REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2021/49674

CASE NO: 2021/51091

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

Date: 7 DECEMBER 2021 .....
(Signature)

CASE NUMBER: 49674/21

In the matter between

PUTCO (PTY) LIMITED Applicant

and

MEC FOR ROADS AND TRANSPORT, GAUTENG First Respondent

THE MINISTER OF TRANSPORT Second Respondent

CASE NUMBER: 21/51091

In the matter between:

TRUSTEES FOR THE TIME BEING OF THE BUS INDUSTRY RESTRUCTURING FUND	First Applicant
SOUTHERN AFRICAN BUS OPERATORS ASSOCIATION	Second Applicant

and

GAUTENG DEPARTMENT OF ROADS AND TRANSPORT	First Respondent
NATIONAL DEPARTMENT OF TRANSPORT	Second Respondent
MINISTER OF TRANSPORT	Third Respondent
SOUTH AFRICAN TRANSPORT AND ALLIED WORKERS UNION	Fourth Respondent
TRANSPORT AND ALLIED WORKERS UNION OF SOUTH AFRICA	Fifth Respondent
TRANSPORT AND OMNIBUS WORKERS UNION	Sixth Respondent
NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA	Seventh Respondent

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JUDGMENT

MUDAU, J:

[1] There are two applications before me for adjudication at this juncture. These are opposed urgent applications pursuant to Rule 6(12) (a) of the Uniform Rules. However, it is to be noted that only the time period for the filing of the notice of intention to oppose has been truncated. All other time periods for the filing of papers in Part A are unaffected. In both cases the relief sought is

similar. It was agreed by counsel that I may have regard to the evidence in the applications holistically and collectively for the purposes of deciding any of them individually.

[2] The applicants bring their respective urgent applications in two parts: In Part A, they both seek interim interdictory relief suspending the tender process initiated by the first respondent, the Gauteng Department of Roads and Transport, by publication of Tender for Contract No DRT 35/11/2019 on 15 October 2021. It is proper to emphasise that this judgment should not be read as in any way pre-empting the judgment in the review application regarding Part B.

[3] The first case is Putco (Pty) Ltd v MEC for Roads and Transport, Gauteng and Another, Case No: 2021/49674. The applicant, Putco (Pty) Ltd ("Putco") is a private company incorporated under the company law of South Africa. The first respondent is the MEC for Roads and Transport, Gauteng ("the Department"). The MEC is cited in his official capacity as the member of the executive council of Gauteng responsible for the Gauteng Department of Roads and Transport. The second respondent is the Minister of Transport as nominal respondent on behalf of the National Department of Transport.

[4] The second case is the Trustees for the time being of the Bus Industry Restructuring Fund and Another v MEC for Roads and Transport, Gauteng and Another, Case No: 2021/51091. The first applicant are the trustees for the time being of the Bus Industry Restructuring Fund ("BIRF"). They act in their representative capacity. The second applicant is the Southern African Bus Operators Association ("SABOA"). SABOA is an association not for gain, which is capable of suing and being sued in its own name in terms of its constitution.

The first respondent is the Gauteng Department of Roads and Transport ("the Department").

[5] The second respondent is the National Department of Transport ("NDOT"). The third respondent is the Minister of Transport ("the Minister"), who is cited in his capacity representing the State. The fourth respondent is the South African Transport and Allied Workers Union ("SATAWU"), a registered trade union. The fifth respondent is the Transport and Allied Workers Union of South Africa ("TAWUSA"), a registered trade union. The sixth respondent is the Transport and Omnibus Workers Union ("TOWU"). TOWU is a registered trade union.

[6] The seventh respondent is the National Union of Metalworkers of South Africa ("NUMSA"). NUMSA is a registered trade union. No relief is sought against the fourth to seventh respondents, collectively "the trade unions", who are cited as respondents for their interest in the outcome of this application.

[7] In the second case, BIRF stresses that in Part A of this application, they ask to intervene to interdict the tender process so as to allow the applicants an opportunity to pursue their review application without the risk of wide-spread disruption to the bus industry, or the risk that they will ultimately be faced with a *fait accompli* flowing from the published tender.

[8] The first respondent, the provincial Department in both cases, is the only party opposing the interdict applications. The Minister and NDOT, who have indicated their intention to oppose the review applications, have given notice that they will abide the judgment of the court in the matters to be determined in this judgment.

[9] Putco's application was prompted by an exchange of correspondence between itself and the Department. It is fitting to begin by sketching the factual and statutory context in which the litigation has occurred in both cases. On 26 October 2021, Putco instituted proceedings in this court for interim relief in which it sought a prohibitory temporary interdict in terms essentially similar to that sought by BIRF and SABOA. BIRF and SABOA launched theirs on 26 October 2021.

In Limine Issue

[10] The Department, in written heads of argument regarding Putco's application, raised a point *in limine* regarding the non-joinder of the other bidders, who in its view, have a direct and substantial interest in the outcome of this application. The Department argues that Putco should have joined all the "third party bidders" that "attended a compulsory briefing regarding the impugned tender". The Department contends that the non-joinder is a fatal flaw in the applicant's case. The application should be dismissed for this reason alone, so they contend.

[11] The legal position in this regard is trite. As Mlambo JA (as he then was) aptly stated in *Gordon v Department of Health, Kwazulu-Natal*[1] with reference to *Bowring NO v Vrededorp Properties CC and Another*[2]: "*The issue in our matter, as it is in any non-joinder dispute, is whether the party sought to be joined has a direct and substantial interest in the matter. The test is whether a party that is alleged to be a necessary party, has a legal interest in the subject-*

[1] 2008 (6) SA 522 (SCA) at para 9

[2] 2007 (5) SA 391 (SCA) para 21

matter, which may be affected prejudicially by the judgment of the court in the proceedings concerned".

