IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

Case No: 5520/2016

In the matter between:

SIYAKHUPHUKA INVESTMENT HOLDINGS (PTY) LTD	Applicant
and	
PORTS REGULATOR OF SOUTH AFRICA	First Respondent
TRANSNET SOC	Second Respondent
MINISTER OF PUBLIC ENTERPRISES	Third Respondent
MINISTER OF TRANSPORT	Fourth Respondent

ORDER

The application is dismissed with costs, including those which have been reserved, and those occasioned by the employment of two counsel.

JUDGMENT

Ploos Van Amstel J:

[1] The application before me was launched some six years ago, on 9 June 2016. In the amended notice of motion[1] the applicant seeks the review and setting aside of decisions by the Ports Regulator and Transnet, with further orders by way of a remedy.

[2] The applicant is Siyakhuphuka Investment Holdings (Pty) Ltd, a company based in Ballito, which is said to have experience in the operation of cargo terminals and container freight stations, and the streamlining and improvement of logistical services.

[3] The first respondent is the Ports Regulator, established in terms of section 29 of the National Ports Act 12 of 2005 (the Act) as an independent ports regulatory body, vested with legal personality.

[4] The second respondent is Transnet SOC Ltd, incorporated as a public company pursuant to section 2 of the Legal Succession to the South African Transport Services Act 9 of 1989, with the State as its only member and shareholder. It was previously known as Transnet Limited. I shall refer to it herein as Transnet.

[5] The third respondent is the Minister of Public Enterprises, the Minister responsible for state owned enterprises, and the 'Shareholding Minister' in terms of s 1 of the Act.

[6] The fourth respondent is the Minister of Transport, the Minister responsible for the regulation of transportation.

[7] The activities of Transnet are divided into a number of business units, one of which is the National Ports Authority of South Africa[2], which is tasked with the administration and regulation of ports in South Africa. I refer to it herein as 'the Ports Authority', where it is convenient to do so.

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[1] It was amended in January 2019.

[2] As defined in s1 of the National Ports Act, and inaccurately described in the founding papers as 'Transnet Ports Authority'.

[8] Section 3(2) and (3) of the Act provide that as soon as the Act takes effect the Minister of Public Enterprises must ensure that the necessary steps are taken for the incorporation of the National Ports Authority of South Africa as a company under the name 'National Ports Authority (Pty) Ltd', with Transnet as the sole member and shareholder. This has not happened yet, although the Act commenced on 26 November 2006.

[9] The 'Authority' is defined in s 1 of the Act as 'National Ports Authority Ltd, contemplated in section 4.' In terms of s 3 the National Ports Authority, from the date the Act comes into effect until the date when National Ports Authority (Pty) Ltd becomes its successor, is for all purposes deemed to be the Authority and must perform the functions of the Authority as if it were the Authority. The functions of the Authority are set out in s 11 of the Act, which, in the main, are to own, manage, control, and administer South Africa's commercial maritime ports, and to ensure their economic functioning. The Authority has the power to maintain and improve port infrastructure and to undertake port development in terms of a port development framework plan prepared and updated from time to time by the Authority. The Authority controls land use, with the power to lease land, and must ensure that adequate, affordable and efficient port services and facilities are provided.

[10] Section 56(1) of the Act empowers the Authority to enter into an agreement with any person in terms of which that person is authorised to design, construct, rehabilitate, develop, finance, maintain or operate a port terminal or port facility, or provide services relating thereto; and sub-section (4) empowers it to contract out any service that it is required to provide in terms of the Act. In terms of ss (5) such an agreement may only be entered into by the Authority in accordance with a procedure that is fair, equitable, transparent, competitive and cost-effective.

[11] Against that background, I turn to the relevant facts. The matter arose out of a proposal by the applicant for the construction and operation of a container terminal at the port of Richards Bay ('the port'). The port functions mainly in break-bulk, dry bulk and liquid bulk cargos. It does not have a container terminal, although some containers do

move through the port. The container terminal that handles large volumes of containers is in the port of Durban.

