REPUBLIC OF SOUTH AFRICA

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

CASE NO: 33992/2019

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED: YES

18 DECEMBER 2019

MODIBA J

In the application for an urgent interim interdict:

MARCÉ PROJECTS (PTY) LTD First Applicant

MARCÉ FIRE FIGHTING TECHNOLOGY (PTY) LTD Second Applicant

And

CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY First Respondent

TFM INDUSTRIES Second Respondent

REASONS FOR THE INTERIM INTERDICT

MODIBA J:

INTRODUCTION

[1] On 18 November 2019, I granted with reasons to follow, an interim interdict in the terms set out below:

"It is ordered that:

[1.1] non-compliance with the forms, service and time-periods provided for in the rules of Court in accordance with the provision of rule 6(12) (a) is condoned, and, the application is dispensed with as one of urgency;

*[1.2] pending the determination of the review application instituted by the applicants under case number **33291/2019,** the first and second respondents are interdicted from implementing the contract entered into between them for the supply of fire engines and water trucks pursuant to the award of the tender initiated by the first respondent on 17 May 2019;*

*[1.3] the applicants shall forthwith approach the office of the Deputy Judge President for an expedited case management and hearing of the review application instituted under case number **33291/2019.***

[1.4] the costs of the application are reserved."

[2] I set out the reasons below.

[3] The first and second applicants, Marcé Projects (Pty) Ltd and Marcè Fire Fighting Technology ("Marcè"), sought the interim interdict on an urgent basis.

The first respondent, the City of Johannesburg ("the City") and the second respondent, TFM Industries (Pty) Ltd ("TFM") ("jointly the respondents"), took issue with the urgency of the application. They also opposed the application on the merits.

[4] The review application puts the tendering procedure based on Regulation 36(1)(a)(i) and (v) of the Municipal Supply Chain Regulations 2005, which empowers a municipality to adopt a shortened tendering process in the event of an emergency ("the Regulation 36 procurement process"), under scrutiny. This is the process which the City contends it adopted when it issued a letter on 16 May 2019 under the subject "a request for the confirmation of the availability of fire engine, water tanks" ("the RFI"), to a number of targeted prospective tenderers. Marcè is one of them. Ultimately, the review court will determine the extent to which the Regulation 36 procurement process ought to comply with section 217 of the Constitution. This section requires government entities to award tenders in accordance with a procurement system which is fair, equitable, transparent, competitive and cost-effective.

[5] Marcè alleges that the subsequent awarding of a tender to TFM for R582, 991, 957.22 (excluding VAT) is unlawful, unreasonable, procedurally unfair and inconsistent with the Constitution because the City failed to follow proper procurement procedures and to adhere to the specifications set out in the RFI.

[6] The City had already concluded a contract with TFM and its implementation had already commenced when Marcè instituted the review application and, subsequently, this application.

[7] The central issue in this application is whether Marcè, as an unsuccessful tenderer, has the right to interdict the further implementation of the tender and whether such an interdict, if granted, will encroach on the City's executive functions to TFM's prejudice.

BACKGROUND FACTS

[8] A report addressed to the City's Accounting Officer, requesting him to approve the outcome of the due diligence that the City undertook with Original Equipment Manufacturers ("OEMS") in South Africa, and the deviation in terms of Regulation 36(1)(a)(i) and (v) of the Municipal Supply Chain Regulations, to appoint TFM for the red fleet contract ("the Regulation 36 Report"), elucidates the background facts. It is attached to Marcè's and the City's papers in this application. Marcè contends that it obtained it from the Mail and Guardian website on 12 July 2019, the day the Mail and Guardian published an article concerning the awarding of the tender to TFM. The respondents do not dispute its authenticity. The City rather accused Marcè of obtaining it illegally and has threatened to prosecute it.

[9] The genesis of the dispute between the parties is an invitation to bid, the City published on 18 September 2018 under bid number A781, calling for proposals for the supply, delivery, maintenance and support services for the red fleet for a period of three years ("Bid A781").

[10] The bid closed on 2 November 2018. The Marcè entities did not tender for Bid A781 as separate entities. They did so as part of a group of entities called the Moipone Consortium.

[11] The bid was subsequently evaluated by the City's Bid Evaluation Committee ("BEC") and the Executive Adjudication Committee ("EAC"). From the Regulation 36 Report, it appears that on 26 February 2019, the EAC recommended to the Accounting Officer that the tender be awarded to Fleet Africa, Super Group, for R19, 577, 476.80 excluding VAT, fuel, tolls, services and repair costs.

[12] The report further states that on 13 March 2019, the City received a letter from Tallis Fleet, who was the preferred bidder for A781, withdrawing its tender. It is unclear from the report how Tallis Fleet became the preferred bidder given the EAC recommendation to award the tender to Fleet Africa, Super Group. It appears that subsequent to Tallis Fleet's withdrawal, the tender could not be awarded to Fleet Africa, Super Group as its bid did not include all the required services. It is also unclear from the Regulation 36 Report how Fleet Africa, Super Group, was recommended given this shortcoming.

[13] On 28 February 2019, one of the tenderers, Bidvest, addressed a letter to the City raising concerns regarding the intended awarding of the tender as recommended by the EAC. It placed the City on terms not to award the tender until its concerns were addressed. Subsequently, its attorneys addressed two letters to the City, making allegations regarding irregularities in the awarding of Bid A781 and threatened an urgent judicial review. It does not seem that it executed this threat.