[12] The usual approach is first, to consider whether the third party sought to be joined would have *locus standi* to claim relief concerning the same subject-matter, and then to examine whether a situation could arise in which, because the third party had not been joined, any order the court might make would not be *res judicata* against him or her, entitling him or her to approach the courts again concerning the same subject-matter and possibly obtain an order irreconcilable with the order made in the first instance. This has been found to mean that if the order or *'judgment sought cannot be sustained and carried into effect without necessarily prejudicing the interests'* of a party or parties not joined in the proceedings, then that party or parties have a legal interest in the matter and must of necessity be joined[3].

[13] As counsel for the Department was constrained to concede in the Putco application, the third party bidders have no lawful claim in law against the Department. There exists no legal interest worthy of protection that may be affected prejudicially by the judgment of the court. The point in *limine* for non-joinder of third party bidders accordingly stands to be dismissed.

Urgency

[14] The question of whether a matter should be enrolled and heard as an urgent application is governed by the provisions of Rule 6(12) of the Uniform Rules. The sub-rule allows the court or a Judge in urgent applications to dispense with

[3] Id.

the forms and service provided for in the Rules and dispose of the matter at such time and place, in such manner and in accordance with such procedure as to it seems meet. It further provides that in the affidavit in support of an urgent application the applicant "... *shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course*". The Rule is not there for the taking.

[15] As this court stressed in *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others*[4], "[T]he 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] The delay in instituting proceedings is not, on its own a ground for refusing to regard the matter as urgent. A court is obliged to consider the circumstances of the case and the explanation given. The important issue is whether, despite the delay, the applicant can or cannot be afforded substantial redress at a hearing in due course.[6]

[16] The applicants express fear that urgency exists for them because the closing date for bids is 7 December 2021, four (4) working days away from the hearing of these applications. In that event, the Department will evaluate bids and award contracts shortly after the closing date. Given the bid validity period of

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[4] (11/33767) [2011] ZAGPJHC 196 (23 September 2011).

[5] At para [6].

[6] At para [8].

120 days, it is likely that the Department will award contracts as soon as April next year, well before a hearing in the ordinary course can take place which is not seriously disputed. The respondents aver that the applicants have delayed in instituting the proceedings. They aver that the applicants have known of the intended publication for some time. As a result, they created their own urgency, the respondents argue. The background facts regarding urgency are set out below.

[17] On 4 March 2021, Putco wrote to the Department calling on it to negotiate in terms of section 46 of the National Land Transport Act 5 of 2009 ("NLTA") about the interim contracts (Letter "FA3"). Putco warned the Department in FA3 that, "Putco is considering whether to take the matter further as there is no reason in law for the Department not to negotiate the contracts with the incumbent operator". On 24 May 2021, the Department replied per letter marked "FA4" authored by the then Head of Department, Mr Sekhudu Mampuru. In it, the Department indicated, amongst other things, that section 46 (1) (b) of the NLTA upon which Putco relied, did not impose a mandatory obligation on the Department to negotiate the interim contract.

[18] Reference was made to a letter dated 30 August 2016, that is four years earlier, in which the Department undertook to negotiate in good faith with Putco for the 2016/2017 interim contract, which never took place and was not acted upon by Putco. It was further indicated that the Department would start to put the contracts on tender as soon as possible whilst the present contract was still running in order to comply with section 41 (5) of the NLTA, and not on the basis of section 46 as contended by Putco. The Department pointed out that failure to

put the contracts on tender would be failure to comply with the provisions of National Treasury instructions: SCM Instruction note 3 2016/2017, as well as a failure to comply with section 217 of the Constitution. Reference was also made to the provisions of section 2 (1) (d)(i) and (ii) of the Preferential Procurement Policy Framework Act 5 of 2000 ("PPPF Act"), which provides that every organ of state is to determine its preferential procurement policy and implement same with specific goals which may include contracting with persons; or categories of persons historically disadvantaged by unfair discrimination on the basis of race, gender or disability; and implementing the programmes of the Reconstruction and Development Programme as published in Government Gazette No. 16085 dated 23 November 1994.

[19] Putco replied on 18 June 2021, as per "FA5". In the letter, Putco explained that, in its view, the Department was not permitted to put the interim contracts out to tender because, amongst other things, an integrated public transport network was not yet in place.

[20] Indeed, on 30 June 2021, Putco carried out its legal threat by instituting proceedings on an urgent basis pursuant to Rule 6 (12) for interim relief to enforce the provisions of section 46 (2) of the NLTA against the City of Johannesburg Metropolitan Municipality and others, pending a referral of the matter to mediation and failing that, to an appropriate court. The application served before this court. In a judgment dated 26 August 2021, Putco's application did not succeed.

[21] In August 2021, the Department distributed a presentation about what it termed "oncoming [sic] tenders in line with SEC42 of NLTA". The presentation

indicated that the Department planned to put all subsidised service contracts out to tender. In reaction to this and on 10 September 2021, Putco's attorneys wrote to the Department as per "FA9". The letter explained that "[i]n the absence of an integrated transport plan properly approved in compliance with the provisions of the [National Land Transport Act] being in place, the Department is not in a position to meet the requirements of the NLTA for the conclusion of a subsidised service contract as part of a tender process". Putco asked for an undertaking that the Department not purport to invoke a tender process in relation to the services covered by its (Putco's) existing contract. Putco asked for this undertaking by 17 September 2021.

[22] The Department did not furnish said undertaking. Instead, on 30 September 2021, the Department addressed a letter to Putco's attorneys, as per "FA12". It indicated *inter alia*, that it had set up a task team comprising departmental officials, municipalities, CSIR and all subsidized bus operators inclusive of Putco. However, on 6 October 2021 the Department asked for more time when further inquiries were made. As indicated above, the impugned tender was published on 15 October 2021.

