

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 23811/2022

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| (1) REPORTABLE: YES /NO |
| (2) OF INTEREST TO OTHER JUDGES: YES /NO |
| (3) REVISED: YES /NO |
| SIGNATURE |
| ...30/09/2022... DATE |

In the matter between:

NALEDI RAIL ENGINEERING (PTY) LTD

Applicant

and

**PASSENGER RAIL AGENCY OF SOUTH AFRICA
SOC LIMITED**

First Respondent

ARMATURE TECHNOLOGY (PTY) LTD

Second Respondent

CTE INVESTMENTS (PTY) LTD

Third Respondent

**KARABO NHLAMOLO PROJECTS
CO-OPERATIVE LTD**

Fourth Respondent

TMH AFRICA (PTY) LTD

Fifth Respondent

YNF ENGINEERING CC.

Sixth Respondent

JUDGMENT

MANOIM J:

Introduction

- [1] On 22nd June 2022, Pulane Kingstone, the newly appointed director of Naledi Rail Engineering (Pty) Ltd (Naledi), the applicant in this case, had opened a copy of Railway News, an industry magazine, when an article there attracted her interest. It was a statement by the Passenger Railway Agency of South Africa (Prasa), the first respondent, a state owned company, announcing the names of five firms who it had awarded contracts. Prasa had awarded the contracts pursuant to a request for tenders (RFT) it had made in 2020. In terms of the RFT firms were invited to bid for five year service contracts to repair

Prasa rolling stock.¹ Amongst the names on the list of successful tenderers were the second to fifth respondents. Significantly missing was the name of Naledi, which had also tendered.

- [2] After some attempts to get clarity from Prasa as to why it had not been included, without success, Naledi decided to bring the present urgent application to interdict further implementation of the tenders.

Relief sought

- [3] The application is divided into a part A and a part B. In terms of part A which I am called upon to decide, Naledi seeks to interdict Prasa from taking any further steps to implement the tenders it has awarded to the fifth respondent (TMH Africa (Pty) Ltd) and sixth respondent (YNF Engineering CC).
- [4] The relief was originally cast much wider, to include the second to fourth respondents, who were appointed as Prasa's service providers for other provinces. However, the relief has now been pared down to interdict Prasa from contracting with the fifth and sixth respondents, both of whom have been appointed for the Gauteng repairs, the same province where Naledi had also tendered. Put differently, Naledi had focused its relief on its two immediate competitors. Part B seeks to review and set aside the awards of the bids to the

¹ The RFT refers to a nine-year coach life cycle management. Case Lines 001-43.

fifth and sixth respondents and for a substitution. The substitution order is expressed in the following terms:

“To substitute the decision of Prasa with a direction that Naledi’s bid be awarded to Naledi.”

- [5] In Part B Naledi also calls for the record of the proceedings of Prasa’s Bid adjudication committee, and the records of the decision to award the tenders to the fifth and sixth respondents and the decision to reject Naledi’s tender. It also calls for any contracts that may have been concluded with the fifth and sixth respondents.

Background to the tender.

- [6] On 7 August 2020 Prasa put out an RFT for firms to be appointed to maintain and upgrade its coaches. Tenders were to be submitted by 30 October 2020. Several firms tendered. Amongst them were Naledi and the fifth and sixth respondents. As part of the tender requirements, firms had to prove that they were financially stable, and in addition, had to have the premises where the repairs were to take place, inspected. Prasa decided on the tenders in April 2022.
- [7] Naledi has been providing coach repair services to Prasa since 2007. It was most recently awarded a five year contract to repair coaches between 2014 and 2019. According to a letter in the record from the acting executive manager for Accelerating Rolling Stock, dated October 2020, he could recommend the services of the firm.² Despite this confident endorsement at the time, Naledi for reasons not disclosed, experienced difficulties, and went into business rescue in early 2021. It emerged from business rescue in November 2021 when Kingstone’s company, called Mirei, bought Naledi from out of business rescue, and is now its sole shareholder. The timing of the events here are important for what comes later. Naledi was placed in business rescue after its tender had been submitted. But it emerged out of business rescue before Prasa awarded the tenders.

² See letter dated 5 October 2020 addressed to whom it may concern. Case Lines 001-118.