[14] The Regulation 36 Report is silent on the City's response to these letters.

[15] Subsequently, at a meeting between various units within the City's establishment, a recommendation was made that Bid A781 be cancelled, and that a new bid excluding certain items with a pricing structure be introduced. Following this meeting, the EAC met to consider the withdrawal of the Tallis bid and referred the bid to the BEC for consideration. Marcè disputes that the recommendation was approved and acted upon. It contends that Bid A781 was still pending when the City issued the RFI on 16 May 2019. I need not resolve this dispute for the purpose of the present application.

[16] The Regulation 36 Report notes that the Tallis Fleet's withdrawal of its bid placed the City in a precarious position and increased the risk of managing fires within the City beyond acceptable levels. This placed the City at the risk of failing to deliver and fulfil its constitutional mandate of providing efficient and effective emergency management services to the citizens of the City of Johannesburg. The report also notes that the available fire rescue vehicles break down daily, costing the City a substantial amount of money to repair and maintain. As a result of the breakdowns, the City is unable to respond adequately to callouts. It will take 8 to 12 months from ordering to delivery of the vehicles.

[17] It is for that reason that a due diligence exercise was conducted with OEMs in South Africa to establish the availability of the vehicles on the South African market. The RFI was issued as part of this exercise. It is this due

diligence exercise that culminated in the production of the Regulation 36 Report, and the awarding of the tender to TFM.

[18] Although the Regulation 36 Report further states that the specifications for Bid A781 were used for this exercise with a view to securing approval for the procurement of the vehicles from the Accounting Officer, it appears that the RFI contained a new requirement namely; that the OEMs ought to have the required vehicles on rubber, available for inspection by City officials on 48 hours' notice.

[19] The RFI only gave the targeted OEMs 48 hours to respond. Marcè, TFM and several other targeted OEMs responded.

[20] Out of the entities that responded to the RFI, only TFM and Fire Raiders indicated that they had vehicles. Fire Raiders indicated that it only had one vehicle. TFM indicated that it could deliver all the specified vehicles within 10 weeks from placing an order. It also provided pricing for each vehicle, inclusive of the equipment to be installed to ensure that the vehicles are operational. It would provide the vehicles and the required services for the aforesaid amount. Pursuant to these responses, two City officials visited TFM premises for a site inspection. The Regulation 36 Report is silent on their findings. Marcè contends that during the inspection, TFM had no vehicles on rubber and therefore did not meet the RFI requirements. TFM and the City dispute this allegation. Again, it is for the review court to resolve this dispute.

[21] On 5 July 2019, the City awarded the tender to TFM. As already stated, Marcè learnt about this development from an article published in the Mail and

Guardian newspaper on 12 July 2019. It had received no communication from the City regarding the outcome of its response to the RFI. Marcè subsequently addressed a request to the City to meet to discuss the process followed to award the tender to TFM.

[22] On 22 July 2019, Marcè sought information from the City in relation to Bid A781 and the RFI in order to prepare for the proposed meeting. Having received no response from the City, on 24 July 2019 it addressed a request in terms of the Promotion of Access to Information Act[1] ("PAIA request") to the City in relation to the same information. It ultimately met with the City on 26 July 2019, having not received the requested information. It does not appear that this meeting yielded Marcè's expectations. By the end of July 2019, the City informed Marcè that it would not reconsider its decision to award the tender to TFM.

[23] On 20 September 2019, Marcè instituted the review application. On 27 September 2019, it instituted the present application.

ISSUES TO BE DETERMINED

[24] The following issues arose between the parties:

[24.1] whether Marcè has *locus standi* to bring this application;

[24.2] whether Marcè meets the test to get an audience in the urgent court;

[1] Act 2 of 2000

[24.1] whether Marcè makes out a case for the interim interdict to be granted.

LOCUS STANDI

[25] Relying on *Westinghouse Constitutional Court*[2], the City contended that Marcè lacks *locus standi* because it did not bid for Bid A781, but was part of the Moipone Consortium bid.

[26] Westinghouse sought to impugn the awarding of a tender to the successful bidder, Areva by Eskom. It was successful in the High Court. Avera and Eskom successfully appealed to the SCA.[3] Westinghouse further appealed to the Constitutional Court. One of the issues that arose in both the High Court and the SCA is whether Westinghouse has legal standing to impugn the tender. Both courts held that it did. The Constitutional Court found that it did not.

[27] The City's reliance on *Westinghouse Constitutional Court*, to impugn Marcè's *locus standi* is misplaced as the facts between the two cases are materially distinguishable for two reasons:

[27.1] Westinghouse tendered as an agent of Westinghouse Electric Company LLC ("Westinghouse USA");

---

[2] *Areva NP Incorporated in France v Eskom Holdings Soc Limited and Others* (2017 (6) SA 621 (CC)

[3] *Westinghouse Electric Belgium Société Anonyme v Eskom Holdings (SOC) Ltd and another* [2016] 1 All SA 483 (SCA)

[27.2] the contract under review is not Bid A781 but the contract awarded pursuant to the RFI.

[28] Legally, an agent and a member of a consortium, stand on completely different footing in relation to whether they have an interest in the proceedings. As an agent, Westinghouse could not have submitted the bid in its own right. Therefore, it had no interest in the outcome in its own right. When tendering as a consortium, the consortium has an interest in the outcome of the tender. However, this is not a distinction that should detain this court further, because, as I have stated above, the contract under review is not Bid A781, but, the contract awarded pursuant to the RFI.