[23] For their part, BIRF and SABOA state that, "On 21 October 2019, at 14h22, following the transport industry information session, Mr Thys Heyns of the Larimar Group (Pty) Ltd, apparently the deponent of Putco's founding affidavit, transmitted email correspondence to a number of recipients, which included various bus operators per annexure "GW6". GW6 records inter alia that, "*the Gauteng Department of Roads and Transport and the MEC took a decision to resolve the two-decade long hiatus in bus contracts.2. Their intention is to put*

all bus contracts in Gauteng out on tendered contracts" ... The most relevant changes the GDRT intends to apply for, include: ~ 30% Sub-contracting requirement... GDRT is looking at net based contracts of 7 years in duration... For the next 7 years (after contracts have been awarded) the capacity of cities to serve as eventual Contracting Authorities will be developed. It seems that the tendered contracts will be bus contracts only without alignment to Integrated Transport Plans. (In my view this may be the target of an immediate legal challenge by various role players).

[24] GW6 further noted that, ... "*On the question of expected timeframes for this process and the looming expiry of the current contracts at the end of March 2020, the GDRT said the target 31 March 2020 to have completed all tendered contracts (!) but admitted that they may not achieve this. The hope to issue extension letters (before January 2020) with a 12 month contract extension, but containing a suspensive provision and 3 month notice period, in case the service must go on tender during the contract extension period...*".

[25] Significantly, GW6 records that "*The absence of Integrated Transport Plans is a fatal flaw in their plans going forward. We will share the presentations with all concerned and will start preparing our responses to their plan of action*". The emphasis is mine. It would seem to me; the current applications were foreshadowed, as early as October 2019, on some of the material terms alleged by the applicants. This is relevant for the determination of the question of urgency in compliance with Rule 6 (12).

[26] BIRF and SABOA say they became aware of the impugned tender when it appeared on the Department's website and in newspapers. There was a flurry

of correspondences that followed culminating in a letter by the applicants' attorneys of record on 6 October 2021, annexure "GW9". GW9 , *inter alia*, suggested that: *"the requirement that any tender documents for first tenders following the expiry of an Interim Contract must include a condition compelling those operators who are awarded a Tendered Contract to contribute a percentage of the value "the Levy" of the awarded Tendered Contract to our client (see clause 1.7); and the requirement that the Levy would apply to all operators both existing and new operators who are awarded a Tendered Contract (see clause 1.9 of the HOA)*". As per a letter marked annexure GW10 dated 7 October 2021, the Department asked for time until 15 October 2021 to consider the issues raised.

[27] On 8 October 2021, the applicants' attorneys addressed a further letter to the MEC for Roads and Transport in Gauteng and the NDOT (annexure "GW11"). The letter advised, *inter alia*, that BIRF is amenable to granting the extension until 15 October 2021 for the provision of the requested undertakings, as recorded in the letter dated 6 October 2021. This was on condition that the Department provide an undertaking that no tender documents for first tender bus contracts, would be publicised or released by the Department prior to 15 October 2021.

[28] The respondents did not respond to this letter. It is the applicants' case that the harm sought to be avoided through the grant of the interim interdict is the commencement of a tender process that does not incorporate the Department's obligations under the HOA. According to the applicants, the necessity for this application only arose on 15 October 2021, when the Department published the

impugned tender on its website. They further say that it was only on this date that the applicants knew that the Department did not consider itself bound by the HOA and did not intend to incorporate its provisions into the tender process. They insist that prior to the publication of the impugned tender, they were in the dark as to the Department's position on the HOA.

[29] The Department contends that the applicants have delayed in bringing this application because publication of the impugned tender has been "lurking in the horizon" since 13 February 2020. Essentially, the Department indicated in a letter of 13 February 2020 to operators holding interim contracts that it intended at some stage to run a competitive tender to replace the interim contracts. The letter of 13 February 2020, BIRF and SABOA complain, was addressed to the operators and not to them. The argument holds no water. The operators are members of SABOA.

Background

[30] The facts are largely common cause and closely connected. The relevant facts may be summarised as follows. On 15 October 2021 as indicated, the first respondent in both cases, the Department, published a tender inviting bids for eight contracts for the provision of subsidised bus services in the province. The impugned tender invites bids for the provision of subsidised bus transport services by way of eight separate tender contracts, covering the areas and routes described as Soweto, Hammanskraal, Tembisa/Tsakane/Vosloorus, Soshanguve, Mabopane/Garankuwa, Sebokeng, Orange Farm/Lenasia, and Atteridgeville/Mamelodi. Currently, services in these areas are provided under a number of separate interim contracts held by various service providers,

including Putco. The majority of these service providers are members of the second applicant in respect of Case No: 2021/51091, the second case.

[31] Putco runs public bus routes in the Soweto, Soshanguve, and Pretoria areas. It runs these routes in terms of contracts with the Department. The contracts pertinent to the matters were concluded prior to the enactment of the Transport Act, under the provisions of the National Land Transport Transition Act[7] (the Transition Act). The contracts were concluded in 1997 and have been extended several times, most recently, until March 2023. There is no disputing that, the open-ended or perpetual permits were unconstitutional and anti- competitive.

[32] The new contracts will cover areas and routes currently serviced under 'interim contracts'. These interim contracts are a legacy of the evergreen permit system adopted by the pre-democratic administration and were envisaged as a temporary solution pending the initiation of competitive tenders for subsidised bus services across the country.

[33] As early as 10 September 1999, the then Minister of Transport (representing the nine provinces) in this country, SABOA, representing employers within the passenger transport industry of which Putco is a member and various labour unions, representing employees in that industry concluded the Tripartite Heads of Agreement ("the HOA"). The Fund ("BIRF") was established on the basis of the HOA, and with the primary objective of providing financial assistance to incumbent bus operators and the provision of severance benefits to South African transport industry employees in cases of retrenchment.

