IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**NO**
Of Interest to other Judges:	**NO**
Circulate to Magistrates:	**NO**

Case No: **171/2022**

In the matter between:

ROADMAC SURFACING (PTY) LTD Applicant
(Registration number: 1992/001299/07)

and

MEC FOR THE DEPARTMENT OF POLICE, ROADS & TRANSPORT, FREE STATE PROVINCE 1st Respondent

TAU PELE CONSTRUCTION (PTY) LTD 2nd Respondent
(Registration number: 2003/020819/07

CORAM: JP DAFFUE J

HEARD ON: 24 MARCH 2022

ORDERS GRANTED ON: 28 MARCH 2022

REASONS HANDED DOWN ON: 02 JUNE 2022

This reasons were handed down electronically by circulation to the parties' representatives by email, and release to SAFLII. The date and time for hand-down is deemed to be 16h00 on 02 June 2022.

REASONS

I INTRODUCTION

[1] On 24 March 2022 I reserved judgment after having heard an opposed application for *interim* relief pending a review application. On Monday, 28 March 2022 I issued the following orders and indicated that my reasons would follow in due course:

"1. The first respondent is interdicted from giving instructions to the second respondent and/or any other tenderer to perform any further work under **Tender No: PR&T18/2021/22**.

2. The second respondent is interdicted from commencing with any further work under **Tender No: PR&T18/2021/22**.

3. The orders in paragraphs 1 and 2 shall serve as interim interdicts with immediate effect pending finalisation of the review application to be instituted on/or before 22 April 2022 by the applicant against the decision of the first respondent to award **Tender No: PR&T18/2021/22** to the second respondent.

4. The costs of 28 January 2022, 10 February 2022 and 24 March 2022 shall stand over for later adjudication.

5. The reasons for the orders will follow in due course."

[2] Insofar as the reasons are handed down some time after the granting of the orders, I place on record that I was on recess duty and had to deal with numerous unopposed motion court matters, several urgent applications, some of which were opposed, as well as two pre-trial conference rolls. Then the second terms started in earnest.

II THE PARTIES

[3] The applicant is Roadmac Surfacing (Pty) Ltd, represented by Adv N Snellenburg SC assisted by Adv JJ Buys, they being instructed by L&V Attorneys, Bloemfontein.

[4] The 1st respondent is the MEC for the Department of Police, Roads and Transport, Free State Province, represented by Adv D de Kock, instructed by the State Attorney, Bloemfontein.

[5] The 2nd respondent is Tau Pele Construction (Pty) Ltd, represented by Adv S Grobler SC, instructed by Peyper Attorneys, Bloemfontein.

III THE LITIGATION HISTORY AND RELIEF CLAIMED

[6] Upon invitation by the Department of Police, Roads and Transport, Free State Province, several construction companies submitted tenders for "the special maintenance on Route P44/1&2 between Deneysville and Jim Fouche from section one (01) to section four (04)."[1]

The duration of the project was advertised to be six months only. Once the tender had been awarded, the applicant, being one of the unsuccessful tenderers, decided to embark on litigation. The history of the litigation will be dealt with briefly hereunder.

[7] On 11 January 2022 the applicant became aware that the tender had been awarded to the second respondent. It immediately reacted and requested reasons to be provided by 14 January 2022.[2] No reasons were provided. On 18 January 2022 its application for urgent relief, set down for 28 January 2022, was issued. The applicant sought a variety of orders in its original notice of motion, but it is not necessary to quote same. Some issues have been resolved as will appear soon.

[8] On 28 January 2022 an order was granted by agreement. The first respondent was directed to on or before 7 February 2022 file "full and written reasons" for the decision not to award the tender to the applicant. The application was postponed to the unopposed roll of 10 February 2022 and it was agreed that the further prayers in the notice of motion, including for an *interim* interdict pending review, shall stand over.

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[1] Invitation to tender, record: vol 1, p 48
[2] Founding affidavit: paras 32, 39 - 48

[9] On 10 February 2022, the reasons having been provided in the meantime, the court by agreement postponed the matter to the opposed roll of 24 March 2022. Further orders were granted pertaining to the filing of supplementary affidavits.

[10] On 24 March 2022 the parties came before me. I was called upon to adjudicate whether *interim* relief should be granted to interdict the successful tenderer to continue with further work on the project pending finalisation of a review application.