[29] Although Marcè did not bid for Bid A781 as an individual entity, the City solicited its bid for the contract under review. Therefore on the interpretation of standing under both the common law and section 38[4] of the Constitution, Marcè as a bidder does have standing to impugn the awarding of the tender to TFM.

[30] Therefore the City's *locus standi* point is dismissed.

---

[4] This section provides:

> "38. Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are-
> (a) anyone acting in their own interest;
> (b) anyone acting on behalf of another person who cannot act in their own name;
> (c) anyone acting as a member of, or in the interest of, a group or class of persons;
> (d) anyone acting in the public interest; and
> (e) an association acting in the interest of its members."

URGENCY

[31] The first hurdle that the applicant had to meet to succeed in the interim relief that he sought, relates to urgency.

[32] Rule 6 (12) of the Uniform Rules of Court provides for the abridgment of the times for the service and filing of process and documents prescribed by the Uniform Rules of Court, and the departure from the established sitting times of the court. The rule provides:

> *"6(12) (a) In urgent applications the court or a judge may dispense with the forms and service provided for in these rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these rules) as it deems fit.*
> *(b) In every affidavit or petition filed in support of any application under paragraph (a) of this subrule, the applicant must set forth explicitly the circumstances which is averred render the matter urgent and the reasons why the applicant claims that applicant could not be afforded substantial redress at a hearing in due course."*

[33] To qualify for an audience in the urgent court, there is a test that an applicant has to meet, emanating from Rule 6 (12). I deal with it below. Where a matter lacks urgency, the court may, for that reason alone, strike the application from the roll.

[34] Concerning the procedure in Rule 6 (12), Notshe AJ stated as follows in *East Rock Trading 7*:

> *"[6] The import thereof is that the procedure set out in rule 6(12) is not there for the taking. An Applicant has to set forth explicitly the circumstances which he avers render the matter urgent. More importantly, the Applicant must state*

> *the reasons why he claims that he cannot be afforded substantial redress at a hearing in due course. The question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of absence of substantial redress in an application in due course. The rules allow the court to come to the assistance of a litigant because if the latter were to wait for the normal course laid down by the rules it will not obtain substantial redress."* [5]

[35] Thus, the test for urgency when an audience is sought in the urgent court is two-fold:

35.1 whether the applicant brought the application with the requisite degree of urgency;

35.2 whether, not hearing the application on the basis of urgency will deny the applicant substantial redress in due course.

[36] In *Mogalakwena Local Municipality*[6] the court set out the general approach to determining urgency in urgent applications. It stated that an evaluation ought to be undertaken by an analysis of the applicant's case, taken together with allegations by the respondent which the applicant does not dispute, bearing in mind the general discretion that the court has in such applications in terms of Rule 6 (12). I followed this approach when determining the dispute between the parties in respect of urgency, and, found that Marcè meets both requirements.

---

[5] *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others* [2011] ZAGPJHC 196 in paragraph 6

[6] *Mogalakwena Local Municipality v Provincial Executive Council, Limpopo and Others* [201] 4 All SA 67 (GP) at paragraphs 64 and 65

Bringing the application at the first available opportunity

[37] On the common cause facts, Marcè did not bring the application promptly after it learnt on 12 July 2019 that the City awarded the tender to TFM. Relying on *Dimension Data*[7]*,* Marcè justifies the delay on the efforts it took, as set out above, by requesting information from the City, and attempting to avoid litigation by meeting with the City.

[38] The respondents contended that this delay is unjustified as Marcè had all the information it required to bring both the review application and the application for interim relief. They also contended that Marcè failed to justify bringing the application for the interim interdict a week after launching the review application. In this regard, TFM relied on *Mhoko*[8] and *Gallagher*[9]*.*

[39] The City also cited *Millennium Waste Management SCA*[10] to further peddle this contention. It contended that Marcè ought to have expected it to promptly contract with the successful tenderer and implement the tender, particularly because the items under procurement relate to emergency services.

[40] *Dimension Data* is trite authority for justifying the delay to launch an urgent application while the applicant resorts to measures to avoid litigation.

---

[7] *Dimension Data (Pty) Ltd v Minister of Justice and Constitutional Development and Another* (25737/2016) [2016] ZAGPPHC 842
[8] *Mhoko Security Services CC v City of Cape Town* 921132/2018) [2018] ZAWCHC 168 (20 November 2018 Savage J
[9] *Gallagher v Norman Transport Lines (Pty) Ltd*
[10] *Millennium Waste Management v Chairperson Tender Board* 2008 (2) SA 481 (SCA)

In *Millennium Waste Management*, the SCA held that an aggrieved bidder ought to anticipate that after announcing the awarding of a tender, contracting with the successful tenderer and implementation would promptly follow.[11]

[41] The facts in *Mhoko* are distinguishable. Mhoko, an unsuccessful tenderer, sought to challenge the City's lawful termination of its month to month contract, about six months after its tender was extended on a month to month basis following its termination. In this period, Mhoko also unsuccessfully appealed the awarding of the tender to another tenderer. The conclusion in *Mhoko*, that that the applicant failed to bring the application at the first availability, thereby creating its own urgency, cannot be applied to Marcè under the present circumstances.