[7] Act 22 of 2000

[34] The parties to the HOA agreed to cooperate to establish BIRF (clause 1.6) in order to facilitate the transition between the Interim Contracts and the Tendered contracts. The purpose of BIRF was to assist bus operators financially with the payment of retrenchment and severance payments to employees who are retrenched as part of the "clean break provision at the end of the Interim Contract" (clauses 5.1 to 5.3, 5.5 and 5.11 of the HOA).

[35] The Department, through the NDOT had agreed to "include a condition in tender documents, for the first tenders following respective interim contracts, compelling those who are awarded such Tendered Contracts to contribute a percentage of the value of the contract towards an Industry Restructuring Fund." (clause 1.7 of the HOA). It is apparent from the HOA that the general intention was to undertake a staged process to convert all Interim Contracts to contracts awarded through a competitive tender process. A substantial number of the original Interim Contracts have been extended and remain in force. A small number of Interim Contracts have terminated and replaced by new contracts pursuant to a competitive tender process.

[36] According to the applicants, the Interim Contracts, although a smaller number of contracts in real terms, account for over 80% of buses on Gauteng roads. There are approximately 1,790 buses operated by the operators holding the eight interim contracts transporting well over 200 000 passengers a day and employ well over 3000 employees.

[37] In 2009, Putco and the Department concluded identical addenda to each interim contract effective from 1 October 2010. In relevant parts the addenda read:

"4.1 The contract will terminate on 31 March 2011, subject to what is set out below:

4.1.1 If the Employer notifies the Operator in writing by no later than 30 September 2010 that it intends to extend the Contract, the Contract will be extended for another period of not less than 6 months;

4.1.2 If the Employer is unable to implement PTNs on the Contract Routes in whole or in part on 1 April 2011 the Employer will extend the Contract for an initial period of not less than 6 months and thereafter for further periods of not less than 3months as may be required in order to comply I with the relevant Legislation. In these circumstances, the Employer shall serve the Operator with two (2) months written notice of any extension.

4.2 it is recorded that the contract shall expire at the end of each contract, unless the Employer serves the operator with the relevant written notice of a further extension.

4.3 the Operator agrees that it is not entitled to any further extensions other than that stipulated in clauses 4.1.1 and 4.1.2 above."

[38] Putco bases its prima facie right to interim relief on five grounds. First ground: that there are no integrated public transport networks in place for the tendered routes, and according to Putco, the Department is obliged to extend its contracts with it. Second ground: that the Tender Document does not include what it terms, Putco's right of first refusal.

[39] Clause 6.4 of each interim contract relied upon by Putco states: "At the end of the contract period, [the Department] may decide to invite tenders for the

provision of services in substantially the same service area. If this is done, such invitation shall amount to a totally new contract on the terms and conditions as set out in the new tender documents (my emphasis). The Operator shall have the right to be awarded the new contract at the rates and on the basis tendered by the tenderer which the State Tender Board has decided has submitted the most acceptable tender (which will not necessarily be the lowest tender) provided that:

(a) the Operator has tendered for the new contract and his tender amount is not more than five percent (5%) higher than the most acceptable tender the Operator proves to the satisfaction of the Employer that he Is able to perform the new contract at the rates applicable to the most acceptable tender;

(b) the operator has performed his contract to the satisfaction of the employer inter alia in that

(i) the operator has not performed any act or omission which would have entitled the Employer to cancel this contract under clause 18;

(ii) the Operator, in the opinion of the Employer, has vehicles, facilities and other assets of such quality and quantity sufficient to enable him to perform the new contract, or has the means to acquire them;

(c) a new contract document shall be signed; and

(d) the Operator complies with all criteria laid down in the tender requirements of the new contract

[40] Third ground: it is alleged that, the Tender Document breaches a tripartite agreement concluded between the nine provincial departments of transport, labour unions, and SABOA. The applicants complain that, the tender document is in breach of Clause 1.3 of the tripartite agreement, which prescribes a maximum percentage for sub-contracting at 10%, whereas the Tender Document requires 30%. Counsel for the applicant in the Putco matter, Adv Franklin SC, points out that the tender document and the tripartite agreement are in that respect, irreconcilable.

[41] Fourth ground: that there are no integrated transport plans in place for the tendered routes The Tshwane Comprehensive Integrated Transport Plan that the Department furnished to Putco is for the period 2015 to 2020, which is not current. The applicants contend on this basis that this is a crucial and fatal omission because four of the eight tendered routes fall within the area of the City of Tshwane. It is not clear how the Tshwane ITPs fall short of what is required for their implementation, other than that they are beyond the 5-year requirement.

[42] Fifth ground, that the Tender Document and the Department's decision to publish it are procedurally unfair. Putco says the Tender Document is procedurally unfair because the Department failed to give affected stakeholders adequate notice of the Department's intention to publish the Tender Document and an adequate opportunity to make representations as required.

[43] Turning back to the HOA, the applicants say that the HOA remains a binding contract document between the NDOT, Provincial Departments of Transport (including Gauteng), SABOA and the trade unions. Over the last twenty years, there has been no suggestion by NDOT, the trade unions or the South African transport industry generally that the HOA is not binding. In fact, so it is averred, the NDOT, as well as a number of provinces, have treated the HOA as binding.

[44] In opposing the relief sought, the department say During March 2011, the Department and the operators of the eight implicated interim contracts executed addenda to the original interim contracts. Annexure "HOD 2" is a copy of the addendum in respect of IC56/ 97, for ease of reference. Clause 24 of "HOD 2" provides, inter alia, that:

" 4.1 *The Contract will terminate on 31 March 2011... The Operator agrees that it is not entitled to any further extension other than that stipulated in clauses 4.1.1and 4.1.2above.*"

4.1.1 If the Employer notifies the Operator in writing by no later than 30 September 2010 that it intends to extend the Contract, the Contract will be extended for another period of not less than 6 months; or

4.1.2 If the Employer is unable to implement ITPNs on the Contract Routes in whole or in part on 1 April 2011 the employer will extend the contract for an initial period of not less than 6 months and thereafter for further periods of not less than 3months as may be required in order to comply with the relevant legislation. In these circumstances, the Employer shall serve the Operator with two (2) months' written notice of any extension".

