



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

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

SIGNATURE

DATE: 14 March 2023

Case No. 060552/2022

In the matter between:

UNYAZI RAIL (PTY) LTD

Applicant

and

PASSENGER RAIL AGENCY OF SOUTH AFRICA

First Respondent

**CHINA RAILWAY INTERNATIONAL GROUP
SOUTH AFRICA**

Second Respondent

SIEMENS MOBILITY (PTY) LTD

Third Respondent

JUDGMENT

WILSON J:

1 The applicant, Unyazi, was disqualified from a tender process run by the first respondent, PRASA. The tender was for the design and construction of a signalling system for PRASA's KwaZulu-Natal rail network. The second and

third respondents are two other participants in the tender process who have not, as yet, been disqualified. They have not participated in these proceedings. I was assured from the bar that the second and third respondents have been notified of the application.

The dispute

- 2 The reason for Unyazi's disqualification was its failure to put up a bid bond in the sum of eighty million rand within the time specified in PRASA's request for proposals. Unyazi says that it could not practically do so because the period of time afforded to arrange the bond – five weeks – was insufficient to allow it to meet a series of very onerous requirements. Those requirements were, first, that the bond be drawn on a bank, and not on any other financial institution; second, that the bank be based in South Africa; and third, that PRASA be entitled to call up the bond if in PRASA's opinion, it is "entitled to amounts recoverable from the Bidder for any reason whatsoever".

- 3 Unyazi argues that these requirements are so onerous as to transgress the requirement, in section 217 of the Constitution, 1996, that public procurement processes take place within a system that is "fair, equitable, transparent, competitive and cost-effective". In particular, Unyazi says that the tender conditions, whether evaluated separately or cumulatively, are unfair, in-equitable or anti-competitive, in that at least three major providers of the services PRASA seeks to purchase, including Unyazi itself, have effectively been excluded from the tender because they cannot meet, or at least cannot reasonably be expected to meet, the conditions applicable to the bid bond.

4 Unyazi alleges that an earlier tender process to which the bid bond conditions applied had to be abandoned, substantially because all but one of the bidders in that process failed to meet the bid bond conditions. The bid bond conditions in that process were even more restrictive, because prospective bidders were only afforded three weeks to obtain the required bond. The one bidder that met the conditions in the time stipulated ended up being disqualified for other reasons. This, Unyazi says, ought to have brought home to PRASA the potentially unfair, inequitable or anti-competitive nature of the bid bond conditions, particularly because Unyazi, and two other bidders in the first process, complained about the onerous conditions attached to the bid bond at that time.

5 However, PRASA was unmoved. It has not, says Unyazi, so much as taken account of the fact that its bid bond requirements could be so unfair, inequitable or anti-competitive as to be unlawful. The two other bidders who took issue with the conditions and the deadline set to reach them in the earlier process elected not to participate in the second process, despite having been given an extra two weeks to comply with the bid bond conditions. Unyazi asks me to accept that those bidders elected not to participate because of the restrictive nature of the bid bond conditions.

6 Unyazi says that this makes the tender process itself unlawful and vulnerable to review. It has launched such a review. The gravamen of its case is that the failure to take into account the potentially unfair, inequitable or anti-competitive nature of the bid bond conditions renders PRASA's

insistence on the provisions irrational. That, it is argued, taints the tender process as a whole.

7 Unyazi now seeks urgent interim relief from me interdicting and restraining PRASA from awarding the tender pending the outcome of the review. To succeed, Unyazi must convince me that its application is urgent; that it has suffered, or reasonably apprehends, irreparable harm if the interim relief is not granted, and that it has no effective remedy other than an interim interdict to prevent or ameliorate that harm.

8 Unyazi must also show that it has a *prima facie* right to the relief it seeks in its review application. There is room for me to entertain some, but not “serious”, doubt about that right, while still granting the relief (*Webster v Mitchell* 1948 (1) SA 1186 (W) at 1189).

9 Finally, the balance of convenience must favour the grant of an interim interdict.

Urgency

10 After some initial demur, PRASA all but accepted that the application was urgent, which it plainly is. It is common cause that the tender is likely to be awarded before the end of March 2023. If Unyazi is correct that the award of the tender would be unlawful, then it is entitled to restrain the award, and will not be able to do that by bringing an application in the ordinary course. Although there was some suggestion in argument that PRASA is unlikely to have commenced the work Unyazi tendered for before the review can be heard on an expedited basis, that speculation lacks a factual foundation in

the papers, and in any event would hardly count as a reason not to grant interim relief. Unyazi was entitled to an urgent hearing.

