REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

(1) REPORTABLE: No
(2) OF INTEREST TO OTHER JUDGES: No

20/3/2023

DATE SIGNATURE

CASE NO: 2023-013882

In the matter between:

BOTHONGO AGRICULTURE GP (PTY) LIMITED Applicant

and

JOHANNESBURG WATER SOC LIMITED Respondent

JUDGMENT

This judgment is deemed to be handed down upon uploading by the Registrar to the electronic court file.

Gilbert AJ:

1. The applicant seeks urgent interim relief interdicting the respondent from adjudicating bids received in response to and/or awarding and/or implementing a tender for the lease of Northern Farms. This tender has been described as the Re-advertised Tender. The relief is sought pending the final determination of review proceedings already instituted in respect of an earlier tender of the lease of Northern Farms.

2. The respondent published the original version of the Re-advertised Tender in December 2020 under tender number JW OPS 038/19. The applicant timeously submitted a bid in response to that tender, but its bid, which according to the applicant was the only qualifying bid, was, the applicant further contends, unlawfully disqualified. The respondent then cancelled that tender. That tender is described as the Cancelled Tender.

3. Of significance, as will appear below, the respondent's version is that the applicant's bid was disqualified *"after a rigorous adjudication process"*.[1]

4. The applicant contends that the tender was cancelled in circumstances where not only should its bid not have been disqualified, but the tender should have been awarded to it.

5. In March 2021, the applicant launched judicial review proceedings against the respondent under case number 2021/11038 challenging the

[1] Answering affidavit, para 51 at Caselines 01-118.

respondent's decisions to: (i) disqualify the applicant's bid (which was the only qualifying bid, accordingly to the applicant) in respect of the Cancelled Tender, and (ii) subsequently cancel the Cancelled Tender. The respondent's two decisions being challenged in the review proceedings relating to the Cancelled Tender are referred to those proceedings as the "Impugned Decisions" and will be referred to as such in this judgment.

6. In the review proceedings, the applicant seeks orders *inter alia*:

6.1. declaring the Impugned Decisions unconstitutional and unlawful, and reviewing and setting aside those decisions;

6.2. directing the respondent to:

6.2.1. award the Cancelled Tender to the applicant;

6.2.2. alternatively, to reconsider the applicant's bid; or

6.2.3. further alternatively, readvertise the Cancelled Tender.

7. The review proceedings are at an advanced stage. All that was outstanding in the review proceedings when the founding affidavit was delivered in this urgent application was for the respondent to file its heads of argument and such other documents as were necessary to enable the applicant to enrol the review proceedings for hearing on the opposed roll in terms of the prevailing practice directives. The respondent did not timeously deliver those documents, with the result that its answering

affidavit in the review proceedings was struck out by the court with effect from 17 February 2023. I return to this later in the judgment,

8. Notwithstanding its self-evident dilatoriness in advancing its opposition in the review proceedings, the respondent proceeded in December 2022 to readvertise the Cancelled Tender, as the Re-advertised Tender, and to receive bids in response to that Re-advertised Tender.

9. The effect of the Re-advertised Tender is that if the respondent implements the Re-advertised Tender (adjudicates bids, awards the tender, and signs an implementation contract), the primary relief sought in the review proceedings will, the applicant argues, become moot and its right to approach another court to vindicate its right to administrative action in relation to the Impugned Decisions will be undermined. The applicant contends that this conduct by the respondent under the circumstances constitutes constructive contempt of court, and which founds one of the *prima facie* rights relied upon by the applicant for interim relief.

10. The Cancelled Tender and Re-advertised Tender relate to the same subject matter, which is the leasing of the Northern Farms. It is not disputed that the subject matter of the Re-advertised Tender has been the subject of the litigation between the parties since March 2021, in the form of the review proceedings.

11. Accordingly, the purpose of the urgent application is to interdict further implementation of the Re-advertised Tender, until final determination of the review proceedings in respect of the Cancelled Tender.