[12] The applicant believed that a container terminal in the port could not only be justified, but would be a success and stimulate the economy of Zululand. It therefore developed a detailed proposal for a container handling facility in the port. The deponent to the founding affidavit (Scheepers) says the proposal is not merely for the creation of a container terminal. He says it is rather a fully-integrated, land-side, port-side container operation with global access via a linked worldwide hub system of a global shipping line, which is to be conducted in four phases. He says this will allow for the development and growth of container shipping at the port of Richards Bay and make the project economically feasible and desirable notwithstanding the current low volumes of container traffic.

[13] On 25 January 2008 the applicant submitted its proposal to the then CEO of Transnet, Maria Ramos. It did so on behalf of a consortium to be formed, named 'Royal Zulu Container Hub'. Mrs Ramos replied in writing on 24 November 2008. In a nutshell, she said Transnet had spent over R250 million on a number of feasibility studies to determine where best to provide additional container capacity to meet the future needs of the country. The findings of these studies were contributing to the formulation of a container strategy for the country which included the viability of establishing a hub port in South Africa. She referred to the research which was being undertaken to inform the strategy, which considered market developments and growth scenarios, shipping line requirements, cargo owners' interests, regional and national impact and the benefit of providing cost effective logistic solutions for South African business. She made the point that the decision regarding the most suitable location for the next container terminal for South Africa was a complex one, and that all options would be considered in preparing a comprehensive proposal for consideration by the Transnet Board and the Minister.

[14] On 13 March 2009 the then acting Group Chief Executive, Chris Wells, wrote to the applicant and said Transnet was finalising its plans for container terminal expansion,

but would be pleased to meet with it in due course to discuss the applicant's strategies. Such a discussion did not take place. On 30 April 2009 Mr Wells wrote to the applicant and said independent research led to the conclusion that the Richards Bay port was more geared for a bulk port and did not satisfy the requirements for a container port. He cited a number of reasons why a container terminal would not be suitable for Richards Bay.

[15] The applicant contends in the papers that Transnet did not properly engage with its proposal and that the decision must have been taken before the feasibility studies were completed. Nevertheless, there is no application to review this decision. Suffice it to say that the contention in the founding affidavit that the decision was irrational and unreasonable does not seem to me to be supported by adequate evidence.

[16] The applicant submitted a complaint against this decision with the Ports Regulator, in terms of s 47 of the Act. A number of hearings took place, and on 15 July 2015 the Ports Regulator published a Record of Decision, in terms of which the complaint was dismissed. The applicant wants this decision reviewed and set aside in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

[17] The respondents contend that the review application is hopelessly out of time and should for that reason be dismissed. In terms of s 7(1) of PAJA any proceedings for judicial review in terms of s 6(1) must be instituted without unreasonable delay and not later than 180 days after the date on which the person concerned was informed of the administrative action. The review application was served on 14 June 2016, that is, 11 months after the record of decision was handed down.

[18] The applicant applied for condonation of its failure to comply with the 180 days' requirement. The court is in terms of s 9 of PAJA empowered to extend that period, but may only do so where the interests of justice so require.

[19] Where there has been a delay, but the application was launched before the effluxion of 180 days, it is open to an applicant to show that the delay was not

unreasonable. However, after the 180-day period the issue of unreasonableness is pre-determined by the legislature; it is unreasonable *per se*. In *Opposition to Urban Tolling Alliance v Sanral*[3] Brand JA said: 'It follows that the court is only empowered to entertain the review application if the interest (sic) of justice dictates an extension in terms of s 9. Absent such extension the court has no authority to entertain the review application at all. Whether or not the decision was unlawful no longer matters. The decision has been "validated" by the delay'. This statement was quoted with approval by Theron J in *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd*[4].

[20] The basis on which the applicant sought condonation was to explain the reasons for the delay. But because of s 7 the delay was unreasonable *per se*. There is nothing in the founding affidavit that even suggests that the interests of justice require that an extension be granted. Counsel for the applicant did however make a submission to this effect from the bar. It was submitted, as I understood it, that it will not be in the interests of justice to let an irregular decision stand. That is not enough. As Brand JA said in *Opposition to Urban Tolling Alliance*, the delay validates the decision. It was also submitted that the lack of independence of the Ports Authority should not be allowed to continue and that the Minister should be ordered, by way of a remedial order, to ensure that the necessary steps are taken for the incorporation of the National Ports Authority as a company, as contemplated in s 3 of the Act.