[8] Prior the Mirei purchase what I will refer to as the 'old Naledi' was in dispute with Prasa over the return of certain coaches and components. It is not clear what this dispute is about from the papers save that it was unresolved. After Kingstone had, via Mirei, acquired Naledi, and become its sole director, she entered into discussions with Prasa to resolve this legacy dispute. At least by April 2022 it was yet to be resolved and this fact also becomes material later.

[9] On 29 April 2022 the firms which had tendered were invited to a meeting at the Prasa offices. Two officials from Naledi arrived. They were invited to speak to the Group Chief Executive officer (GCEO) from Prasa. This is Naledi's version of the conversation:

"During that meeting, PRASA advised Naledi that it could neither award nor reject its bid for the tender until Naledi had returned PRASA's equipment, and until Naledi had withdrawn its 'litigation against PRASA.

[10] Since this is one of the crucial facts in this case, I also quote from Prasa's answering affidavit on this point:

"The GCEO advised Naledi that he did not have a letter of award or a letter of rejection in respect of Naledi's bid because there were unresolved disputes between the parties. As such, he conveyed that PRASA would not finally determine Naledi's bid because the disputes regarding the coach, components and claims remained unresolved. The meeting with Naledi concluded on this basis.

[11] These versions are consistent. What emerges is that Naledi was told on 29 April that no decision had yet been made on their bid and a decision could only be made once the dispute surrounding the coach components had been resolved.

[12] Thereafter says Kingstone, she did not hear anything further from Prasa until 22 June when she read the article and realised that Naledi had not been awarded one of the four opportunities given to firms in Gauteng as part of what was a national tender. Only two firms were appointed for Gauteng, the fifth and sixth respondents.

Urgency

- [13] This application was brought on 6 July 2022. All the respondents have challenged the hearing on the grounds of urgency. The first basis for the challenge is that the matter was brought late, the second, that even if it was brought timeously, it was nevertheless not prosecuted with any of the necessary vigour that the Rules and Practice note require.
- [14] The respondents argue that the trigger date for the applicant was the 29 April 2022, because this was the date that Prasa advised Naledi that its bid was neither accepted nor rejected. But this is entirely unfair to Naledi. It was left in limbo with this ambivalent response. It did not know where it stood until it became clear at the earliest on 22nd June, that it was not one of the successful bidders. Even then, absent an express rejection, it was still in limbo. I do not consider then its choice to launch its action on 6 July 2022 was unnecessarily delayed given the number of respondents and the detail that it needed to traverse in its founding papers.
- [15] The question of whether having launched its action it delayed prosecuting the action is more complex. Naledi stands accused of pressurising the respondents to file their answering papers (initially by 14 July, later extended to 18 July but they in fact filed a day later on 19 July) but then failing to act with any sense of urgency when it came to filing its replying affidavit. The latter pleading, after several delays, was only filed on 11 August. In between Naledi applied to the Deputy Judge President for a special allocation for this matter, which was given. The matter was allocated to me and at a case management meeting with the all the parties held on 12 August 2022, it was decided that the matter would be heard on 14 September 2022.
- [16] I accept the criticism that Naledi pressured the respondents but was less than punctual itself. However, each of the respondents that took up the opportunity was able to file a further supplementary affidavit, so none were prejudiced by the time squeeze initially imposed on them. Secondly the matter was fact 'heavy', and the applicant had to deal separately with the cases of three respondents.

- [17] In any event there is authority for an unsuccessful tenderer to seek relief by way of urgency. In *Darson Construction (Pty) Ltd v City of Cape Town*, SelikowitzJ stated that "...an unsuccessful tenderer should seek an interdict immediately after the contract has been awarded". I do not consider then that the matter should be stuck off on the basis of urgency.

Interim interdict

- [18] As mentioned earlier I am only required to decide Part A of this application which is an application for an interim interdict to stop Prasa from taking any steps to implement the tender that it has awarded to the fifth and sixth respondents.
- [19] The requirements for an interim interdict are well known. They are a prima facie right although open to some doubt, an apprehension of irreparable harm, that the balance of convenience favours the granting of the interdict and the absence of an alternative adequate remedy.³

Prima facie right

- [20] Naledi's case for a prima facie right is that the decision to award of the tenders will be set aside on review because it is "... so profoundly irrational, that one cannot help suspect that something more nefarious is afoot."
- [21] The case for irrationality can be summarised as follows. It is far from clear what the basis of Prasa's refusal to award Naledi a tender is. Two possible reasons exist. The first, is that as was stated to the two Naledi executives on 29 April by the Prasa GCEO; Naledi was not yet being considered because of the past unresolved disputes over the return of its equipment. The second, which

³ *Setlogelo v Setlogelo* 1914 AD 22 and *Webster v Mitchell* 1948 (1) SA 1186 (W).

emerged only when Prasa filed its supplementary affidavit, was that Naledi was disqualified because it had been in business rescue.