12. Before considering whether the applicant has satisfied the requirements for interim interdictory relief, especially in the context of granting an interdict that implicates the principle of separation of powers (an issue pertinently raised by the respondent), it is appropriate to set out the chronology in more detail. These chronological facts are either common cause or cannot be seriously disputed.

13. The applicant seeks to draw various inferences from these facts, particularly for purposes of demonstrating that it has a *prima facie* right founded upon constructive contempt by the respondent. The respondent argues that these inferences are not justified.

14. The Cancelled Tender was advertised during December 2020. The applicant, who was the only bidder, was disqualified and the respondent cancelled the tender. As appears above, the applicant has sought in the review proceedings that both these Impugned Decisions – to disqualify the bid and then to cancel the tender - were unlawful.

15. The applicant launched the review proceedings in March 2021 to review the Impugned Decisions, under the Promotion of Access to Justice Act, 2000 ("PAJA") and/or on the basis of the principle of legality. The relief that is sought by the applicant in those review proceedings has been described above.

16. It is only in a further alternative in the review proceedings that the applicant seeks that the Cancelled Tender be readvertised. In the first instance the applicant seeks that the Cancelled Tender be awarded to it, alternatively that the respondent be ordered to reconsider the applicant's bid in respect of that tender. The argument by the respondent that as the applicant wanted a readvertisement of the Cancelled Tender, the applicant cannot now complain that the respondent went ahead and readvertised the tender in December 2022 is misplaced.

17. At the time that the review proceedings were launched, no steps had been taken by the respondent to readvertise the Cancelled Tender, or to otherwise act following upon its cancellation of the tender. In other words, the respondent appeared content to await the outcome of the review proceedings.

18. On 11 March 2021, the respondent delivered its notice of intention to oppose the review proceedings.

19. On 3 May 2021, the respondent delivered the record of the Impugned Decisions.

20. Between May 2021 and September 2021, the parties agreed to suspend the *dies* in the review proceedings to facilitate negotiations with a view to resolving the matter out of court.

21. On 1 October 2021, the respondent delivered its answering affidavit.

22. On 15 October 2021, the applicant delivered its replying affidavit.

23. On 1 February 2022, the applicant filed its heads of argument. But the respondent did not.

24. It is clear from this chronology of the litigation in the review proceedings that it was the failure of the respondent to timeously deliver its heads of argument, chronology and list of authorities that precluded the applicant from enrolling those proceedings for hearing on the opposed roll.

25. To advance the review proceedings, on 12 October 2022, the applicant obtained a court order compelling the respondent to file its heads of argument, heads of argument, chronology and list of authorities within three days.

26. On 24 October 2022, the respondent's legal representatives acknowledged receipt of the compelling order. The respondent still did not comply and had still not complied by the time this urgent application was launched on 14 March 2022.

27. In November 2022, the applicant launched an interlocutory application in the review proceedings seeking that the respondent's defence be struck out because of its failure to comply with the compelling order.

28. That interlocutory application, which was enrolled for hearing on 14 February 2023, had not yet been heard by the time the applicant deposed to a founding affidavit in these urgent proceedings. Subsequently, in its

replying affidavit, the applicant points out that on 14 February 2023 the interlocutory court, after hearing argument from the parties' counsel, *inter alia* granted an order compelling the respondent to deliver its heads of argument, chronology and list of authorities by close of business on Friday, 17 February 2023, failing which the respondent's defence was struck out.

29. Although the respondent did deliver its heads of argument on 17 February 2023, it did not deliver a chronology and list of authorities. The applicant contends that in terms of the order granted on 14 February 2023 the respondent's defence is struck out and that effectively the applicant can now approach the court for default judgment in the review proceedings. The respondent during argument before me did not advance any argument to the contrary.