[42] *Gallagher* is also distinguishable because Marcè did not simply sit back without seeking relief. Further, unlike the applicant in *Gallagher, Marcè* is also not approaching the court without a full and proper explanation for its delay.

[43] By 12 July 2019, Marcè had obtained the Regulation 36 Report. An analysis of Marcè's founding affidavits in both applications reveals that ultimately this is the information it relied on to institute the review application and a week later, the application for interim relief. By the end of July 2019, it knew that the City would not reconsider its decision in respect of the RFI.

[44] The question arises whether it was necessary for Marcè to wait for the City to respond to its request for information to bring this application which, as

[11] At paragraph 23

I have already alluded to, it only brought a week after instituting the main application.

[45] The stance taken by the City to Marcè's request for information, perplexes this court. Its lamentation that Marcè orchestrated the urgency it seeks to rely on, by lying dormant after it learnt that the award has been made, and that it would not reconsider its decision, is deplorable given that it failed to respond to Marcè's request for the information it required to exercise its rights. Its response to the information contained in the Regulation 36 Report, which it obtained in the public domain was not only intimidating, it thwarted any engagement on the tender. This conduct by the City renders the present facts distinguishable from *Westinghouse*.

[46] I do not consider it appropriate to second guess Marcè's discomfort with relying primarily on the Regulation 36 to bring the applications, especially considering the City's response to Marcè's quest to obtain information and to engage on the tender. Marcè apparently did not have all the information it required to exercise its rights. Hence, its version is speculative in some respects. The grounds of review surmmarised in paragraphs 70.3.4 and 70.3.6 of this judgment and the respondents' answer to these grounds illustrate this point. Further, Marcè may not have pleaded certain issues that bolster its challenge because it was not aware of their existence.[12]

[47] Furthermore, some of Marcè's grounds of review, when read in light of the respondents' versions as set out in their answering affidavits, indicate that

[12] *Helen Suzman Foundation v Judicial Service Commission (Trustees for the Time Being of the Basic Rights Foundation of South Africa as amicus curiae)* 2018 (7) BCLR 763 (CC) at paragraph 59.

even with the information contained in the Regulation 36 Report, it clutched at straws to understand the process followed to award the tender, its correlation to Bid 781, the criteria used to evaluate the RFI and the basis on which the tender was awarded to TFM. TFM's version on the questions Marcè raises in respect of some of these issues, as well as its response to the RFI, indicates that it too probably did not have the same comprehension as the City in respect of the RFI process and its correlation to Bid A781.

[48] The record that the City has filed in the review application as required in terms of Rule 53 consists of several arch lever files. When compared to the Regulation 36 report by sheer size, the latter document only contains scant information on the RFI. It does not include the responses of the other targeted OEMs. It only sets out summaries of their responses. It also does not include documents that are part of Bid A781.

[49] The corollary to an unsuccessful tenderer's duty to promptly impugn the awarding of a tender, is the duty upon the contracting government entity to promptly engage with it and to accede to its requests for information. Where the City fails in this duty, it is dissembling of the City to contend that the unsuccessful tenderer should not be given an audience in the urgent court because it delayed to approach the court.

[50] For its tardiness in responding to Marcè's request for information, the City ought not to benefit from Marcè's delay in bringing the application by having it struck from the roll. It only responded to Marcè after it instituted the

application, declining Marcè's PAIA request. Yet it subsequently filed the information as required by Rule 53 (1).

[51] The City's stance taken at the 26 July 2019 meeting, which thwarted meaningful engagement on the bid, coupled with its delay in responding to Marcè's request for information was unreasonable. It placed Marcè in a precarious position by frustrating Marcè's efforts to engage with the tender process. Hence, Marcè was also in the dark regarding the implementation of the contract, until the City's Mayor Herman Mashaba tweeted this information on 23 September 2019.

[52] That customarily, in review applications, an applicant has the right to supplement its founding affidavit after the Rule 53(1) record is filed, does not justify penalizing Marcè for delaying to bring the applications under the present circumstances. Rule 53(1) was proclaimed prior to the advent of PAIA. 53(1) and PAIA have different objectives. Rule 53 (1) obliges a decision maker to file a record relating to the impugned decision. The record enables the applicant and the court to fully and properly assess the lawfulness of the decision-making process. It allows an applicant to interrogate the decision and, if necessary, to amend its notice of motion and supplement its grounds for review. On the other hand, PAIA affords any person, subject to certain statutory limitations, the right of access to any information held by the state, which it requires to exercise its rights. While reasons for the refusal of Marcè's PAIA request are not before this court, notably, the City does not assert the applicability of any statutory limitation to the PAIA request. Where a PAIA

request is denied, an applicant is hampered in the formulation and prosecution of case.[13]

[53] Penalizing Marcè for the delay under these circumstances would send an undesirable message to bearers of information, that they may disregard the objectives of PAIA by denying a requester's efforts to obtain information and invariably, frustrate its efforts to exercise its rights.

[54] Under the present circumstances, I find that Marcè's delay in bringing this application is justified.

[55] In any event, the ultimate test on urgency is whether, if not given an audience in the urgent court, the applicant will be denied substantive redress in due course. To this requirement I now turn.