Irreparable harm and alternative remedies

11 There can, in my view, be no question that Unyazi will suffer irreparable harm if the interdict is not granted. It is harm enough, in my view, that the tender will likely be awarded, and the work will likely commence, without Unyazi's bid being considered. I think that it is also plain that Unyazi has no realistic remedial alternative to an interdict. There is, in other words, no other way of reversing its disqualification. Ms. Sello, who appeared together with Mr. Nondwangu for PRASA, argued that, instead of seeking to review the tender process, Unyazi ought to have applied to court for an order extending the time available to it to meet the bid bond requirements – which, it turns out, Unyazi could have done if given more time. However, that is water under the bridge. The question is whether Unyazi has that alternative available to it now. Having been disqualified, Unyazi plainly no longer has that alternative available, the decision to disqualify Unyazi itself being of an administrative character, which cannot be reversed without court intervention.

Unyazi's *prima facie* right

12 Unyazi's entitlement to interim relief accordingly boils down to whether it has a *prima facie* right to set the tender process aside, and the strength of that right evaluated in light of the balance of convenience. It has long been accepted that the stronger a *prima facie* right, the less the balance of convenience is required to favour the grant of interim relief. Conversely, the

weaker the *prima facie* right, the greater the weight of any inconvenience that will be suffered by the party potentially subject to the interim interdict sought (see, in this respect, *Eriksen Motors (Welkom) Ltd v Protea Motors Warrenton* 1973 (3) SA 685 (A) at 691E-G).

13 In its review, Unyazi argues that PRASA's insistence on its bid bond conditions serves no rational purpose and has an unfair, inequitable or anti-competitive effect. The section 217 requirement that public procurement takes place "in accordance with a system" that is, amongst other things "fair", "equitable" and "competitive", means that every tender process must be sufficiently fair, equitable and competitive in order to be lawful. Unyazi says that PRASA has failed to take account of the conditions' effect on the extent to which its tender process promotes these requirements. This, Unyazi alleges, amounts to the failure to take into account a relevant consideration, in the sense meant in section 6 (2) (e) (iii) of the Promotion of Administrative Justice Act 3 of 2000.

14 The imposition of any condition on a bid in a tender process has, at least in theory, the potential to exclude a prospective tenderer from that process. Indeed, as PRASA points out, the bid bond requirements are at least in part designed to ensure that only credible bidders, who are able to undertake the work, are considered for the award of the contract in this case. Unyazi stakes its claim partly on the proposition that its consortium includes the biggest and most capable global provider of the sorts of services that PRASA needs. If, Unyazi suggests, it cannot meet the bid bond conditions,

then almost no-one can. That is, in itself, advanced as a strong reason why PRASA's tender process must be unfair, inequitable or anti-competitive.

15 During argument, Ms. Sello suggested that I can safely assume that, since they have not been disqualified from the tender process, the second and third respondents in this case have in fact been able to meet the bid bond requirements. That is not clear to me on the papers, but I do not in any event think that it follows from the mere fact that an otherwise credible bidder – even one of the biggest and the best – cannot meet the specific requirements of a bid bond, that the conditions on the bond render the tender process unfair, inequitable or anti-competitive. Unyazi's inability to meet the conditions just as easily raises questions about whether it is in fact as capable a bidder as it says it is.

16 There may be something to the argument if it could be shown that the bid bond conditions are irrational on their face. But I do not think that has been shown, even *prima facie*.

17 The requirement that the bid bond be drawn on a South African bank may be idiosyncratic, given that South African banks are not the only players in the financial services market capable of providing the required guarantees. But it is not obviously irrational. PRASA justifies the requirement on the basis that a South African bank provides an easier and more straightforward means of execution on the guarantee. Mr. Snyckers took issue with this, arguing that the type and location of an otherwise credible guarantor makes no difference in principle to the strength of a creditor's right. Whatever the merits of that contention, I cannot say that PRASA is obviously irrational to prefer domestic

banks, subject, as those institutions are, to well-known regulatory regimes and possessed, as they are, of familiar reputations.