- [22] Naledi then compares the approach Prasa took to its bid in with the approach it took to those of the fifth and sixth respondents. This examination Naledi contends reveals that Prasa adopted a double standard. Factors considered adverse to Naledi were not considered adverse to the fifth and sixth respondents, despite being equally applicable. Indeed, Naledi contends whilst it was able to successfully refute these adverse circumstances, the other two firms would not be in a position to do so but were never challenged on them.
- [23] If the reason offered now is that Naledi was in business rescue at the time of the tender being lodged, then it has three responses to this. In the first place Naledi argues it was no longer in business rescue at the time that the decision to award the tenders was made. It had emerged from business rescue in November 2021. It was thus no longer in business rescue when the decision was made to award the tenders in April 2022. Secondly, at the time it is common cause, the bid adjudication committee was not aware of the business rescue issue, i.e., they were neither aware that Naledi had been in business rescue nor that it had emerged from business rescue. This means that this aspect has been considered by Prasa after the fact. But in *National Lotteries Board v South African Education and Environment Project* the court held that if a decision is based on considerations that the decision maker only became aware of later, this does not alter the fact that when the decision was taken it was made unlawfully.⁴
- [24] Thirdly, even if business rescue was a consideration, for disqualifying a bid, either before or after the fact, then there still had been unequal treatment of bidders. It is common cause the fifth respondent, was placed in business rescue on 4 May 2022, a few days after it received the award on 29 April 2021. Naledi contends that if business rescue is a consideration, then why was it disqualified for having once been in business rescue as a bidder when the fifth respondent was not, despite still being in business rescue.

⁴ 2012 (4) SA 504 (SCA).

- [25] Prasa's response was that the fifth respondent was not yet in business rescue at the time the decision to award it the tender was made whereas Naledi had been in business rescue after it had submitted its tender but before the award of the tenders had been made. This may be so but if this consideration was taken into account post facto concerning Naledi (recall it was stated that the BEC was not aware of Naledi's prior business rescue at the time it deliberated) then why was it not in relation to the fifth. Alternatively, if it was not to be taken into account in respect of the fifth respondent, why was it taken into account for Naledi. On this point at least on the current record Naledi has a point of an inconsistent approach.
- [26] Next, still in relation to the fifth respondent, Naledi alleges it should have been disqualified on the basis of several years of financial statements indicating the firm was experiencing increasing financial losses and was only treated as a going concern by its auditors, because the majority shareholder, a Swiss firm with the same name, had given an undertaking for a year to guarantee its debt. This appears to have satisfied Prasa at the time it made the award. This notwithstanding the fact that financial stability is a qualifying factor in terms of the tender requirements.⁵ Nor since the award was made and the firm was in business rescue, does it appear that the Swiss shareholder is ready to step in. Indeed, Mr Damons, the business rescue practitioner of the fifth respondent, states in his affidavit that now the tender has been awarded he will be in a position to "*market*" the firm to prospective buyers. Unlike the sixth respondent, as at the date of hearing, the fifth respondent has not yet entered into a contract with Prasa which is a requirement before services can be rendered.
- [27] The double standard raised in respect of the sixth respondent is based on history as well. Both firms had previously provided services to Prasa. In relation to Naledi, as I have already explained, Prasa took into account (at least as this was conveyed to Naledi on 29th April) its failure to return its equipment and threats of litigation. This despite the fact that Naledi had reassured Prasa it was

⁵ In the RFT the following is stated: *FINANCIAL STABILITY Bidders are required to submit their latest financial statements prepared and signed off by a professional accountant for the past three years with their Tender in order to enable PRASA to establish financial stability.* Case Lines 001-99.

no longer pressing litigation and was trying to arrange the return of the equipment.

