the matter. Mr Kissonsingh SC sought to persuade me that the late knowledge of the alleged failure by Miner to comply with its local content obligations, coupled with what he submitted were cryptic responses in the answering affidavits on this issue, justified my considering the matter as one of urgency and granting the interdict sought.
25. It seems to me that there are two aspects to the issue of urgency. The first relates to Reelin's ground of review based on what it calls the *'botched assessment of pricing'* in the tender process. This ground of review is based on its complaint to the Ombudsman that the tender decision should be vitiated because it was premised on an incorrect and fallacious calculation of price. The process required Reelin to include VAT at 15%, but permitted Miner to quote at rates without VAT and customs clearing charges. Reelin contends that consequently the price competitiveness and fairness of the tender process was *'irredeemably undermined'*.
26. The second aspect of the issue of urgency relates to the local content complaint. The reason why it is considered separately is because Reelin's case is that whatever delay there might have been with its instituting proceedings based on its tender pricing complaint, the local content complaint arose later, and is thus not subject to the same chronological constraints.
27. Dealing firstly with the tender pricing ground of review, the question of urgency must be considered in the full context of this case. Reelin was advised in July 2021 that it had not succeeded in its tender bid. It knew from this date that it had fallen short on the price component of the tender evaluation process. This much was obvious

to it because it knew that as a foreign company, Miner would score 0 on the BBBEE component. What is more, from the word go Reelin identified the price comparator and VAT issue as a ground for challenging the award of the tender to Miner. It expressly did so in its complaint to the Ombudsman. In its founding affidavit, it makes it clear that it relies on the same reasons in its ground of review on this issue as it did before the Ombudsman.

28. Having identified the price comparator and VAT issue as a possible ground of review from July 2021, was it reasonable for Reelin to wait until February 2022 to apply for an urgent interdict to prevent further action under the tender pending the outcome of its simultaneous review application? It is a well-established principle of our system of judicial review that delay in a challenge to the exercise of public power may serve as a bar to a successful review. One reason for this is to curb potential prejudice to other affected parties. The other is that there is value to the finality and certainty of public decision-making.¹ Delay *'can prejudice the respondent, weaken the ability of the court to consider the merits of a reviewer and undermine the public interest in bringing certainty and finality to administrative action.'*²
29. In the context of this principle, it is even more important for an applicant who seeks to interdict the implementation of a successful tender bid pending its review to proceed to institute its interdict proceedings with reasonable haste. In this case, it was not only the review application that was instituted seven months after the grant of the tender, but the application for the interdict pending review was subject to the same time delay. What is more, the contract period was only one year. It is difficult to comprehend how a delay of seven months in instituting an application for an

¹ Hoexter & Penfold *Administrative Law in South Africa* (3ed) p720

² *Department of Transport v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC) para 160, cited in Hoexter & Penfold, *loc cit*

interdict against a twelve-month contract can be reasonable, unless there are very special circumstances at play.

30. I find no such circumstances in this case. There was no reason for Reelin to await the outcome of the Ombudsman's investigation before it could approach the court for an interdict: as I have already indicated, it knew what its grounds of complaint were; it did not have to await confirmation of Miner's bid price in order to approach a court for an interdict. In argument, it was suggested that without this information, Reelin could not be sure that it would have a good case for review, and hence for an interdict. In the context of judicial review, where reasonable haste is always required, an applicant does not have the luxury of waiting for its best case before it should take steps to protect its position, particularly when it ultimately proceeds by way of urgency in an effort to interdict the administrative action against which it complains.
31. But above and beyond this, Reelin fails sufficiently to explain why it waited more than two months after it knew Miner's bid price to institute its urgent application. The only explanation given is that Reelin was under a duty to look for a non-litigious solution with Transnet. The chronology shows that Reelin followed this path for an extended period of time. It expressly sought an amicable solution with Transnet. However, it must have known that without court action, Transnet could not simply overturn its tender decision. After all, Reelin was represented by lawyers throughout. There is no evidence that Reelin could have been justified in thinking, from Transnet's conduct, that a likelihood existed that Transnet would take action to review its own decision.
32. For these reasons, I find that Transnet has failed to establish that it was justified in approaching the urgent court for the grant of an interdict based on its challenge to

the price comparison component of the tender process. It failed to act with the requisite urgency in seeking such relief. Any urgency there may now be, based on its inability to obtain substantial redress in due course, is of its own self-creation.