[11] It also needs to be pointed out that the applicant filed an amended notice of motion during the course of the litigation. In this document virtually the same relief is sought in Part A thereof, but Part B, providing for the review, differed from the initial notice of motion. The respondents objected to this alleged incorrect procedural approach. I decided not to become involved in any controversy in this regard and the orders granted reflect that attitude.

IV THE APPLICANT'S CASE

[12] The applicant submitted that a proper case has been made out for interlocutory relief pending finalisation of a review application to set aside the first respondent's award of the tender to the second respondent. It is submitted that:

12.1 on the first respondent's own version the applicant's tender had been discarded and the tender awarded to second respondent based on a process that was not fair, equitable, transparent, comparative or cost-effective;

12.2 the reasons advanced by the first respondent establish reviewable irregularities;

12.3 the 30% sub-contracting requirement was not a pre-qualification requirement in terms of the eligibility criteria, being the first stage of the evaluation process;

12.4 the Preferential Procurement Regulations of 2017 have been declared invalid by the Supreme Court of Appeal, and may I add, this decision was confirmed by the Constitutional Court;

12.5 the applicant's tender was for R38 803 821.40, the lowest of all the tenders, whilst the second respondent's tender that was accepted, amounted to R51 615 000.00, R12 million more than that of the applicant; it was also the fifth lowest tender.

V THE DEFENCES

[13] The respondents relied on several defences which can be summarised as follows:

13.1 on 7 February 2022 the first respondent's Acting Director: Legal Services responded in an email to the office of the State Attorney wherein he belatedly provided reasons why the applicant was not the successful bidder. I quote *verbatim*:[3]

"It is a known fact that Pre-qualification being stage one (1) is compulsory for the contractor must complete 30% subcontracting amount. The criteria found its way in terms of Section 14 subparagraphs 14.1 to 14.6 of Preferential Procurement Regulations, 2017 pertaining to the Preferential Procurement Policy Framework Act now of 2000.

We further refer Roadmac to SBD 6.1 of its tender whereby it says "Not applicable" while it is a MUST to give subcontracting amount as part of terms and conditions of the tender.

We further refer Roadmac to Tender Bulletin advertisement no. 75 dated 3rd December 2021 as to prequalification criteria (PPR 2017).

[3] Supplementary founding affidavit: Annexure "SA 1" at p 329

Based on non compliance of 30% subcontracting, it was deemed not to be responsive to pre-qualification at stage 1."

13.2 it is the first respondent's case that no responsibility rested on the MEC to provide reasons in a shorter time period than the time period referred to in s 5 of the Promotion of Administrative Justice Act (PAJA);[4] however this issue has become moot as reasons were in fact provided, although belatedly;

13.3 the applicant should have followed a process in terms of the Promotion of Access to Information Act (PAIA),[5] but although the applicant eventually applied in the prescribed format in terms of PAIA, the internal remedies in PAIA had not been exhausted and therefore the applicant approached the court prematurely for relief – this was again an issue that did not have to be considered;

13.4 with reference to the well-known *dicta* of the Constitutional Court in *National Treasury v Opposition to Urban Tolling Alliance ("OUTA")*[6] it was submitted that the applicant had failed to show strong grounds that it was likely to succeed in the review application;

13.5 in terms of s 18(1) of the Superior Courts Act[7] the Supreme Court of Appeal's judgment and orders were suspended when the Minister launched an application for leave to appeal; consequently the decision setting aside the Preferential Procurement Regulations of 2017 was stayed and therefore these regulations were at all relevant times still in full force and effect and nothing prohibited the Department from setting a pre-qualification requirement as stated, to wit "full computation of the 30 (thirty) percent of the sub-contracting amount is a pre-qualification requirement"[8];

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[4] 3 of 2000
[5] 2 of 2000
[6] 2012 (6) SA 223 (CC)
[7] 10 of 2013
[8] Supplementary answering affidavit: para 3.8

13.6 reliance was placed on the wording of the tender notice and invitation to tender as well as clause 29 of the contract's specific data stipulating that 30% of the contract value must be subcontracted to local contractors, as well as the tender bulletin of the Department;[9]