[45] The Department points out that Putco attended the relevant tender briefing sessions and also submitted tender, which eliminates any prejudice. The Department also points out, correctly in my view, that it has a constitutional obligation to advance economic empowerment of the previously disadvantaged individuals and communities.

[46] At issue inter alia is a second pre-qualification requirement relates to sub-contracting in the impugned tender. It provides: The Bidder must sub-contract a minimum of 30% of the value of the contract to any Public Transport Operator registered on one or more of the categories as stipulated in Regulation 4 of the Preferential Procurement Regulations, 2017 in terms of clause 18 dealing with subcontracting.

The NLTA

[47] The applicable statute is the National Land Transport Act 5 of 2009. Chapter 5 of the NLTA contains special provisions regulating the conclusion of contracts for the procurement of public transport services. Section 40 obliges provinces and planning authorities to take steps as soon as possible after the Act's commencement to integrate contracted and uncontracted transport services in their area, into the larger public transport system. Section 41 authorises contracting authorities (including provincial departments of transport) to negotiate and conclude once-off contracts, for a period of up to twelve years, with an existing operator in its area, in order to achieve the integration and transformation of the public transport sector: It provides thus:

"(1) Contracting authorities may enter into negotiated contracts with operators in their areas, once only, with a view to-

(a) integrating services forming part of integrated public transport networks in terms of their integrated transport plans;

(b) promoting the economic empowerment of small business or of persons previously disadvantaged by unfair discrimination; or

(c) facilitating the restructuring of a parastatal or municipal transport operator to discourage monopolies.

(2) The negotiations envisaged by subsections (1) and (2) must where appropriate include operators in the area subject to interim contracts, subsidised service contracts, commercial service contracts, existing negotiated contracts and operators of unscheduled services and non-contracted services.

(3) A negotiated contract contemplated in subsection (1) or (2) shall be for a period of not longer than 12 years.

(4) The contracts contemplated in subsection (1) shall not preclude a contracting authority from inviting tenders for services forming part of the relevant network.

(5) Contracting authorities must take appropriate steps on a timeous basis before expiry of such negotiated contract to ensure that the services are put out to tender in terms of section 42 in such a way as to ensure unbroken service delivery to passengers."

[48] Regarding subsidised service contracts section 42 obliges the contracting authority to go out to tender when an existing old order contract, or a contract negotiated under section 41, comes to an end. It provides thus:

"(1) The Contracting authorities must take steps within the prescribed period and in the prescribed manner before expiry of contracts contemplated in subsection (2) (a), (b) or (c) to put arrangements in place for the services to be put out to tender so that the services can continue without interruption.

(2) If after expiry of-

(a) a negotiated contract concluded under section 41;

(b) a subsidised service contract concluded under this section; or

(c) a negotiated contract, interim contract, current tendered contract or subsidised service contract concluded in terms of the Transition Act,

or any extension thereof, the relevant services may continue to be subsidised, this must be done in terms of a subsidised service contract concluded in terms of this section.

(3) Where a contract referred to in subsection (2) (a), (b) or (c) has expired and no arrangements have been put in place to put the services out to tender, or such

arrangements are unsatisfactory or inadequate in the Minister's opinion, the Minister must forthwith enter into negotiations with the contracting authorities, the National Treasury and the Auditor-General with a view to ensuring compliance with this Act and legislation on financial and procurement issues.

(4) Only a contracting authority may enter into a subsidised service contract with an operator, and only if the services to be operated in terms thereof, have been put out to public tendering and awarded by the entering into of a contract in accordance with prescribed procedures in accordance with other applicable national or provincial laws".

[49] Section 46 permits a contracting authority to let an existing old order contract to run its course, or to negotiate with an incumbent operator to amend its old order contract to provide for its inclusion in an integrated public transport network, or to make an existing operator an offer of alternative services or a monetary settlement to "buy out" the remaining portion of its old order contract. A section 41 process, it seems to me, is distinct and does not affect the procedures envisaged in section 46 of the NLTA.

[50] As for the alleged failure to publish ITPs the Department points out that, Section 93(4) of the NLTA further clarifies the legal position as it provides as follows: - *"Wherever this Act makes references to a transport plan, a contracting authority or other entity may proceed with any action, despite the fact that the relevant plan has not been prepared, approved or published in terms of this Act, but such authority or entity must have regard to any available transport planning or other information at its disposal*". The Department also insists that, The MEC has no obligation to publish ITPs as that is the responsibilities of the municipalities concerned and that for new service contracts municipalities are the contracting authorities in terms of Section

11(1)(c)(xxvi), who in any event, were also not cited in this application. That the Tender may not be published on this ground, is prima facie, doubtful.

[51] Importantly, section 217 of the Constitution requires organs of state to procure good or services in accordance with a system "which is equitable, transparent, competitive and cost-effective". The Public Finance Management Act 1 of 1999 ("PFMA") repeats this requirement in section 38(1)(a)(iii) by obliging the accounting officer of a department with ensuring that the department adopts a procurement system that is fair, equitable, transparent, competitive and cost-effective.

[52] The PFMA thus obliges provincial departments to implement a supply chain management system which ensures that goods and services are generally procured through a tender process, unless that cannot practically be achieved. Expenditure that is incurred in contravention of the requirements of the PFMA amounts to irregular expenditure, and must be disclosed in the department's annual report and financial statements. The Department laments the fact that all these contracts have been extended in the face of an adverse finding by the Auditor General made in 2013. In that audit finding, the Department incurred irregular expenditure amounting to R2 357 224 882 for that relevant financial year which was in contravention to section 38(1)(c)(ii) of the PFMA and Treasury Regulation 9.1.1.