Substantive redress in due course

[56] It is trite that upon the successful review of a tender, courts have a wide discretion to order a multi-dimensional just and equitable relief in terms of section 172 (2) of the Constitution, taking into account the primacy of the public interest against the rights, responsibilities and obligations of all the affected parties.[14] Therefore, determining whether an applicant meets the substantial redress in due course requirement should not be considered from the narrow perspective of the relief that an applicant seeks.

---

[13] *Hellen Suzman Foundation* at paragraph 59.
[14] *AllPay Consolidated Investment Holdings (Pty) Ltd v CEO, SASSA* 2014 (4) SA 179 (CC) at para 33 and 39

[57] It has to be determined from the multi-dimensional perspective of the nature that section 172 (2) calls for, to circumvent, to the extent possible, the practical difficulties that will face the reviewing court in the event that it sets the impugned tender aside. To this the court in *Pikoli*[15], relied on by *Marcè,* alluded when it said:

[57.1] one of the main aims of an interim interdict is to preserve the status *quo* pending the final determination of the rights of parties to pending litigation;

[57.2] the law requires of all concerned to respect the pending legal process and, as far as is reasonably possible, to limit the practical consequences of the challenged action. Therefore, in appropriate circumstances, a litigant should halt its actions if it is aware that those actions are being challenged and that failure to do so may even result in liability for contempt of court;

[57.3] when considering whether to grant or refuse an interim interdict, the court seeks to ensure, as far as is reasonably possible, that the party who is ultimately successful will receive adequate and effective relief.

[58] Both the City and TFM contend that the review application will give Marcè substantial redress in due course subject to the court's remedial discretion, but for different reasons, with which I disagree.

---

[15] *Pikoli v President of the Republic of South Africa and Others* 2010 (1) SA 400 (GNP) at paragraphs 403H to 404A

[59] TFM contends that other litigants have found themselves in this position. There is nothing peculiar about the position that Marcè finds itself in.

[60] The City reprobates and approbates on whether Marcè will not have substantial redress in due course if the application is not heard urgently. On the one hand, it contends that the review court is entitled to grant just and equitable relief that does not require the restoration of the status *quo* by ordering the City to re-run the tender process anew. On the other hand, it contends that in the event that the reviewing court orders a re-run, Marcè will obtain the substantial redress of the kind it seeks in due course, as it will have the opportunity to participate in a fair and lawful tender process. Yet it also argues that there is nothing to interdict as the tender had been partially implemented with 17 vehicles having been delivered by 20 September 2019.

[61] The City seeks to procure 92 vehicles under the RFI. With 17 having been delivered by the time the review application was launched, and 30 more in an advanced state of manufacturing, the tender has only been partially implemented. These circumstances are ideal to keep the status *quo* constant, to enable the reviewing court to set aside the tender from the day of the order, or any subsequent date, in the event it find that it was awarded unlawfully. Such an order would promote the lawful, fair, equitable and competitive procurement right that Marcè asserts, while protecting the interest the public has in lawful procurement processes, which includes the efficient use of scarce public resources. Such an order would be completely out of question if the tender is implemented further.

[62] On a tender valued for R582,991,957.22, the prospective loss to the state that could be prevented by halting the further implementation of the tender is substantial. It enhances Marcè's argument for the absence of substantial redress in due course.

[63] As argued by counsel for Marcè, any negative consequences will be offset by the expedited hearing of the review application, with court ordered timelines for the filing of papers in that application. These measures are in place. Marcè promptly requested the Deputy Judge President to place the review application under judicial case management as ordered in the interim order. The Deputy Judge President has appointed me as the case manager. I have held the first case management meeting with the parties during which timelines for the filing of papers in the review was agreed. The provisional date of hearing in February 2020 has been sent to the office of the Deputy Judge President for allocation.

[64] The City's fire response capacity has been tremendously enhanced by the delivery of 17 vehicles, compared to where it was prior to the award of the tender. This addresses the public interest considerations in relation to negative consequences that the interdict might create.

[65] I found that not hearing Marcè on an urgent basis under circumstances where the tender is only partially implemented, will unjustly limit the just and equitable relief that the court would grant to effectively vindicate infringed rights and protect the public interest in the event that the tender is found to have been unlawfully awarded and is set aside.

REQUIREMENTS FOR AN INTERIM INTERDICT

[66] It is trite that an applicant for an interim interdict to be successful, it ought to meet the following requirements according to the well-known 1914 judgment in *Setlogelo v Setlogelo:*

[66.1] the existence of a *prima facie* right;

[66.2] a well-grounded apprehension of irreparable harm if the interim relief is not granted (and the ultimate relief is granted);

[66.3] the balance of convenience favours the granting of the interdict;

[66.4] the absence of a suitable alternative remedy.

[67] Concerning the application of this test in a constitutional dispensation, the Constitutional Court in *OUTA* said:

> *"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."*[16]

[68] Therefore, the refined test for an interim interdict of the nature Marcè seeks is as follows:

[68.1] an interim interdict restraining the exercise of statutory powers is not an ordinary interdict;

[16] At paragraph 45.

[68.2] courts grant it only in exceptional cases and when a strong case for that relief has been made out.[17]

[69] Guided by the approach the Constitutional Court adopted in *OUTA*, I did not traverse the merits of the review at this stage, lest I, without the benefit of the full record, which might necessitate the filling of supplementary affidavits, inappropriately traverse the purview of the review court. I considered the issues in the review for the restricted purpose of determining whether Marcè makes out a strong case for the interim interdict to be granted.