13.7 just as first respondent, the second respondent also relied on the tender notice and invitation to tender as well as item 29 of the contract data and submitted that there was non-compliance with s 1 of the Preferential Procurement Policy Framework Act (PPPFA)[10] insofar as the applicant's tender did not comply with the tender requirements; consequently, the second respondent aligned itself with the first respondent's submission that the applicant did not submit an acceptable tender and that the tender was correctly disqualified, while also relying on sub-regulations 4(1) and 4(2) which I quote:

"4. (1) If an organ of state decides to apply pre-qualifying criteria to advance certain designated groups, that organ of state must advertise the tender with a specific tendering condition that only .... or more of the following tenderers may respond-

(a) ...;

(b) ...;

(c) a tenderer subcontracting a minimum of 30% to- ...

(2) A tender that fails to meet any pre-qualifying criteria stipulated in the tender documents is an unacceptable tender."

13.8 contrary to the applicant's version that the tender requirements were vague and uncertain, it was submitted in the heads of argument on behalf of the second respondent that the tender notice was "very clear" and "it is difficult to conceive of how, Roadmac being an entity in the Highest Echelons of road construction companies in the Country, could have misunderstood this requirement."

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[9] The tender bulletin: p 373

[10] 5 of 2000

13.9 second respondent also submitted that the balance of convenience did not favour the granting of an interdict insofar as the specific road was causing a hazard to all road users and also, since the award of the tender, effect had been given to it and several millions had been paid to it, being the monetary value created by it.

VI THE REQUIREMENTS FOR *INTERIM* INTERDICTS

[14] The four well-known requirements to be proven by an applicant for *interim* relief to be successful are the following:[11]

"a. a *prima facie* right, even if it is subject to some doubt;

b. a reasonable apprehension of irreparable and imminent harm if an interdict is not granted and ultimate relief is eventually granted;

c. the balance of convenience favours the granting of the interdict; and

d. the absence of any other satisfactory remedy."

[15] In *Simon NO v Air Operations of Europe AB and Others*[12] the Supreme Court of Appeal confirmed the well-known test to be applied in adjudicating a *prima facie* right in the context of an application for an *interim* interdict in the following *dictum*:

"The accepted test for a *prima facie* right in the context of an interim interdict is to take the facts averred by the applicant, together with such facts set out by the respondent that are not or cannot be disputed and to consider whether, having regard to the inherent probabilities, the applicant should on those facts obtain final relief at the trial. The facts set up in contradiction by the respondent should then be considered and, if serious doubt is thrown upon the case of the applicant, he cannot succeed."

[16] The first requirement, to wit a *prima facie* right even open to some doubt, has been considered in a different light since *Setlogelo*. In *Gool v Minister of Justice and Another*[13] the full bench of the Cape Provincial Division held that in order to restrain a Minister *pendente lite* from exercising certain powers vested in him by a statute, relief should only be granted in exceptional circumstances and when a strong case is made out. The Constitutional Court stated recently in

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[11] *Setlogelo v Setlogelo* 1914 AD 221 at 227
[12] 1999 (1) SA 217 (SCA) at 228 G – H
[13] 1955 (2) SA 682 C at 688 F – 689 C

National Treasury and Others v Opposition to Urban Tolling Alliance and Others ("OUTA") with reference to *Setlogelo* as follows:[14]

"44. The common law annotation to the *Setlogelo* test is that courts grant temporary restraining orders against the exercise of statutory power only in exceptional cases and when a strong case for that relief has been made out. Beyond the common law, separation of powers is an even more vital tenet of our constitutional democracy. This means that the Constitution requires courts to ensure that all branches of Government act within the law. However, courts in turn must refrain from entering the exclusive terrain of the Executive and the Legislative branches of Government unless the intrusion is mandated by the Constitution itself.

45. It seems to me that it is unnecessary to fashion a new test for the grant of an interim interdict. The *Setlogelo* test, as adapted by case law, continues to be a handy and ready guide to the bench and practitioners alike in the grant of interdicts in busy Magistrates' Courts and High Courts. However, now the test must be applied cognisant of the normative scheme and democratic principles that underpin our Constitution. This means that when a court considers whether to grant an interim interdict it must do so in a way that promotes the objects, spirit and purport of the Constitution."