- [28] The sixth respondent however was the subject of an internal Prasa report that was highly critical of it making the most serious of accusations against it. I need to stress here that this report was never shown to the sixth respondent, and it disputes its correctness. It is thus hearsay in these proceedings. But Naledi does not raise the issue of the document to assert the truth of its contents. Rather again to evidence the inconsistent manner in which Prasa has dealt with the respective tender parties history. If history mattered and Prasa had in its possession such a report from its own staff, why was this not taken into account when that of Naledi was? Prasa does not satisfactorily deal with this.
- [29] The second issue in relation to the sixth respondent relates to the premises where it is to conduct its repairs. Prasa as part of the tender requirements inspected all the repair depots of the bidders. In the case of the sixth respondent this was a depot in Pretoria. However subsequently after the bid was awarded the sixth respondent either moved its depot or acquired a new one in Isando where it allegedly will conduct the repairs. Prasa does not deal with this issue whilst the sixth respondent contends that the new Isando depot is an additional depot and not a replacement for the approved Pretoria depot. I am unable to come to any conclusion on this issue on the present record.
- [30] On these facts I consider that Naledi has established at least a prima facie right that Prasa's decision to refuse its bid was inconsistent with its approach to approve the bids of the other two successful tenderers. Prasa took into account irrelevant issues and failed to consider ones that were relevant. As a result, the decision taken was irrational. I am less certain of the strength of its case to set aside the award to the fifth and sixth respondents, but I do not need to come to a conclusion on these issues given what I find in relation to the other factors for an interim interdict as I go on to discuss.⁶

⁶ Naledi has also raised issues concerning the process of the decision making in Prasa and later remarks made to Parliament by the GCEO on the experience of the appointed bidders. However, given my findings in respect of the remaining issues I do not need to consider these points further although doubtless they will remain live issues for the review.

Irreparable damage, balance of convenience and any alternative remedy

- [31] Naledi alleges that if the interim relief is not granted it will suffer irreparable damage. But its contentions go wider than the impact on itself. It also alleges irreparable harm to the public and to Prasa. The irreparable harm to itself flows from the loss of opportunities to perform repair work that may be given to the other two firms during the period prior to the conclusion of the review. Then it alleges in more abstract terms that the public is harmed when there is an ongoing abuse of public power.⁷ Thirdly, it alleges that Prasa will suffer harm and so will its passengers if substandard service is rendered.
- [32] If the interdict is granted, then until the review process is concluded, neither of the two respondent firms will be rendering a service to Prasa. Naledi will not be rendering any services either during this period, because the substitution relief is only contained in Part B. This means that Prasa will have no service provider in Gauteng until the review is concluded. Approached in this way the harm to Prasa, and the fifth and sixth respondents, will be greater than to Naledi. Furthermore, the commuters to whom Prasa provides services will also be harmed if the carriages in which they travel cannot be repaired.
- [33] The same facts also have a bearing on the balance of convenience. This favours the continuation of the services than their temporary suspension. As far as the damage to Naledi itself is concerned this is not as clear cut as it seeks to make out. In the first place, on the facts Naledi has put up, the two firms would not be able to service all the coaches likely to be sent to them. Nor is it clear how much work Naledi would have received had its bid been accepted. It is common cause that no single firm would have been given all this work. Indeed, the tender indicated that four firms would have been appointed for the Gauteng region. To the extent that the delay leads to Naledi losing out on work if it ought to have been given had it been awarded the tender in April 2022, a damages claim remains possible.

Conclusion.

⁷ See *Pikoli v President of Republic of South Africa and others* 2010 (1) SA 400 (GNP), where the court held that not only the parties but society as a whole has an interest in upholding the Constitution.

[34] Although Naledi has established a prima facie case to some of the relief sought in Part B, it has not made out a case on irreparable harm and the balance of convenience. Accordingly, interim relief is refused.

Costs

[35] I have decided to reserve the issue of costs pending the outcome of Part B of this application. My reason for doing so is that the applicant has been partially successful in relation to the questions of urgency and making out a prima facie right. It would be unfair at this stage of the proceedings when the record of decision making is still awaited, to mulct them with costs.

ORDER:-

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

1. The application is dismissed.
2. The costs of the application are reserved pending the outcome of Part B of this application.



N. MANOIM
JUDGE OF THE HIGH COURT
GAUTENG DIVISION
JOHANNESBURG

Date of hearing: 14 September 2022

Date of judgment: 30 September 2022

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