18 The rationality test is not particularly exacting. I need only be satisfied that the South African bank requirement is rationally connected to a legitimate purpose. The mere fact that other requirements may be equally rational, or even preferable, does not render the requirement PRASA has imposed irrational. Here, I cannot see anything inherently senseless about PRASA's preference for a domestic bank guarantee, or the reasons it advances for that preference. It is certainly not irrational merely because it might be difficult for a particular bidder to fulfil.

19 It was also contended that the conditions under which the bid bond could be called up were not rationally connected to the terms of the guarantee PRASA required in its request for proposals. The bid bond required in the request for proposals could be called up in a series of clearly specified circumstances, but the terms of the guarantee PRASA ultimately required were that PRASA could call it up if it believed a bidder owed it money "for any reason whatsoever".

20 Unyazi argues that this effectively means that PRASA can call up the guarantee on a "whim". That, I think, is an exaggeration. It is possible that what PRASA really meant was that the bond could be called up in respect of sums owing "for any reason whatsoever" relating to the circumstances specifically delineated in the tender conditions. But even if it did not, there is nothing inherently irrational or unlawful in the requirement that a guarantee can be called up in the event that PRASA subjectively, but honestly, believes

that a bidder owes it money. That is not the same as saying that PRASA can call up the guarantee on a “whim”. Triggering conditions of this nature are commonplace in construction contracts. They entitle the employer to form the honest but subjective view that they are owed money and to require the contractor, by calling up the guarantee, to pay the money now, and argue about the true nature of its liability, if any, later.

21 In the context of this case, the bid bond serves important purposes. It helps ensure that a bidder seriously intends to carry out the work if its bid is successful. It also insulates PRASA against the cost of a preferred bidder withdrawing between the award of the tender and the signature of the contract for the work, if that means that PRASA ultimately has to accept a more expensive tender.

22 Finally, it was contended that the five-week deadline to obtain the required guarantee was irrational, when read alongside all the other requirements applicable to it. If, as Ms. Sello suggests, two bidders actually did manage to secure the guarantee in that time, that is a strong indication that the deadline was not irrational. In any event, the five-week deadline was not attacked as irrational *per se*, although the period is criticised as being slightly shorter than the minimum PRASA’s standard operating procedure generally provides for.

23 In my view the five-week period could only really be assailed if any of the other conditions were shown to be irrationally or unusually onerous. I do not think that has been shown. What has been shown is that the bid bond conditions might have discouraged prospective bidders because, in the

prevailing circumstances, they were unable to raise the finance necessary to obtain the guarantee.

24 I do not think that is enough to suggest, even *prima facie*, that the tender process is unfair, inequitable or anti-competitive. Unyazi's difficulties in raising the guarantee in the required time illustrate the point. Unyazi said that it had difficulties raising finance from Chinese members of its consortium because of the strict anti-covid lockdown in place in China at the time the guarantee had to be raised. It seems to me, though, that this difficulty might be indicative of an inherent weakness of Unyazi's consortium, rather than of anything irrational about the bid-bond requirement. Unyazi's particular difficulties in arranging the finance necessary to meet the bid bond requirements do not, without more, make the requirements themselves irrational.

25 Of course, had the bid conditions, including the bid bond requirements, been designed to exclude a particular class of bidders, or if, notwithstanding the absence of such an intent, they clearly had that effect, or if the conditions were tailor-made to prefer one bidder, or a particular class of bidders, over another, then they would be clearly unfair, inequitable or anti-competitive (see for, example, *Swifambo Rail Leasing (Pty) Limited v Passenger Rail Agency of South Africa* 2020 (1) SA 76 (SCA), paragraphs 23 to 24). But there is no suggestion that has happened in this case.

26 It follows from this that the success of Unyazi's proposed review is far from clear. It is possible that a closer examination of the Unyazi's grounds as the papers in the review mature may yield a clearer idea of why the bid bond

conditions were unfair, inequitable or anti-competitive. As things stand, however, I am driven to conclude that Unyazi has shown no more than a weak *prima facie* right.