[17] Although the Constitutional Court held that the *Setlogelo* test as adapted by case law still remains a handy and ready guide to the bench and practitioners in the magistrates and high courts, "the test must now be applied cognisant of the normative scheme and democratic principles that underpin our Constitution." It continued: "When considering to grant an *interim* interdict a court must promote the objects, spirit and purport of the Constitution." Consequently, the Constitutional Court stated the following:[15] "If the right asserted in a claim for an interim interdict is sourced from the Constitution it would be redundant to enquire whether that right exists. Similarly, when a court weighs up where the balance of convenience rests, it may 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."

[18] Before I step off the topic, it is necessary to quote the following from OUTA:[16]

"65. .... It (the court) must assess carefully how and to what extent its interdict will disrupt executive or legislative functions conferred by the law and thus whether its restraining order will implicate the tenet of division of powers. Whilst a court has the power to grant a

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[14] 2012 (6) SA 223 (CC) paras 44 & 45
[15] Ibid, para 46
[16] Ibid, paras 65 & 66

restraining order of that kind, it does not readily do so except when a proper and strong case has been made out for the relief and, even so, only in the clearest of cases.

66 .... What this means is that a court is obliged to ask itself not whether an interim interdict against an authorised state functionary is competent but rather whether it is constitutionally appropriate to grant the interdict."

VII EVALUATION OF THE EVIDENCE AND SUBMISSIONS BY THE PARTIES

Urgency

[19] In order to consider urgency, it is important to note that rule 6(12) requires absence of substantial redress, which is not equivalent to irreparable harm which is required before *interim* relief is granted. It is less than that.[17]

[20] The tender contract is for six months only and if the applicant was forced to rely on a review application in the normal sense of the word and based on the normal time periods prescribed by rule 53, it would no doubt not be afforded substantial redress, even if successful on review.

[21] The prejudiced party is entitled to seek appropriate relief by way of an *interim* interdict in order to mitigate losses that may be suffered as a result of unlawful administrative action. This has been clearly recorded in *Olitzki Property Holdings v State Tender Board and Another.*[18]

[22] It is apparent that the first respondent is of the view that the contract works must be concluded in haste.

[23] The applicant reacted immediately on receipt of information that the tender had been awarded to the second respondent. It received the information on 11

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[17] *East Rock Trading 7 (Pty) Ltd and Anther v Eagle Valley Granite (Pty) Ltd and Others* [2012] JOL 28244 (GSJ) at paras 6 – 8, *GPCM v Minister of Home Affairs and Others* 2020 (3) SA 434 (GP) paras 7 – 9 and *Mogalakwena Local Municipality v The Provincial Executive Council, Limpopo and Others (2014) JOL 32103 (GP)* paras 63 & 64

[18] 2001 (3) SA 1247 (SCA) paras 37 *et seq*; see also *Darson Construction (Pty) Ltd v City of Cape Town and Another* 2007 (4) SA 488 (C) at 506 E - H

January 2022 and a week later, on 18 January 2022, the application was issued.

The first requirement for interim interdicts: prima facie right

[24] One aspect that bothered all counsel that appeared in this application has now been put to rest by the Constitutional Court and no further attention will be given to the submissions received, save to mention that insofar as it is eventually found by the review court that the first respondent applied the impugned regulations during the period of suspension, that court may well have to adjudicate the legal challenge raised by the applicant *in casu*. In *Minister of Finance v Sakeliga NPC (previously known as Afribusiness NPC) and Others*[19] the Constitutional Court confirmed that footnote 28 of the minority judgment was of no consequence and could not affect the majority judgment. It held in a unanimous judgment as follows:

"[16] Based on this clear statutory position, the operation and execution of the order of the Supreme Court of Appeal was halted. In practical terms, what happened immediately after that order was granted was that the countdown on the 12 month period of suspension began. But the countdown was halted on the 21st day by the lodgment of the application for leave to appeal in this Court. Because section 18(1) suspends the operation and execution of a judgment "pending the decision of the application [for leave to appeal] or appeal", the countdown resumed after this Court dismissed the appeal on 16 February 2022. Unsurprisingly, the Minister does realise that this is how the order ought to be interpreted. He says he is seeking confirmation that—

'.....'

For the reasons I have given, there is no need for this clear legal position to be confirmed.

[17] As at 16 February 2022, of the 12-month period of suspension, less than a month had elapsed."

