IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

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

27/8/20
DATE

SIGNATURE

CASE NO: 26213/2020

In the matter between:

KUSA KOKUTSHA (PTY) LTD	Applicant
and	
SOUTH AFRICAN NATIONAL ROADS AGENCY SOC LIMITED ("SANRAL")	First Respondent
GIJIMA HOLDINGS (PTY) LTD	Second Respondent
GUMA SUPPLY CHAIN MANAGEMENT (PTY) LTD	Third Respondent

JUDGMENT

D S FOURIE, J:

[1] Pending determination of a review application launched on 18 June 2020 the applicant seeks an order, on an urgent basis, for the suspension of a tender for the operations and maintenance of an open road tolling system in the Gauteng Province issued by the first respondent (SANRAL) on 17 July 2020.

[2] The applicant also seeks an order:

(a) Directing SANRAL to suspend the tender process in respect of this new tender;

(b) Interdicting SANRAL from awarding the new tender to any bidder, concluding a contract with any bidder or otherwise carrying out any actions in the implementation of the new tender.

[3] The application is opposed by the first, second and third respondents. The first respondent contends that the application is not urgent and, secondly, that no *prima facie* right or any other requirement for an interim interdict has been established. The second and third respondents also submit that the application is not urgent and that the applicant has failed to show that this is one of the *"clearest of cases"* justifying the grant of an interim interdict against an organ of state as envisaged by the Constitutional Court in *National Treasury v Opposition to Urban Tolling Alliance* 2012 (6) SA 223 (CC).

[4] In its founding affidavit the applicant explains that it had submitted a responsive bid for the tender concerned, met the quality criteria and threshold and made the best financial offer by a substantial margin. However, the first respondent decided to cancel the tender for the procurement of a new tender regarding the operations and maintenance of an open road tolling system. On 18 June 2020 the applicant launched a review application wherein it applies for an order reviewing and setting aside the first respondent's decision to cancel the previous tender. In addition thereto, it also seeks an order for the tender to be awarded to it on grounds that the cancellation is *prima facie* irregular and unlawful, that the cancellation was taken for an unreasonable and/or unlawful

reason and that no lawful, rational or reasonable grounds exist for the cancellation.

[5] The applicant relies on various grounds for urgency. It contends, *inter alia*, that it has a reasonable, well-founded apprehension that the first respondent will do everything in its power to delay the review proceedings until it has made an award under the new tender. This will entirely and irreparably deprive the applicant of substantial redress if it is successful in the review application.

[6] It also points out that the closing date for the submission of bids in respect of the new tender is 16 September 2020. According to the applicant it has reason to believe that the first respondent will move with haste to conclude the process for the new tender and award the new tender to a bidder other than the applicant. In answer to this contention, the second and third respondents point out that "*any disruption arising from the new tender*" is likely to take place only in December 2020 at the earliest and therefore the applicant can be accommodated in the normal course. According to the applicant this is incorrect because if the applicant was to proceed in the normal course there is a very serious likelihood that the matter would not be resolved by then (December 2020), but in all probability only during 2021.

[7] One of the main requirements for an applicant to be entertained urgently is for it to show that it cannot obtain substantial redress at a hearing in due course. It appears to be not in dispute that the current incumbents' contract is due to expire on 2 December 2020. It has been pointed out by the applicant in

its founding affidavit that directions were sought from the Acting DJP to assist in ensuring an expedited time table to ensure that the review application is concluded swiftly. It is common cause that the applicant has secured an audience with the Acting DJP on 11 August 2020 to deal with the case management of the review application. During the oral hearing the parties were requested that the outcome of the case management meeting on 11 August 2020 should be reported back to this Court.

[8] On 11 August 2020 the attorneys acting on behalf of the first respondent informed this Court in writing as follows:

> *"3. Potterill ADJP accepted that the review should indeed be heard (as all the parties agreed) on an expedited basis, and was able to allocate 11 and 12 November 2020 for the purposes, with agreed time lines for the filing of further papers and heads of argument to accomplish this. …*
>
> *4. It accordingly remains SANRAL's position that on any scenario now no 'concrete will be cast' or 'trucks role on highways' (as was argued by Kusa) this year. The tender itself is only to be determined on 2 December 2020.*
>
> *5. The outcome of the case management meeting confirmed that no irreparable harm will be suffered by Kusa; the quite obviously adequate other remedy is now time tabled for a date before the end of the term. And should any difficulty present itself regarding making an order before the end of the year, it will be open to the reviewing Judge to call for an undertaking from SANRAL pending delivery of judgment, failing which to consider a temporary stay."*

[9] Shortly after receipt of this letter all parties were given the opportunity to make further submissions in writing regarding the contents of the letter, if they wish to do so. The applicant filed further submissions as well as the second and third respondents. It has been contended on behalf of the applicant that, in view of the fact that the closing date for bids under the new tender has been set at 16 September 2020, the first respondent *"plans to consider and determine a tender, which on SANRAL's own version is extremely large and complex, in two and a half months".* It is then concluded that the first respondent, for reasons best known to it, is proceeding *"with reckless intent to rush through determination of the new tender in the face of the pending review"*, despite the fact that there would be no conceivable prejudice to it.

[10] Attached to the applicant's further submissions are copies of numerous correspondence *inter se* and also addressed to the Court. For obvious reasons it is not necessary for me to deal with each of these letters, save to point out what appears to be an undertaking in one of the letters, written on behalf of the first respondent (SANRAL) and addressed to the Court. It is a letter dated 11 August 2020 in which the attorneys acting for the first respondent state the following:

> *"The first (para 8.1 of the response) is that 'pending the outcome of the hearing … in November' SANRAL will not determine the new tender. This of course is not logical, since it is common cause that the tender will not be determined before December. SANRAL however of course confirms that it will not determine the new tender before the outcome of the High Court hearing: this has never seriously been in issue."* (my underlining).

[11] The important part of this letter, as I understand it, is the first respondent's undertaking that it will not determine the new tender before the outcome of the High Court hearing, i.e. the review application. This is, in my view, sufficient for all parties to accept that the first respondent has undertaken to await the outcome (judgment) of the review application before determining the new tender.

[12] This undertaking now in effect also takes care of the relief sought in paragraph 2 of the notice of motion in terms whereof the first respondent is to be ordered to suspend the tender process and interdicted from awarding the new tender to any bidder. In his additional submissions counsel for the second and third respondents has also pointed out the importance of the said undertaking. It is therefore clear that the first respondent (SANRAL) would only decide the new tender (if still be necessary or possible) after the outcome of the High Court hearing and that it should therefore follow that the first respondent will not implement the tender before that date. Put differently, the undertaking has done away with any urgency that may have existed. This leads me to the conclusion that the application before me is no longer urgent and should therefore be struck off the roll.

[13] That brings me to the question of costs. It is not necessary to repeat all the arguments in this regard. It was submitted on behalf of the respondents that any urgency that might have been present, is self-created. On the other hand,

the undertaking referred to above came at a late stage (unless it was implied earlier). I was initially of the view that each party should pay its own costs, but after having considered the matter carefully, I am of the view that it will be best under the circumstances to reserve the costs for determination at the final hearing of the issues between the parties as they may wish to put forward further submissions about costs.

ORDER

In the result I make the following order:

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

2. Costs are reserved.

D S FOURIE
JUDGE OF THE HIGH COURT
PRETORIA