The balance of convenience

27 Ordinarily critical to the assessment of the balance of convenience, is any “separation of powers harm” PRASA would suffer if the interim relief were granted. Weighing this harm involves recognising the need to allow the state to continue to exercise its powers and functions, unless “the clearest of cases” has been made out that they are based on an illegality (*National Treasury v Opposition to Urban Tolling Alliance* 2012 (6) SA 223 (CC) (“*National Treasury*”) at paragraph 47).

28 In this case, however, Mr. Snyckers, who appeared with Ms. Stein for Unyazi, argues that there will be no “separation of powers harm”, because, properly construed, the concept of “separation of powers harm” cannot and does not apply to interdicts in restraint of the exercise of public procurement powers. The argument, as I understood it, was that separation of powers concerns do not arise in every case where a court is asked to restrain an organ of state from exercising statutory powers. They only arise when the organ of state concerned is an executive office bearer, or the department of state for which they are responsible.

29 I do not think that is a realistic interpretation of the decision in *National Treasury*.

30 *National Treasury* was concerned with the appropriateness of interim relief being granted against organs of state “exercising statutory powers flowing from legislation whose constitutional validity is not challenged” (*National Treasury*, paragraph 27). In that context a court must “not fail to consider the probable impact of the restraining order on the constitutional and statutory powers and duties of the state functionary or organ of state against which the interim order is sought” (paragraph 46). The court “must keep in mind that a temporary restraint against the exercise of statutory power well ahead of the final adjudication of a claimant's case may be granted only in the clearest of cases and after a careful consideration of separation of powers harm” (paragraph 47).

31 I do not think that *National Treasury* left any room for doubt: interim relief restraining an organ of state from exercising valid statutory powers pending review may only be granted in the clearest of cases. PRASA is indisputably an organ of state. Nobody suggests that its procurement powers are not based in statute, or that those powers are suspect. The *National Treasury* test clearly applies.

32 As the court in *National Treasury* itself implicitly accepts, the “clearest of cases” includes cases where the statute underlying the power sought to be restrained is itself constitutionally suspect, or where the statute, though valid on its face, is deployed in a manner injurious to constitutional rights. In those sorts of cases, interim relief will fairly readily be granted. Besides that, as I

held in *Gibb v PRASA* [2021] ZAGPJHC 146 (26 August 2021), where a credible case has been set up on review that the organ of state is acting, or has acted, *ultra vires* its statutory powers, an interim interdict will also be necessary to protect the applicant's rights pending the determination of the review. There will be no appreciable separation of powers harm in any of these cases, because the debate on review will always be concerned with whether the organ of state actually has the power it seeks to exercise.

33 Unyazi's case is not of this character. Unyazi alleges not that PRASA lacks the powers it exercises, but that PRASA has failed to weigh a material consideration – the need for its tender process to be competitive – before exercising that power. But Unyazi has itself failed to establish that the bid bond conditions it complains of are themselves clearly material to the fairness, equity or competitiveness of the tender process.

34 For those reasons, I do not think that this case can be said to be one of “the clearest”. Unyazi has not shown, even *prima facie*, that PRASA has conducted itself unlawfully. It is not clear to me that the constitutional standards of fairness, equity and competitiveness applicable to this case require anything more than a process free of conditions that are (a) tailor made in advance to ensure the success of a particular bidder; or (b) designed improperly to exclude a particular bidder or class of bidders; or (c) otherwise demonstrably irrational or unlawful. Having failed to set up a case that PRASA has breached any of these requirements, Unyazi's case boils down to little more than the proposition that a fair, equitable and competitive

process would not have resulted in its disqualification. I do not think that is enough.

35 That aside, at the practical level, Unyazi wishes to delay the progress of a tender to upgrade the rail network signalling system of South Africa's second most populous province. One need not look very far to see the urgency of infrastructure renewal projects across South Africa. This project is no exception.

36 For all these reasons, the balance of convenience tips decisively against the grant of interim relief.

Order

37 Unyazi has failed to establish a *prima facie* right of the strength necessary to overcome the inconvenience to PRASA of interim relief being granted pending review. Accordingly, the application is dismissed with costs, including the costs of two counsel.



S D J WILSON
Judge of the High Court

HEARD ON: 1 March 2023

DECIDED ON: 14 March 2023

For the Applicant: F Snyckers SC
N Stein
Instructed by Hulley and Associates Inc

For the First Respondent: M Sello SC

K Nondwangu
Instructed by Mncedisi Ndlovu Sedumedi
Inc