[19] [2022] ZACC 17, a judgment delivered on 30 May 2022

[25] The OUTA[20] judgment referred to by both respondents and quoted above makes it clear that courts considering granting temporary restraining orders against the exercise of statutory power shall only do so in exceptional cases and when a strong case has been made out.

[26] The Constitutional Court acknowledged in *National Gambling Board v Premier, Kwazulu-Natal and Others*[21] that an *interim* interdict is a court order preserving or restoring the *status quo* pending the determination of rights of the parties, that it does not involve a final determination of these rights and does not affect their final determination.

[27] Section 217(1) of the Constitution[22] provides that an organ of state contracting for goods of services must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. Section 2(1)(f) of PPPFA provides that:

"The contract must be awarded to the tenderer who scores the highest points, unless objective criteria… justify the award to another tenderer."

[28] In *Chairperson, Standing Tender Committee and Others v JFE Sapela Electronics and Others*[23] the Supreme Court of Appeal had this to say about an "acceptable tender":

An 'acceptable tender' in turn is defined in s 1 as meaning 'any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document'. It is well established that the legislature and executive in all spheres are constrained by the principle that they may exercise no power and perform no function beyond those conferred upon them by law. This is the doctrine of legality. ..... The acceptance by an organ of State of a tender which is not 'acceptable' within the meaning of the Preferential Act is therefore an invalid act and falls to be set aside. In other words, the requirement of acceptability is a threshold requirement."

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[20] Fn 14 above
[21] 2002 (2) SA 715 (CC) at para 49
[22] See also *Metro Project CC and Another v Klerksdorp Local Municipality and Others* 2004 (1) SA 16 (SCA) at paras 11 – 13 and numerous judgments thereafter, and *inter alia Millennium Waste Management (Pty) v Chairperson Tender Board: Limpopo Province and Others* 2008 (2) SA 481 (SCA) at paras 17 - 21
[23] 2008 (2) SA 638 (SCA) at para 11

[29] *In Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province and Others,*[24] Jafta JA (as he then was), writing for a unanimous bench of the Supreme Court of Appeal, considered the definition of "acceptable tender" and held as follows, quoting Scott JA's dictum in *JFE Sapela Electronics* with approval:

"[18] ..... Therefore the definition in the statute must be construed within the context of the entire s 217 while striving for an interpretation which promotes 'the spirit, purport and objects of the Bill of Rights' as required by s 39(2) of the Constitution. In *Chairperson: Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others* Scott JA said (para 14):

'The definition of 'acceptable tender' in the Preferential Act must be construed against the background of the system envisaged by section 217(1) of the Constitution, namely one which is 'fair, equitable, transparent, competitive and cost-effective'. In other words, whether 'the tender in all respects complies with the specifications and conditions set out in the contract documents must be judged against these values'.

[19] In this context the definition of tender cannot be given its wide literal meaning. It certainly cannot mean that a tender must comply with conditions which are immaterial, unreasonable or unconstitutional. The defect relied on by the tender committee in this case is the appellant's failure to sign a duly completed form, in circumstances where it is clear that the failure was occasioned by an oversight. In determining whether this non-compliance rendered the appellant's tender unacceptable, regard must also be had to the purpose of the declaration of interest in relation to the tender process in question. (emphasis added)

[30] In order to adjudicate the first requirement of a *prima facie* right it is necessary to consider whether the applicant's tender was correctly rejected as not being acceptable. I shall consider the alleged vagueness of the tender invitation in light of relevant authorities. It is trite that "the law requires reasonable and not perfect lucidity."[25] – Although the *dictum* in *Pretoria Timber Company* was expressed whilst adjudicating the alleged vagueness of a regulation, the principle is generally applicable. Much more recently the Constitutional Court considered the doctrine of vagueness in *Affordable Medicines Trust and others v Minister of Health and others.*[26] I quote:

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[24] 2008 (2) SA (SCA) at paras 18 & 19

[25] *R v Pretoria Timber Company (Pty) Ltd* 1950 (3) SA 163 (A) at 176H

[26] 2006 (3) SA 247 (CC) at para 108; see also *Mpumalanga Tourism v Barberton Mines* 2017 (6) SA 62 (SCA) at para 15

