

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

CASE NO: 2022/8370

REPORTABLE: Not

OF INTEREST TO OTHER JUDGES: Not

REVISED

12 APRIL 2022

In the matter between:

BLACK LAWYERS' ASSOCIATION

Applicant

and

ESKOM (SOC) LIMITED

Respondent

Delivery: This judgment was handed down electronically by circulation to the parties' legal representatives by email, and uploaded on caselines electronic platform. The date for hand-down is deemed to be 12 April 2022.

JUDGEMENT

MOLAHLEHI J

[1] The purpose of this judgment is to provide the reasons as requested by the applicant, the Black Lawyers Association (the BLA), for the decision of this court in striking off the roll the urgent application on 4 April 2022. The decision was consequent the urgent application launched by the BLA in two Parts, Part A and Part B.

[2] In the notice of motion, the BLA sought an interdict restraining the respondent, Eskom (SOC) Limited, from adjudicating and appointing any bidder considered successful over the bids submitted under tender number RFP NO MWP114 CX (RFP), pending the review application under Part B of the notice of motion.

[3] In Part B, the BLA seeks to review and set aside the decision of Eskom issued under the RFP for the provision of legal services for three years.

[4] It is common cause that Eskom is an organ of state as envisaged in section 239 of the Constitution. Therefore, it is bound by the provisions of section 217 of the Constitution in the performance of its functions. It is, furthermore, bound by the requirements of the Broad-Based Black Economic Empowerment Act.¹

[5] The dispute between the parties arose from the RFP issued by Eskom to the market seeking, "highly – skilled, expedience and well-resourced law firm to assist it holistically in managing potential multi – dimensional legal, business, financial and reputational risks arising from the findings made in the reports, issued and those to be issued by the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State (the State Capture).

[6] The BLA complains that the RFP is unfair, irrational, inconsistent with transparency, unlawful, contrary to public policy and statutes, including instruments intended to promote transformation and black economic empowerment.

[7] Eskom issued the RFP on 14 January 2022 and was to remain open for submission of applications by the interested parties until 24 January 2022.

[8] The Gauteng branch of the BLA was unhappy with the RFP and accordingly addressed a letter to Eskom on 21 January 2022, raising the complaint regarding the functional requirements of the RFP. In the same letter, it also requested Eskom to hold back the valuation and adjudication of the bids pending a meeting with the BLA.

[9] Eskom did not respond to the letter, and the BLA accordingly followed up with another letter wherein it threatened the institution of legal proceedings. There was no response to the letter from Eskom.

¹ Act number 53 2030.

[10] The BLA's President addressed another letter to Eskom, raising similar issues raised by the Gauteng branch. In response to this letter on 1 February 2022 Eskom indicated that the BLA's complainant would receive attention in due course.

[11] After not hearing from Eskom for some time, the BLA addressed another letter to Eskom seeking an undertaking that Eskom would not proceed with the appointment of any bidder arising from the RFP.

[12] The BLA contended that the RFP is liable to be set aside for various reasons, including insufficient time given to bidders, the reasonable risk and the reasonable possibility that many black law firms from the previously disadvantaged background would not be able to meet the deadline. The other point made is that the limited timeframe excludes law firms outside the Province of Gauteng.

[13] In dealing with the issue of urgency, the BLA contended that it had requested Eskom to furnish it with an undertaking that it would not adjudicate the RFP without first meeting with them.

[14] In paragraph 142 of the founding affidavit, the BLA makes the following averments:

"42 ESKOM has not furnished such undertaking despite the fact that BLA has been cognisant of the fact that ESKOM is a big organisation and delayed bringing the application as it might be difficult to get decision-makers to a meeting to consider BLA's concerns and react thereto. One can infer from this failure that ESKOM is intent on evaluating, adjudicating, concluding contracts and implementing the contracts as if the bid is lawful."