33. What of the aspect of the local content? Reelin's case here is that because it only confirmed Miner's alleged failure to comply with its local content obligations under the tender in February this year, it acted with the requisite urgency in taking action to interdict the implementation of the tender. Reelin expressly says that the local content aspect is pivotal to the urgency of the matter.
34. The question that must be asked in this regard is how the local content complaint relates to Reelin's review of the tender? This is important because, unless it can be linked to the review, there would seem to me to be no legal basis to consider this aspect of its case on the basis of urgency. Reelin expressly states in its founding affidavit that the relief in Part A of the Notice of Motion 'is sought pending the relief ... set out in Part B.' It follows that the local content complaint is considered by Reelin to be part of its case on review.
35. What is perplexing, though, is that in its founding affidavit there are indications that the local content complaint is not a ground of review. It is not identified as a ground of review under the heading '*Reviewable Irregularity*' where only the price comparison and VAT issue is addressed. The local content issue is addressed under 'Urgency and Prejudice'. If it is indeed Reelin's case that it does not intend to found its review application on the local content ground, then this ground of complaint is unconnected, and hence irrelevant to the relief it seeks, namely to interdict the implementation of the tender pending the review. On this basis it is difficult to see how the alleged discovery only recently that Miner is not complying with its tender obligations could overcome Reelin's fundamental problem with

urgency. Reelin knew of the grounds of review many months ago and failed to act timeously to apply to interdict the implementation of the tender pending its review on these grounds.

36. Quite what Reelin's case is regarding the local content issue is not clear. This is because there are other averments by Reelin which seem to indicate that it may intend advancing it as a ground of review. In its replying affidavit it says that as an organ of state Transnet: *'has an obligation when it considers a tender bid made by a company which is not only based overseas but which intends to deliver fully assembled components (i.e. not made in this country) to ensure that the bidder will comply with South Africa requirements.'* It says that Transnet failed to comply with this obligation. Similarly, in its heads of argument, Reelin describes the local content issue as a *'second ground of review'*.
37. Assuming that Reelin's case indeed is to rely on the local content issue as a second ground of review, I am not persuaded that it makes the application for an interdict urgent. As I have already indicated, Reelin has known about its first ground of review for months. It has failed to establish a case for urgency in this regard. The fact that, on its submission, it only found out in February 2022 that it now had a more solid case for review, based on its alleged confirmation that Miner is contravening its obligations to deliver compliant products, cannot overcome its primary difficulty with urgency.
38. As I discussed earlier, an applicant is not entitled to wait for a better case for review and only then to institute urgent interdictory proceedings. It must act timeously as soon as it has a reasonable case for review. Reelin has not abandoned its price comparison and VAT ground of review, so it must consider it has reasonable prospects in that regard. Regardless that it may think that it now has better

prospects, because of the local content issue which only arose more recently, the fact remains that it did not proceed timeously to seek interdictory relief in the first place. An application for an interdict pending the judicial review of a tender award cannot be non-urgent on some review grounds yet urgent on others.

39. For these reasons, even if one takes the local content issue into account, I am not satisfied that Reelin has made out a proper case for urgency.

40. I make the following order:

1. The application is struck from the Roll for want of urgency.
2. Reelin is directed to pay the costs of first and second respondent, including those of Senior Counsel where so employed.



R M KEIGHTLEY

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION

This judgment 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 5 April 2022.

Date Heard (Microsoft Teams): 22 March 2022

Date of Judgment: 5 April 2022

On behalf of the Applicant: Adv A Kissoon Singh SC
Adv A Granova

Adv TR Palmer

Instructed by: V Chetty Inc

On behalf of the First Respondent: Adv FJ Nalane SC

Instructed by: Motsoeneng Bill Attorneys

On behalf of the Second Respondent: Adv AJ Daniels SC

Instructed by: Baker & McKenzie