"[108] Regulation 18(5) was challenged on the basis that it is vague and does not conform to the principle of legality. The doctrine of vagueness is one of the principles of common law that was developed by courts to regulate the exercise of public power. As pointed out previously, the exercise of public power is now regulated by the Constitution which is the supreme law. The doctrine of vagueness is founded on the rule of law, which, as pointed out earlier, is a foundational value of our constitutional democracy. It requires that laws must be written in a clear and accessible manner. What is required is reasonable certainty and not perfect lucidity. The doctrine of vagueness does not require absolute certainty of laws. The law must indicate with reasonable certainty to those who are bound by it what is required of them so that they may regulate their conduct accordingly. The doctrine of vagueness must recognise the role of government to further legitimate social and economic objectives and should not be used unduly to impede or prevent the furtherance of such objectives." (emphasis added and footnotes omitted)

[31] In *Minister of Social Development and Others v Phoenix Cash and Carry Pmb CC,*[27] the court held that:

"... a tender process which depends on uncertain criteria lends itself to exclusion of meritorious tenders and is opposed to fairness among tenderers, and between tenderers and the public body which supposedly promotes the public weal; ..." and "... a public tender process should be so interpreted and applied as to avoid both uncertainty and undue reliance on form, bearing in mind that the public interest is, after giving due weight to preferential points, best served by the selection of the tenderer who is best qualified by price. This is particularly relevant to the activities of a 'technical evaluation committee' which examines the tenders for formal compliance but does not evaluate the merits of the bids."

[32] In his reasons for disqualifying the applicant, the first respondent firstly relied on a so-called section 14 with sub-sections. These do not exist. If he meant, regulation 14 of the 2017 Regulations, that regulation deals with remedies, for example, if a tenderer failed to declare any subcontracting arrangements, the organ of State shall not disqualify the tender, but give the tenderer an opportunity to make representations. Secondly, it was stated that the "compulsory" requirement, namely to "complete 30% subcontracting amount" was not complied with. Clearly, the first respondent did not have the faintest idea which regulation he wanted to rely on to substantiate the alleged non-compliance of

[27] [2007] 3 All SA 115 (SCA) at para 2

the prequalification of a 30% subcontracting requirement. If I accept for the moment that the first respondent intended to refer to regulation 14 and not section 14, regulation 14 does not deal with prequalifying criteria.

[33] I agree with the applicant's counsel that on a proper consideration and interpretation of the tender notice and invitation to tender the eligibility criteria stipulated in clause C.2.1 did not require the applicant to satisfy a 30% subcontracting requirement.[28] The reference in the tender notice and invitation to tender that the "successful tenderer must subcontract a minimum of 30% of the value of the contract" does not relate to prequalification criteria in terms of regulation 4 of the 2017 Regulations, but relates to an obligation on the successful tenderer after the tender has been awarded to it. This is clear from the tender notice and invitation to tender where the reference to successful tenderer is in the singular, whilst tenderers in the plural are referred to in the paragraphs above the particular paragraph.

[34] It is apposite to refer to the approach to the interpretation of documents with reference to *Natal Joint Municipal Pension Fund v Endumeni Municipality*[29] and the discussion of this judgment in *Capitec Bank Holding Ltd & Another v Coral Lagoon Investments (Pty) Ltd & Others*[30] which I quote:

"[50] *Endumeni* simply gives expression to the view that the words and concepts used in a contract and their relationship to the external world are not self-defining. The case and its progeny emphasise that the meaning of a contested term of a contract (or provision in a statute) is properly understood not simply by selecting standard definitions of particular words, often taken from dictionaries, but also by understanding the words and sentences that comprise the contested term as they fit into the larger structure of the agreement, its context and purpose. Meaning is ultimately the most compelling and coherent account the interpreter can provide, making use of these sources of interpretation. It is not a partial selection of interpretational materials directed at a predetermined result.