[53] In this matter, The Auditor General made the following recommendation: ~ "Management should develop a procurement compliance checklist for all contracts to be awarded to ensure that all laws and regulations are adequately complied with. ~ The accounting officer together with the MEC should embark

on a review of the bus subsidy contracts to prevent re-occurrence of this reportable irregular expenditure." There is no disputing that, the Auditor-General is constitutionally and statutorily obliged to audit and report on, inter alia, the financial statements of all provincial departments.

[54] The Department further points out that, *"While the aim of the intended contracts is to provide a subsidy to the successful bidders, such financial assistance must comply with the prescribed provisions of the PFMA and to give effect to the overarching provision of section 217 of the Constitution and the provisions of the PFMA, the National Land and Transport Act 5 of 2009 (NLTA), with specific reference to section 42 was enacted"*. This can hardly be faulted.

[55] The Department states in paragraph 77.10 of the second matter as a source of authority that, the Preferential Procurement Policy Framework Regulations, 2017 mandates subcontracting as condition of tender. The Regulations were issued in terms of section 5 of the Preferential Procurement Policy Framework Act, Act Number 5 of 2000 (PPPFA). In terms of Regulation 9 (1) it is provided that if feasible to subcontract for a contract above R30 million, an organ of state must apply subcontracting to advance designated groups, which are the previously disadvantaged. This is clearly mandatory and seems to me, a clear regulatory and policy framework to address the injustices of the past, which forms the basis of the 30% subcontracting requirement in the impugned tender document.

[56] Further, if an organ of state applies subcontracting as contemplated in sub regulation (1), the organ of state must advertise the tender with a specific tendering condition that the successful tenderer must subcontract a minimum of

30% of the value of the contract to (a) an Exempted Micro Enterprise ("EME") or Qualifying Small Enterprise ("QSE"). The applicants admit this aspect.

Interim Relief

[57] It remains to be determined whether the applicants have established a *prima facie* right. In this enquiry, the established test is to take the facts averred by the applicants, together with such facts set out by the Department that are not or cannot be disputed and to consider whether, having regard to the inherent probabilities, the applicants should on those facts obtain final relief at the envisaged application. The facts set up in contradiction by the respondents should then be considered and, if serious doubt is thrown upon the case of the applicants, the applicants cannot succeed.

[58] The requirements that an applicant for interim interdictory relief must satisfy are trite. They are: (a) the existence of a *prima facie* right, even if it is open to some doubt; (b) a reasonable apprehension by the applicant of irreparable and imminent harm to the right if an interdict is not granted; (c) the balance of convenience must favour the granting of the interdict; and (d) the applicant must have no other effective remedy.[8] An interim interdict is a court order preserving or restoring the status *quo* pending the determination of rights of the parties. It is important to emphasize that an interim interdict does not involve a final determination of these rights and does not affect their final determination. In an application for an interim interdict the dispute is whether, applying the

[8] *Setlogelo v Setlogelo* 1914 AD 221 at 227.

relevant legal requirements, the status *quo* should be preserved or restored pending the decision of the main dispute.[9]

[59] Elsewhere, Holmes JA in *Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton and Another*[10] explained the approach to be adopted in applying the requirements for an interim interdict in the following terms:

> "In exercising its discretion the Court weighs, inter alia, the prejudice to the applicant, if the interdict is withheld, against the prejudice to the respondent if it is granted. This is sometimes called the balance of convenience. The foregoing considerations are not individually decisive, but are interrelated; for example, the stronger the applicant's prospects of success the less his need to rely on prejudice to himself. Conversely, the more the element of 'some doubt', the greater the need for the other factors to favour him. The Court considers the affidavits as a whole, and the interrelation of the foregoing considerations, according to the facts and probabilities; see *Olympic Passenger Service (Pty.) Ltd. v Ramlagan*, 1957 (2) SA 382 (D) at p. 383D - G. Viewed in that light, the reference to a right which, 'though prima facie established, is open to some doubt' is apt, flexible and practical, and needs no further elaboration".

[60] Putco contends that it has a clear, alternatively, a *prima facie* right to the relief it seeks. It contends there is little, if any, dispute about irreparable harm and the balance of convenience with reference to *Resilient Properties (Pty) Ltd v Eskom Holdings SOC Ltd*[11] in which Van der Linde J stated:

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[9] *National Gambling Board v Premier, KwaZulu-Natal, and Others* 2002 (2) SA 715 CC at para 49.

[10] 1973 (3) SA 685 (A) at 691D-G. See also *Knox D Arcy Ltd v Jamieson and Others* 1996 (4) SA 348 (A) at 361

[11] 2019 (2) SA 577 (GJ) at para 49

"There is an inverse relationship in interim interdicts between the requirements of a prima facie right and the balance of convenience: the stronger the one, the weaker the other is permitted to be. Resilient need only establish a prima facie right, although open to doubt. It must show that on its version, together with the allegations of Eskom and GLM that it cannot dispute, it should obtain the relief sought in part B. If, having regard to Eskom and GLM's contrary version and the inherent probabilities, serious doubt is then cast on Resilient's case, it cannot succeed.".

Both these matters concern an application for an interdict restraining the exercise of statutory powers. From a proper reading of our jurisprudential history, in the absence of any allegation of *mala fides*, Courts do not readily grant such an interdict.[12] In *Marcé Projects (Pty) Ltd v City of Johannesburg Metropolitan Municipality*[13], an unsuccessful tenderer applied for an interim interdict against the City of Johannesburg to prevent the implementation of a tender award and tender contract pending a review of the award and contract in Part Putco submits that it is no different from its interim relief, pending its review in Part B.