[70] Marcè seeks the awarding of the tender to TFM reviewed and set aside on the basis that it is irregular, unlawful and unconstitutional. It relies on the following grounds of review:

[70.1] non-compliance with section 217 of the Constitution and other applicable legislative prescripts;

[70.2] having never before manufactured and delivered fire trucks in South Africa, TFM should not have been selected;

[17] *Gool v Minister of Justice and Another* 1955 (2) SA 682 (C) 688F and 689C and *National Treasury and Others v Opposition to Urban Tolling Alliance and Others (2012 (6) SA 223 (CC)* at paragraph 43

[70.3] there was no basis to adopt the deviation procedure to award the tender as:

[70.3.1] there was already a structured tender process under way;

[70.3.2] there was no emergency justifying the deviation;

[70.3.3] TFM has not delivered the vehicles as required in terms of the RFI;

[70.3.4] TFM did not meet the specifications as set out in the RFI in that it did not provide:

(a) the confirmation of the vehicles sought with pricing;

(b) motor vehicles which were on rubber and could be inspected within 48 hours;

(c) motor vehicles that meet the local content requirements prescribed by the DTI.

[70.3.5] TFM's appointment is unprocedural, irrational and unreasonable in that Marcè was not afforded the same opportunity to submit a tender that did not meet all the specified requirements;

[70.3.6] contrary to what was stated in the RFP, the City paid an upfront payment to TFM.

[71] I found that the application meets the requirements for an interim interdict on the basis of the refined test in *OUTA*, hence the order granted on 18 November 2019.

The existence of a prima facie right

[72] The right that Marcè asserts in this application is the right to participate in a lawful, fair, reasonable and transparent procurement process. It does not contend that it is entitled to have the award made to it. It contends that due to the irregularities that it has identified in the process followed by the City when awarding the tender to TFM, it has been stripped of this right in that the awarding of the tender to TFM under those circumstances was unlawful.

[73] Relying on *OUTA*, the respondents contended that Marcè lacked the right to seek interdictory relief.

[74] The City disagrees that Marcè was stripped of its right to participate in a lawful, fair and transparent procurement process. It contends that Marcè was afforded an opportunity to participate in the RFI and did not, when it so participated, complain that the process is irregular. It failed to meet the City's requirements in that it had no vehicles on rubber, did not provide pricing and did not meet the DTI local content requirement, hence it was disqualified and the City did not engage with it further. Therefore, Marcè has nothing to protect by way of interim relief, without which irreparable harm would ensue if the interdict is not granted. Marcè does not require the interdict to protect its fair process rights, therefore it has failed to prove a *prima facie* right in the sense contemplated in *OUTA*[18].

[75] Section 217 of the Constitution is the foundational provision applicable in all procurement processes. It requires all other procurement legislation, regulations and policies to be implemented in accordance with a procurement system that is fair, equitable, transparent, competitive and cost effective.

[76] Marcè could not complain that the tender process was irregular when it received the RFI or when it responded to it because it had no information at that stage to formulate such a view. The first inclination it formulated in relation to the alleged irregularities is when it obtained the Regulation 36 Report on 12

[18] At paragraphs 48-50

July 2019. By then, not only was it already part of the RFI, a decision in respect of the RFI had been made.

[77] *OUTA* is distinguishable from the present facts. *OUTA* does not limit the *locus standi* of an applicant who seeks to interdict the implementation of a tender pending a review to a tenderer who contends that the bid was wrongly awarded to the successful tenderer in that it ought to have been awarded to it.

[78] In *OUTA*, the Constitutional Court set aside the interim interdict granted by the High Court on the basis that the impugned decisions fell within the framework of government policy. It was not the applicant's case in *OUTA* that the impugned decisions were taken unlawfully. The applicant sought to impugn the decisions on the sole basis that the costs of collecting e-tolls are unreasonably high and irrational. Hence, the Constitutional Court found that preventing the implementation of the decision under those circumstances will offend the doctrine of separation of powers.

[79] Here, Marcè contends that the impugned decision is unlawful as it was implemented contrary to the section 217 of the Constitution. No organ of state may use the veil afforded to it by the doctrine of separation of powers to implement a decision that was allegedly taken unlawfully. Therefore, the City's reliance on *OUTA* under these circumstances is misplaced.

[80] In *Tasima*, the Constitutional Court observed that section 217 seeks to protect scarce public resources. It went further to say, once those charged with the responsibility to procure public goods start operating outside the ambit of this section, corruption thrives. In *casu*, while Marcè does not allege that the tender is tainted with corruption, the allegations of irregularities it makes in this application, even in the absence of corruption, if found to have occurred, will demonstrate a failure to protect public resources within the ambit of section 217.

[81] Where the impugned decision relates to the use of public resources by authorities charged with the responsibility to protect them, limiting the *prima facie* right requirement as envisaged in *Setlogelo* to the rights of the applicant before court would not give effective meaning to section 217. The broader public interest in the lawful procurement processes, which includes the effective use of public resources has to be taken into account when assessing the need for an interdict.