[51] Most contracts, and particularly commercial contracts, are constructed with a design in mind, and their architects choose words and concepts to give effect to that design. For this reason, interpretation begins with the text and its structure. They have a gravitational

[28] Clause C.2.1, being part and parcel thereof and referred to in the tender notice and invitation to tender can be found on p 52
[29] 2012 (4) SA 593 (SCA) para 18
[30] 2022 (1) SA 100 (SCA) paras 50 & 51

> pull that is important. The proposition that context is everything is not a licence to contend for meanings unmoored in the text and its structure. Rather, context and purpose may be used to elucidate the text." (emphasis added)

[35] Regulation 4 of the 2017 Regulations is the only regulation dealing with the 30% subcontracting requirement as a prequalifying criterion, but the first respondent did not rely on this regulation for the decision to disqualify the applicant. In any event and insofar as the first respondent wanted to rely on regulation 4, it should have advertised the tender with this specific tender condition, which he failed to do. The uncertainty of the first respondent as to which regulation is applicable is an ambiguity in itself and *prima facie* a sufficient ground exists to have the award of the tender to the second respondent reviewed and set aside.

[36] The reliance on a 30% subcontracting requirement as part and parcel of the eligibility criteria, which is clearly not a requirement *ex facie* the tender notice and invitation to tender, is also an ambiguity and a further ground to have the award of the tender reviewed and set aside. As mentioned, there is a further ambiguity insofar as the requirement contained in the tender bulletin differs apparently from the invitation to tender. The tender bulletin stipulates[31] merely that at stage 1 there must be "full computation of the 30% subcontracting amount." Computation is nothing but a calculation. Most grade 7 children will be able to calculate what is 30% of R38 803 821.40 tendered by the applicant. The failure to insert that amount in the tender is really insignificant, bearing in mind what was said in paragraph 19 in *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province and Others.*[32] The applicant filled out the form which clearly stipulates that the minimum subcontracting value will be equivalent to 30% with the abbreviation: "T.B.C." Whether it means "to be calculated" or "to be confirmed" is irrelevant. It knew that if it was the successful tenderer it would have to subcontract a minimum of 30% of the contract value to "Targeted Enterprises through Contract Participation Goals."[33] The tender bulletin did not stipulate that a subcontractor had to be identified by the tenderer and its

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[31] At p 374 of the record
[32] Fn 24 above
[33] Tender notice at p 48

particulars included in the tender documents. Even regulation 9 of the 2017 Regulations merely refers to a "tendering condition that the successful tenderer must subcontract a minimum of 30% of the value of the contract" to certain designated groups. A list of all suppliers must be provided by the organ of State in such a case. No evidence in this regard has been placed before me.

[37] I agree with the applicant that the first respondent's decision was based on errors of law and fact. He took into account irrelevant considerations and ignored relevant considerations. His decision was not rationally connected to the information before him and thus reviewable. I am satisfied that a strong case has been made out and that the review court will consider the aforementioned favourably in favour of the applicant.

[38] In conclusion a final word on the 2017 Regulations. These regulations were declared invalid as it had been found that the Minister of Finance who promulgated these regulations acted *ultra vires* and contrary to the powers given to him in s 5 of the PPPFA. A review court will have an opportunity to consider this aspect again notwithstanding the fact that the tender process was initiated and finalised during the period when the declaration of invalidity was suspended. Regulations 4 and 9 depart from the provisions of s 217 of the Constitution and do not meet the threshold of advancing the objectives in s 217(1) to be read with s 2(1)(f) of the PPPFA. An award shall be made to the entity that scores the highest points, unless objective criteria justify the award to another tenderer. Regulation 4 unlawfully creates a criterion to disqualify tenderers before their tenders have been evaluated. If it applied *in casu*, it effectively meant that the first respondent did not need to follow the PPPFA because of a discretionary power, without a framework to pre-decide which tenders are deemed worthy and even without evaluating them.

Irreparable harm

[39] I am satisfied that if *interim* relief is not granted, the applicant stands to suffer irreparable harm. If the applicant is eventually successful with its review

application, the contract works might have been concluded by then and in such a case, the applicant will be saddled with a hollow judgment.

Balance of convenience

[40] I have taken note of the fact that the second respondent proceeded with the works notwithstanding the fact that the applicant indicated its intention to launch an application for relief. The second respondent has not even established site by then. The mere fact that work in an amount of R6.5 million has been completed could not stand in the way of an *interim* interdict. The first and second respondents acted at their own peril notwithstanding the imminent litigation. The *dictum* of Conradie J in *Corium (Pty) Ltd and Others v Myburgh Park Langebaan (Pty) Ltd and Others*[34] is apposite. This *dictum* has been accepted to be correct in *Actaris SA (Pty) Ltd v Sol Plaatjie Municipality and Another.*[35] The strong words of Bosielo J (as he then was) in paragraph 27 are apposite *in casu*. The attitude of the respondents to continue with the implementation of the contract while faced with an urgent application, issued and served at a stage when no road works have been embarked upon, speaks in the words of the learned judge of "sheer intransigence and arrogance."

