

High court pulls up the handbrake on Durban Pier 2 PSP

The Freight Logistics Roadmap, developed by Operation Vulindlela, recommended a series of regulatory and institutional reforms on rail but made limited, ad hoc recommendations in relation to ports. More specifically, the roadmap recommended that the public-private partnerships advertised by Transnet for the Port of Ngqura in the Eastern Cape and Durban Pier 2 in KwaZulu Natal be expedited.

Durban Pier 2 handles approximately two-thirds of South Africa's total container cargo, and when a call for qualifications was put out, thirty-two of the world's leading port handling companies expressed their interest. Once Transnet selected a preferred partner, it would sell a 49% stake in a special purpose vehicle to jointly operate and invest in Pier 2.

Transnet is, naturally, the legacy owner, but the expectation was that the private sector partner invest in equipment to recapitalise the terminal and bring in expertise to jointly operate the terminal for the next 25 years. This is, then, not a decision to be taken lightly. To prove that bidders had the financial muscle to fulfil this obligation, the bid set a threshold for solvency and liquidity to be considered. Eight parties made the cut, and finally, in March 2024, the Philippines-based company, ICTSI, was selected as the preferred partner.

As the agricultural sector (which exports 52% of its products in value terms), the prospect of an international partner bringing capital and equipment was warmly welcomed. However, before the rubber could hit the road, an unsuccessful applicant brought an urgent application to the KwaZulu Natal High Court, arguing irregularities and asking for an interdict. The argument is that the successful bidder should have been disqualified as they did not meet the solvency ratio stipulated as a requirement but was, instead, permitted to use its market capitalisation. The pros and cons of a solvency ratio vs. market capitalisation is a debate that I would rather not venture into, but from a process point of view, the preferred bidder was permitted to use a different metric than all other bidders. This was deemed to be a material issue, and on the 9th of October 2024, the High Court in Durban decided that there were sufficient grounds to grant the interdict. In the review process to follow, the court will need to decide whether the tender process was indeed procedurally unfair; if that is the case, make an appropriate ruling. The applicant is asking the court to instate itself as the preferred bidder or alternatively (and more likely) instruct Transnet to restart the process. In layman's terms, the court pulled up the handbrake as no further action can now be taken to implement the partnership at Pier 2 until the court has a chance to consider the actual decision and come to a conclusion about the way forward.

Agbiz will watch the progress closely to determine what the final outcome of the review process will be. However, it is now a factual guarantee that the process of incorporating private sector capital and expertise into Pier 2 will be delayed. The next step will be to liaise via colleagues at the NLCC and BUSA to determine what measures can be put in place in the interim to improve performance at the terminal.

By Agbiz CEO Theo Boshoff