[15] The BLA further contended that if the application is not treated as one of urgency, Eskom is "likely to appoint attorneys it wishes to appoint and will not await the outcome of the review application." According to them, the relief sought in Part B will be of no consequence if the relief sought in Part A is not granted on an urgent basis.

[16] Eskom, in its answering affidavit, raised the following points in opposition to the application:

- "8.1. There is no urgency in the case, and if there were any urgency, it is self-created;
- 8.2. The BLA has failed to plead or meet the OUTA standard for such an interim interdict laid down by the Constitutional Court;
- 8.3. The BLA's case is flawed at the level or both law and fact; and
- 8.4. The BLA has failed to provide evidence showing that a single law firm was prejudiced as a consequence of the RFP at issue."

The legal principles governing urgency

[17] The test for determining urgency in an urgent application is set out in Rule 6(12) of the High Court Rules. The primary requirements for the test are; (a) the applicant has to set out explicitly the circumstances which render the matter urgent, and (b) give reasons why the applicant could not be afforded a substantial redress at a hearing in due course. The other requirement is to provide an explanation for any delay that may have occurred in instituting the proceedings.

[18] The test was explained in *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd*,² where it was held that:

"[T]he 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.

It is important to note that the rules require absence of substantial redress. This is not equivalent to the irreparable harm that is required before the granting of an interim relief. It is something less. He may still obtain redress

² [2011] ZAGPJHC 196.

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in an application in due course but it may not be substantial. Whether an applicant will not be able obtain substantial redress in an application in due course will be determined by the facts of each case."

[19] For the reasons set out below and applying the well-established principles of urgency set out in law, I found that this matter was not urgent and accordingly struck it off the roll for lack of urgency.

[20] In the first instance, the application was launched on an extremely urgent timeframe when regard is had to the fact that the BLA became aware of the RFP in January 2022. They gave Eskom five days to respond to their application despite having had about five weeks to institute these proceedings.

[21] The BLA enrolled the matter on the urgent roll for hearing on Tuesday, 15 March 2022. After that, they unilaterally withdrew the matter from the roll and re-enrolled it for Tuesday, 22 March 2022. The explanation for this as set out in the replying affidavit is that the matter "has morphed into a semi-urgent application."

[22] The other reason for striking the matter of the roll is that urgency was self-created in that as early as 24 January 2022, the BLA had already raised their complaint about the RFP. In fact, the letter, more importantly, served as an ultimatum of the intention to institute proceedings against Eskom arising from its decision to issue the RFP. The BLA instituted the proceedings on 28 February 2022, and as indicated earlier, they afforded Eskom only five days to file the answering affidavit.

[23] It would appear from BLA's papers that they filed their papers as they did because according to them they anticipated that Eskom's officials would be slack in dealing with the matter. They regarded this approach as appropriate and contended that they were vindicated by the fact that the deponent to the answering affidavit is not the same person they dealt with before filing the application.

[24] The BLA contended that they had satisfied the requirement of having to show that there would be no substantial redress in due course if the matter was not heard as one of urgency. They contended that if the matter was to be heard in the ordinary

course, Part B would "be of no consequences," as a successful review will not provide substantial redress to the relief they are seeking.

[25] I do not agree with the above submission by the BLA because if successful in the review application, the court has the power in terms of section 172 (1) of the Constitution to make an award that is just and equitable.³

[26] It was for the above reasons that this court made the following order:

1. The applicant's application is struck off the roll for lack of urgency.

E Molahlehi
Judge of the High Court.,
Gauteng Local Division,
Johannesburg.

Representation

For the applicant:	Adv. F R Memane
Instructed by:	Popela Make Attorneys
For the Respondent:	Adv. Steven Budlender SC
With counsel:	Adv Stuart Scott
And with counsel:	Adv Mawande Seti-Baza
Instructed by:	Cheadle Thomson & Haysom
Hearing date:	30 March 2022
Order made:	4 March 2022
Delivered:	12 April 2022

³ See *All Pay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* [2013] ZACC 42; 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC) paragraph [35].