[61] Counsel also referred this court to a case, in *Member of the Executive Council for Health, Eastern Cape and Another v Kirland Investments (Pty) Limited*[14]. There, Cameron J stated that: '[T]here is a higher duty on the state to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights. Government is not an indigent or bewildered litigant, adrift on a sea

[12] *Molteno Bros. & Others v South African Railways and Harbours* 1936 AD 321; *Gool v Minister of Justice & Another* 1955 (2) SA 682 (C).
[13] 2019 JDR 2656 (GJ)
[14] 2014(3) SA 481 (CC) at para 82

of litigious uncertainty, to whom the courts must extend a procedure-circumventing lifeline. It is the Constitution's primary agent. It must do right, and it must do it properly.'

[62] However, the matter is not as simple as it would seem because the Constitutional Court in Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd Construction (Pty) Limited[15] endorsed the test that was approved by the Constitutional Court in Khumalo and Another v Member of the Executive Council for Education: KwaZulu Natal[16] that in assessing delay the first question to be determined is the reasonableness of the delay. If the delay is found to be unreasonable, the next question is whether it should nevertheless be overlooked in the interests of justice.

[63] The trite requirements for an interim interdict were described by the Constitutional Court in *National Treasury and Others v Opposition to Urban Tolling Alliance and Others*[17] ("OUTA") as "initially fashioned for and ideally suited to interdicts between private parties".[18] It was therein pointed out that any court disposed to do so must appreciate the trenching effect the granting of such restraining order can have on the exclusive domain of another branch of government, and therefore must proceed sensitive of the doctrine of the separation of powers.

[64] The Constitutional Court in *OUTA* held:

> "The balance of convenience enquiry must now carefully probe whether and to which extent the restraining order will probably intrude into the exclusive

[15] 2019 (4) SA 331 (CC) at para 48

[16] 2014 (3) BCLR 333 (CC); (2014) 35 ILJ 613 (CC); 2014 (5) SA 579 (CC)

[17] 2012 (6) SA 223 (CC).

[18] At para 42.

terrain of another branch of Government. The enquiry must, alongside other relevant harm, have proper regard to what may be called separation of powers harm. A court must keep in mind that a temporary restraint against the exercise of statutory power well ahead of the final adjudication of a claimant's case may be granted only in the clearest of cases and after a careful consideration of separation of powers harm".[19]

[65] The Court further stressed that, "[W]hen it evaluates where the balance of convenience rests, a court must recognise that it is invited to restrain the exercise of statutory power within the exclusive terrain of the Executive or Legislative branches of Government. It 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 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".[20]

[66] Putco bases its *prima facie* right to interim relief on five grounds. The first ground is that there are no integrated public transport networks in place for the tendered routes, and according to Putco, the Department is obliged to extend its contracts with it. The second ground is that the tender document does not include what it terms, Putco's right of first refusal. The third ground is that the tender document breaches a tripartite agreement concluded between the nine provincial departments of transport, labour unions and SABOA. The fourth ground is that there are no integrated transport plans in place for the tendered routes. The fifth ground is that the tender document and the Department's decision to publish it are procedurally unfair.

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[19] At para 47.

[20] At para 65.

[67] Reliance on the first ground in this regard is based on Clause 4.1.2 of each contract and provides: "If [the Department] is unable to implement IPTNs on the Contract Routes (in whole or in part) on 1 April 2011, [the Department] will extend the Contract for an initial period of not less than 6 months, and thereafter, for further periods of not less than 3 months, as may be required in order to comply with the relevant legislation. In these circumstances, [the Department] shall serve [Putco] with two (2) months' written notice of any extension." In this regard the NLTA defines an integrated public transport network as a system in a particular area that integrates public transport services between modes, with through-ticketing and other appropriate mechanisms to provide users of the system with the optimal solutions.

[68] This court is urged to read the definition above with the definition of "intermodal" in the National Department's White Paper on National Transport Policy 2021: "*Use of at least two different modes of transport for transfer of people or goods in an integrated manner in a door-to-door transport chain. The true advantage of intermodalism is the ability to logistically and effectively link two or more modes of transportation for the benefit of customers and users*". The practical implementation thereof seems to be the proverbial "albatross" around the Department's neck, which in my view requires policy considerations.

[69] But a White Paper by any stretch, cannot in my view be elevated to the status of an Act. It can still be withdrawn. The process of making a law, sometimes begins with a discussion document, called a Green Paper. This is drafted in the Ministry or department dealing with the particular issue in order to show its thinking on a particular policy. It is then published so that anyone who is

interested can give comments, suggestions and ideas. Essentially, a White Paper is nothing more than a refined discussion document that contains broad statements on a specific governmental policy. It is still with parliamentary committees who can amendment it before it is sent to the relevant Minister. In the legislative scheme, it has not matured into a Bill that is debated in Parliament and adopted by Cabinet. It is not law, holds no weight outside the parliamentary committees from which it originates.

Prima facie right

[70] Putco alleges that the interim contracts oblige the Department to extend each contract for as long as the Department is unable to adopt and implement an integrated public transport network. Putco avers that, Tender Document is unlawful because it fails to incorporate the relevant consideration of Putco's right of first refusal under the interim and tendered contracts. SABOA contend that, it has the right to enforce contractual undertakings made by the Department, and the strong prospects of success in the main review proceedings, of having the impugned tender set aside. The Department contends in both cases that no case is made for an interim interdictory relief in spite of Putco's claim to the contrary. The submission in this is that the applicants can still enjoy substantial relief in due course. Reference was made to section 93(4) of the NLTA authorizing the contracting authority to proceed with any action, despite the fact that the relevant plan has not been prepared, approved or published in terms of the NLTA.