[82] In *casu*, a clear public interest to protect public funds exists. As already mentioned, on 26 February 2019, the EAC recommended to the Accounting Officer that the tender be awarded to Fleet Africa, Super Group, for R19, 577, 476.80 excluding VAT, fuel, tolls, services and repair costs. Tallis subsequently became the preferred bidder. It had bid for R132,837,306.51. TFM tendered for R91, 360,498.04. At that stage, although it was the lowest

bidder, it was never recommended for the tender. The procurement of the same goods was subsequently effected through the RFI, leading to the awarding of the tender to TFM in July 2019 for R582, 991, 957.22 (excluding VAT). Notably, seemingly equivalent to the Fleet Africa, Super Group offer, TFM will only provide vehicles and equipment under the present tender. The substantial difference between the Fleet Africa, Super Group offer and TFM's offer in Bid A781 on the one hand, and the amount TFM was awarded the tender for pursuant to the RFI on the other hand raises serious questions about the basis for awarding the tender to TFM as well as the effective use of public resources. These issues stand to be determined in the review.

[83] Therefore, Marcè has successfully established two clear rights worthy of protection, namely:

[83.1] its right as a tenderer to participate in a tender process that complies with section 217;

[83.2] the public interest in the procurement process, which includes the protection of scarce public resources.

A well-grounded apprehension of irreparable harm

[84] Marcè must show a reasonable apprehension of irreparable harm if the relief is not granted.[19] Irreparable implies that the effects of the harm could not be reversed. The harm must also be anticipated and ongoing.[20]

[85] The harm to be prevented in the present circumstances is the continued implementation of a tender in the event that the review court finds it to have been unlawfully awarded and the risk it places on the integrity of the review process. If the interdict is not awarded, the continued implementation of the tender will render the review academic as it will limit the just and equitable relief that the court may award. The review court is unlikely to set aside the tender and contract concluded pursuant thereto retrospectively, as doing so will require the return of the vehicles that have been delivered and the return of funds paid. Such an order will be impractical, as it will not restore the parties to their respective positions before the award was made.

[86] Awarding the interdict on the other hand, will prevent further implementation of the contract, thereby preserving the practical effect of the just and equitable relief that the reviewing court may award. This will make setting aside the award from the date of the interdict or any other subsequent date as determined by the reviewing court possible. The relief may include a re-run of the

[19] Outa at paragraph
[20] *City of Tshwane Municipality v Afriforum and Another* 2016 (6) SA 279 (cc) at para 79.

tender in respect of the remaining vehicles, thereby promoting the right to participate in a lawful, fair, equitable, competitive and just tendering process which Marcè seeks to assert in the review. It will also prevent significant financial loss to the fiscus as a substantial amount of funds are yet to be employed.

[87] Interdicting the further implementation of the tender does not offend the principle of separation of powers under the present circumstances, because in the review Marcè is not asking the court to usurp or to interfere with the exercise of the City's executive powers within the framework of the Constitution, the law or government policy. The doctrine of separation of powers does not provide for a total separation of the three arms of government. It also does not sanction the unfettered exercise of power by the three arms of government. It operates subject to a system of checks and balances.[21]

[88] The decision Marcè seeks to impugn in the review is consistent with the principle of separation of powers. An organ of state is only entitled to act to the extent it is empowered by the Constitution, the law and government policy. The constitutional principle of legality requires organs of state to act lawfully and within the boundaries of the Constitution.[22] Where an organ of state acts beyond its constitutional and statutory authority, it is precisely

[21] *Ex Parte Chairperson of The Constitutional Assembly: In Re Certification of The Amended Text of The Constitution of The Republic of South Africa, 1996* 1997 (2) SA 97 (CC); See also *OUTA* at paragraph 44.
[22] *Member of the Executive Council, Department of Education, Eastern Cape Province and Another v Eduplanet* (Pty) Ltd (189/17) [2017] ZAECGHC 9 at paragraph 18.

the function of the court to prevent such action. Under such circumstances, judicial intervention is consistent with the doctrine of separation of powers.

The balance of convenience

[89] It is trite that this requirement involves the balancing of competing interests in respect of the harm the respondents would suffer if the interdict is granted and that which the applicant would suffer if it is not granted.

[90] Save for stating that 30 vehicles scheduled for delivery on 30 November 2019 are in advanced stage of manufacturing, TFM has not placed facts before the court in relation to the prejudice it will suffer if the interdict is granted. The log jam created by the interdict will not be long given the prospects of an expedited hearing of the review application, alleviating any prejudice that TFM is likely to suffer.

[91] The public interest straddles the two competing interests. On the one hand, the vehicles under procurements are intended to enhance the City's fire fighting capacity. On the other hand, the City has an obligation to protect scarce public resources by procuring goods and services through a lawful, fair, equitable and competitive tender process.

[92] The City's diminished fire-fighting capacity and its inability to respond adequately to fire hazards, thereby saving property and lives is used as an emergency to justify embarking on a truncated tender process in terms of Regulation 36. When the Regulation 36 report was prepared, a projection was made that it is desirable to increase the City's fire fighting particularly because the winter months are fire prone. This projection does not hold for the summer months.

[93] Although granting the interdict is not convenient for the City for the reasons already stated, the delivery of 17 vehicles on 20 September 2019 probably enhanced the City's fire response capacity from its pre-Bid A781 state. The City's increased fire-fighting capacity tilts the scale of convenience in favour of awarding the interdict.

[94] The public interest in the protection of scarce public resources is undermined when tenders are awarded unlawfully given the inherent risk of cost ineffective procurement in such instances. The prospect of saving significant financial loss to the City occasioned by an unlawfully awarded tender tilts the scale of convenience in favour of awarding the interim interdict.