[21] I do not see why the interests of justice require an extension in this case. The applicant's proposal was made to Transnet in 2008. Transnet does not want a container terminal in the port of Richards Bay. When I asked counsel for the applicant what the applicant will ask the Port Regulator to do if the matter is referred back to it, the answer was that basically it will be asked to tell Transnet to give its proposal the green light.[5] The prospect of that happening seems to me to be remote. The Ports Regulator made it clear in its record of decision that the applicant was not entitled to make an unsolicited bid as

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[3] *Opposition to Urban Tolling Alliance v Sanral* [2013] 4 All SA 639 (SCA) at para 26.
[4] *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 (4) SA 331 (CC) at para 49.
[5] This was the expression used in the applicant's written complaint to the Ports Regulator, under the heading 'Nature of the relief sought'.

the Treasury Practice Note did not apply to Transnet, and that if it wanted to pursue its proposal it would have to do so in terms of a procedure referred to in s 56(5). Counsel also suggested that the Ports Regulator may apply for an interdict against the Ports Authority, in terms of s 54(1)(a)(i) of the Act. He was unable to suggest what such an interdict might entail.

[22] The applicant is free to make a fresh proposal and try to persuade Transnet that a container terminal will be a good idea. However, such a contract may only be entered into by the Ports Authority in accordance with the provisions of s 56(5) of the Act. In other words, there will have to be a competitive bid process.

[23] The suggestion that the review should be heard so that the Minister can be directed to ensure that the Ports Authority be incorporated as contemplated in s 3 is unpersuasive. Firstly, that process is under way, although there has been a substantial delay. Secondly, the applicant cannot make an unsolicited bid to the Ports Authority. It will have to participate in a procurement process that complies with s 56(5). Whether or not the Ports Authority is incorporated by then is not that material.

[24] It seems clear to me that if I do extend the 180-day period the prospect of success of the review application will be slim indeed. In all those circumstances I do not consider that an extension of the 180-day period should be granted, with the result that this court has no authority to consider the review. The application for a review of the Port Regulator's decision will therefore be dismissed.

[25] The second review relates to an alleged decision by Transnet to approve a container terminal or container handling facility at the port, to be operated by Transnet Port Terminals (TPT), which is one of its business units.

[26] Mr Balfour, who is employed by the Ports Authority, denies that it took such a decision. He says the two applications made to the Ports Authority by TPT, one dated 11 April 2016 and the other 25 April 2016, were both refused. He explains that the Ports

Authority does not consider a container terminal at the port of Richards Bay a feasible option, due to the existing infrastructure and the nature of the cargo that is handled there. TPT operates a bulk handling terminal and a multi-purpose terminal, which handles break-bulk cargo and containers. Other operators include the Richards Bay Coal Terminal, Grindrod and Vopak. None of the operators has been issued with a licence to operate a dedicated container terminal at Richards Bay, nor has there ever been one there. The small number of containers are handled by TPT under its current licence, utilizing a reach stacker, which is a much cheaper but less productive alternative. He says the volume of containers passing through the port should be a minimum of 250 000 in order to justify a dedicated container terminal. In 2008/2009 the number was approximately 8000 and in 2017/2018 approximately 13 000.

[27] There is no evidence that Transnet took the decision complained of, other than the newspaper article and emails put up by the applicant, which take the matter no further. There is therefore nothing to review.

[28] In those circumstances there is no need to deal with the remedial measures suggested by the applicant.

[29] The application is dismissed with costs, including those which have been reserved, and those occasioned by the employment of two counsel.

PLOOS VAN AMSTEL J

CASE INFORMATION

Date Judgment Reserved	:	**13 September 2022**
Date Judgement Delivered	:	**16 September 2022**

Appearances:

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