Irreparable harm

[71] Putco says it may also be impractical or otherwise not in the interests of justice to set aside the Tender Document or awards made to successful tenderers at that late stage even if it succeeds in showing that the Tender Document and awards made pursuant to it are unlawful and irrational. For their part, SABOA and BIRF say, the termination of the interim contracts held by incumbent operators gives rise to the real risk of service disruption, and large-scale retrenchments. Furthermore, that, members of SABOA, including PUTCO, are forced to incur unnecessary costs in preparing a bid. According to the Department, the real irreparable harm, now claimed can only be established after the Tender is awarded or not awarded, which is the appropriate time when it should be challenged. The Department points out that, as Putco's contracts have indeed been extended. until March 2023 there is therefore no breach of the existing contracts, which are protected in terms of the agreements.

[72] The Department say it is not infringing on Putco's rights as the contracts are in place and a Tender has not yet been awarded for the same route, to any competitor of the Applicant. Putco, it is pointed out, might be a preferred candidate after all the bids are considered and evaluated. Putco was informed in 2020, in the letter of extension, of the existing contract, that the Department will be advertising a Tender. The Department further say, in the event of the awarding of a Tender to another successful bidder for the same route in terms of section 41 (which is highly unlikely), the First Respondent would be compelled in law to let the contract run its course in terms of section 46. *Prima facie*, this approach is unassailable.

[73] As for the concerns that Putco will incur costs in preparation for the bids, the answer is that, the issue of costs of preparing a bid is purely economical, and a normal occurrence and business expenditure, which should not be addressed through urgent proceedings. The provisions of Section 46(1) and (2) of the NLTA and Regulation 7(15), discussed above provide for negotiations, mediation and arbitration and are on itself alternative remedies available to the Applicant.

Balance of convenience

[74] The Court has a discretion to grant an interdict, which is an extraordinary remedy. Putco claims that the Interim relief causes the Department no harm for the interim contracts are in place and Putco is operating its bus routes. It is well established that in deciding whether or not to make an interim order, this Court must consider where the balance of convenience lies. On the one hand, the Court must weigh up the damage and inconvenience which the respondents would suffer if the interim interdicts are granted, and on the other the damage and inconvenience which would be suffered by the applicants if they are refused. It is well established that the interests of the public are relevant to an assessment as regards where the balance of convenience lies[21] rather than to take into account merely the interests of the applicants. However, this claim overlooks the concerns raised by the Auditor General, as well as the relevant statutory injunction to publish tenders without undue delay referred to above.

No alternative remedy

[21] Verstappen v Port Edward Town Board 1994 (3) SA 569 (D) at 576E-J; Roberts v Chairman, Local Road Transportation Board, Cape Town, and Another (2) 1979 (4) SA 604 (C) at 607E

[75] In this regard Putco relies on this assertion on the basis the publication of the Tender is unlawful. But as the Department points out, the provisions of Section 46(1) and (2) of the NLTA and Regulation 7(15), discussed above provide for negotiations, mediation and arbitration and are on itself alternative remedies available to the Applicant.

[76] The applicants agree with the Department that a tender process of this magnitude is not an overnight affair. It takes a long time and significant state human and financial resources to put in place. As indicated above, every organ of state is statutorily enjoined to determine its preferential procurement policy and implement same with specific goals which may include contracting with persons; or categories of persons historically disadvantaged by unfair discrimination on the basis of race, gender or disability. Hence the 30% subcontracting requirement, which is at the heart of both matters. It is a policy backed by valid legislation.

[77] This is precisely what OUTA warns every Court to be alert about. In my view, the decision in issue is 'policy-laden as well as polycentric'. These matters therefore, are not examples of the clearest of cases, where the relief sought can easily be granted before the review is determined. At the heart of the parties' dispute requires full ventilation before the court that will deal with Part B of the application. The issues raised in both matters are not only confined to the terms of the contract, but embedded with policy matters, which is the domain of another branch of government.

[78] Consequently, I am satisfied that the 'separation of powers harm', which this court must have regard in exercising its discretion with regard to the balance of

convenience in both cases is not of a kind that enjoins the grant of an interim interdict regard being had to the relevant facts. Consequently, I am satisfied that the 'separation of powers harm', which this Court must have regard to in the exercise of its discretion with regard to the balance of convenience in both cases is not a kind that enjoins a grant of an interdict. I have thus concluded for the reasons alluded to above, that the applicants have not made a case for the granting of interim relief in both cases.

[79] With the Department having launched a counter application, if the parties are serious and desirous to bring part B expeditiously, I can see no good reason why the necessary affidavits should not be filed within a few weeks and, if application were then to be made for the promotion of the hearing with the Deputy Judge President on that basis, I can see no good reason why such application should not receive favourable consideration.

Orders

[80] The following orders are made in the interim interdict applications, respectively.

Case No: 2021/49674:

1. The Applicant's non-compliance with the Uniform Rules of Court relating to forms, service and time periods to the extent applicable is not condoned and this application is not dealt with as a matter of urgency under Uniform Rule 6(12).

2. Part A of this application is dismissed with costs inclusive of those occasioned by the employment of two counsel.

Case No: 2021/51091:

1. The Applicant's non-compliance with the Uniform Rules of Court relating to forms, service and time periods to the extent applicable is not condoned and this application is not dealt with as a matter of urgency under Uniform Rule 6(12).

2. Part A of this application is dismissed with costs inclusive of those occasioned by the employment of two counsel.

T P MUDAU
JUDGE OF THE HIGH COURT

Heard on : 30 November 2021

(2021/49674)

Appearances

For the Applicant : Adv A E Franklin SC
Adv T Ngcukaitobi SC (Heads)
Adv J Mitchell

Instructed by : Bowman Gilfillan Inc

For the Respondents: Adv A M Viviers

Instructed by : State Attorney

(2021/51091)

For the Applicant	: Adv G Fourie SC
	Adv F Hobden (Heads)
	Adv N Ndlovu
Instructed by	: Werksmans Attorneys
For the Respondent	: Adv L Nkosi-Thomas SC
	Adv T Mmakola Makola
Instructed by	: State Attorney
Date of judgment	: 7 December 2021