[41] I have taken due notice of the manner in which courts must consider the balance of convenience in these kind of applications. The Constitutional Court has made itself clear in paragraphs 65 and 66 of *OUTA* quoted above.[36] I accepted that many roads in the Province need urgent rehabilitation. However, in my view, and if the Department has delayed taking corrective steps, it shall not all of a sudden advertise tenders just before the festive season and then award tenders when most people are on holiday. Then, when asked to give reasons for an award, it wasted time and energy to initially refuse to give reasons, but eventually gave reasons about a month later and only after taken to court. Instead of preventing implementation of the tender award and agreed to an interdict, it allowed the second respondent to proceed. Also, when

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[34] 1993 (1) SA 853 (CPD) at p 858
[35] [2008] 4 All SA 168 (NC) paras 21 – 27
[36] Quoted *supra*: fn 16

requested to agree to truncated time periods in order to have the review finalised as soon as possible, it, through its counsel remained quiet. There was nobody in court to provide instructions to her. Obviously, the impact of the restraining order will have a negative effect on the duties of the Department, immediate service delivery and the public using the particular road, but I was satisfied that it is constitutionally appropriate to have granted the interdict. The balance of convenience favoured the granting of relief and the applicant, the unsuccessful tenderer, who was entitled to fairness and due compliance with s 217 of the Constitution and the provisions of the PPPFA during the relevant tender process. In the process of considering the orders to be granted, I could not take my mind off the sheer difference between the tender prices. Why shall the *fiscus* be held liable to pay 30% more to the second respondent than the price tendered by the applicant? Mr Grobler conceded that the applicant is a major role player in the industry. The public interest, on which the respondents so heavily relied, will not be served by allowing the payment of extravagant amounts to the second respondent in this particular factual matrix.

No satisfactory alternative remedy

[42] There is no alternative satisfactory remedy. In my view, the applicant had no other option than to approach the court for *interim* relief in order to mitigate losses that it may suffer as a result of a finding by the review court that the first respondent's decision should be reviewed and set aside. A claim for damages is in my view not a suitable alternative remedy. Protracted litigation will follow in order to prove damages and there is always the possibility that the dissatisfied litigant will take the judgment on appeal which will further delay finalisation and increase costs. The applicant requested an undertaking from the first respondent to suspend the implementation of the tender, but it refused.

VIII CONCLUSION

[43] I conclude therefore that the applicant has proven the four requisites of an *interim* interdict and consequently, relief was granted as requested.

[44] Both respondents complained that the applicant acted contrary to the rules in amending its notice of motion midstream. In order to stay away from any controversy and without having to consider the various submissions, I decided to grant relief as contained in paragraph 3 of my order, *ie* that the applicant's review application shall be instituted on or before 22 April 2022. This might have caused unnecessary costs, but hopefully provided sufficient clarity.

[45] I believed that I could act as case flow manager to oversee the management of the future proceedings and consequently, during oral argument I requested counsel to provide me with suitable dates for the hearing of the review application in the event of a finding that an *interim* interdict might be granted. Counsel for first and second respondents, either could not receive instructions, or were not prepared to commit their clients to truncated time periods in order to ensure that the review application was speedily entertained.

[46] Mr Snellenburg requested me to grant costs orders in favour of the applicant at this stage of the proceedings. In my view and although the applicant achieved success with the *interim* interdict, the court considering the review application will eventually be in the best position to decide what would be an appropriate order. Consequently, I decided to let the costs stand over for later adjudication.

[47] Consequently, orders were granted on 28 March 2022 as encapsulated in paragraph 1 *supra*.

J P DAFFUE, J

On behalf of Applicant	:	Advv N Snellenburg SC & JJ Buys
Instructed by	:	L&V Attorneys BLOEMFONTEIN
On behalf of 1st Respondent	:	Adv D de Kock
Instructed by	:	State Attorney BLOEMFONTEIN
On behalf of 2nd Respondent	:	Adv S Grobler SC
Instructed by	:	Peyper Attorneys