The absence of a suitable, alternative remedy

[95] The mootness of a review process once the tender is fully implemented, satisfies this requirement. Not granting the interdict will annihilate any suitable remedy that the review court may consider to be just and equitable.

INTERESTED PARTIES

[96] Marcè acknowledges the interest of the other tenderers in these proceedings; hence it intends joining them in the review. It also intends issuing a section 16A notice due to the constitutional nature of the relief that it seeks in the review.

[97] The substantial public interest in this matter due to the considerable financial loss to the fiscus if the tender is found to be awarded unlawfully, warrants a proper representation of the public interest in these proceedings. It is for that reason that I grant an order below, inviting organizations that protect such interests in matters such as these, to intervene in order to represent the public interest not only in the review, put also in the application in terms of section 18 (2) and (3) of the Superior Court's Act[23] which TFM instituted on 10 December 2019.

[98] The respondents are eager to have the section 18 (2) and (3) application heard. Such an application is inherently urgent. Its urgency renders the Rule 16A process nugatory.

[23] No 10 of 2013.

[99] Parties external to the state apparatus face serious impediments when they seek to address alleged irregularities in the exercise of executive functions. The limitations that Marcè encountered when seeking to obtain information from the City and to engage with it on its decision to award the tender to TFM, bears testament to this proposition. State entities tasked with addressing such allegations may be better placed for this task as they are equipped with appropriate statutory powers. Notably, the City is already subject to the attention of such an entity in relation to procurement activities for amongst others, its firefighting component.

[100] On 29 March 2019, President Cyril Ramaphosa published proclamation No R.17 of 2019[24] referring it for investigation, the procurement and contracting for several goods and services by the City of Johannesburg to the Special Investigating Unit in terms of section 2 (1) of the Special Investigating Units and Special Tribunals Act.[25] He made the referral on the basis that allegations contemplated in section 2(2) of the said Act have been made in relation to the affairs of the City of Johannesburg. Section 2 (2) provides:

"(2) The President may exercise the powers under subsection (1) on the grounds of any alleged-

(a) serious maladministration in connection with the affairs of any State institution;
(b) improper or unlawful conduct by employees of any State institution;
(c) unlawful appropriation or expenditure of public money or property;

[24] Published in Government Gazette No 42338 of 2019.
[25] No 74 of 1996.

(d) unlawful, irregular or unapproved acquisitive act, transaction, measure or practice having a bearing upon State property;
(e) intentional or negligent loss of public money or damage to public property;
(f) offence referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, and which offences was [sic] committed in connection with the affairs of any State institution; or
[Para. (f) substituted by s. 36 (1) of Act 12 of 2004 (wef 27 April 2004).]
(g) unlawful or improper conduct by any person which has caused or may cause serious harm to the interests of the public or any category thereof.

[101] As envisaged in section 2 (3) of the Act, the proclamation sets out terms of reference for the investigation. Notably, the award of a tender for vehicles and vehicle maintenance services from an entity called Fire Riders (Pty) Ltd and repairs and maintenance work at fire stations is included in a schedule to the proclamation. The inclusion of these awards in the terms of reference as well as the papers before court implicates the awarding of tenders in relation to the firefighting component of the City in controversy for quite some time. The allegations that Marcè makes against the City in the review application indicates that the controversy has continued beyond the publication of the proclamation.

[102] The terms of reference are extended to activities that took place after the publication of the award but relevant to, connected with, incidental or ancillary to matters mentioned in the Schedule, or involve the same persons, entities or contracts investigated under authority of the proclamation.

[103] While the Schedule specifies areas of investigation, it also includes ‘any related unauthorised, irregular or fruitless and

wasteful expenditure incurred by, or losses suffered by, the Municipality or the State.

[104] In terms of section 2(4) The President may at any time amend a proclamation issued by him.

[105] In the premises, I consider it appropriate to refer this judgment to the Special Investigating Unit for noting and where deemed appropriate, for action as mandated either by the above proclamation or by the Act.

[106] In the premises the following order is made:

ORDER

1. The order granted on 18 November 2019 is confirmed.

2. The Registrar of this Court is directed to:

2.1 identify organizations that represent the public interest in procurement matters, and send them this judgment in order to consider intervening in these proceedings in the public interest;

2.2 send this judgment to the Head of the Special Investigating Unit for noting and for any action deemed appropriate within its statutory mandate;

2.3 upload the papers in the application for review, the application for an interim interdict, the application for leave to appeal and the application

in terms of section 18 (2) and (3), for easy access by the organizations referred to above.

3. All the parties shall upload any further papers in all proceedings brought under the above case number on caselines and notify the other parties as well as my Clerk of such action by email.

_____

MADAM JUSTICE L T MODIBA
JUDGE OF THE HIGH COURT,
GAUTENG LOCAL DIVISION,
JOHANNESBURG

APPEARENCES

Counsel for applicants:	Advocate K Pillay SC assisted by Advocate Y Ntloko
Attorney for applicants:	Dlamini Attorneys
Counsel for first respondent:	Advocate M Sello assisted by Advocate M Seape
Attorney for first respondent:	Mkhabela Huntley Attorneys Inc.
Counsel for second respondent:	Advocate L Hollander
Attorney for second respondent:	Thomson Wilks Inc.
Date of hearing:	12, 14 November 2019
Date of granting order:	18 November 2019
Date reasons were furnished:	17 December 2019