30. From these common cause facts the inference drawn by the applicant that the respondent has delayed, deliberately so, the hearing of the review proceedings does have substance. That the respondent's defence has been struck out also reinforces the applicant's second asserted *prima facie* right to found interim interdictory relief, namely on the grounds of review described in the review proceedings.

31. Throughout the conduct of the review proceedings, until its decision to re-advertise the Cancelled Tender in December 2022, on the evidence before me, the respondent was content to await the outcome of the review proceedings that had been launched in March 2021. Although there was

no formal agreement to that effect, or a court order interdicting the respondent from acting upon its decision to cancel the tender, such as re-advertising the tender, that this was the respondent's position can be readily and justifiably inferred from its conduct.

32. It is now necessary to set out the chronology in relation to the Re-advertised Tender and the relevance thereof in the context of the chronology relating to the litigation in the review proceedings.

33. On 9 February 2023 the respondent in a supplementary affidavit deposed to in the review proceedings for the first time informed the applicant that it had readvertised the Cancelled Tender in December 2022. The respondent motivated this disclosure in the review proceedings on the basis that it was a central fact that needed to be placed before the court in the review proceedings and that this justified the filing of the supplementary affidavit. The relevance of the respondent's re-advertisement of the Cancelled Tender cannot be doubted.

34. What is remarkable, in the context of the on-going review proceedings in relation to the Cancelled Tender, is that it was only on 9 February 2023 that the respondent disclosed to the applicant that it had already readvertised the tender in December 2022.

35. The respondent explains that it had already on 5 December 2022 readvertised this tender in various media publications and the Government Gazette and that in response four bidders submitted bids.

The respondent explains that the closing date for the readvertised tender was 3 February 2023.

36. What is immediately evident is that the respondent not only did not inform the applicant that the Cancelled Tender was going to be readvertised, or had been readvertised, but the respondent waited until after the closing date for bids on 3 February 2023 in respect of that readvertised tender before informing the applicant, and the court, on 9 February 2023 that the Cancelled Tender had since been readvertised.

37. The inference that the applicant seeks be drawn from these facts is that the respondent deliberately withheld from the applicant's knowledge that the bid had been readvertised so that by the time the applicant discovered the readvertisement of the tender, it would no longer be able to participate in the Readvertised Tender as the tender would have closed.

38. The respondent does not squarely address this issue in its answering affidavit, but instead contents itself with generalised denials. The facts from which the inference is drawn are common cause or cannot be seriously disputed, and called for an explanation from the respondent.

39. The respondent's counsel submitted during argument that the timing of the delivery of the supplementary affidavit in the review proceedings on 9 February 2023 was precipitated by the applicant having enrolled the interlocutory application for hearing on 14 February 2023 seeking that the respondent's defence in the review proceedings be struck out. This explanation does not feature in the papers and in any event lacks

substantive cohesion. The appropriate reaction from the respondent to the applicant's enrolment of the interlocutory application in the review proceedings to strike out the respondent's opposition would have been the filing of the heads of argument and the other outstanding documents, not the filing of the supplementary affidavit.

40. In my view there is considerable substance to the applicant's inference that it seeks to draw that the timing of the disclosure of the re-advertised tender was deliberate. This is of relevance to the applicant's assertion that the respondent had acted in constructive contempt by seeking to render the applicant's relief that it seeks in the review proceedings nugatory, or largely nugatory. If there was sufficient progress in relation to the finalisation of the Re-Advertised Tender (such as the tender having been awarded to a successful bidder), that may severely curtail the relief available to be granted by the review court.

41. The applicant does not seek that this urgent court actually find that there is constructive contempt but rather that there is sufficient evidence of constructive contempt to found a *prima facie* right to sustain interim interdictory relief.

42. To now turn to the requirements for interim interdictory relief, particularly in matters such as this.

43. I have taken considerable guidance from the Constitutional Court decision of *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC) *["Outa"]*, a decision referred to by both

parties and particularly relied upon by the respondent. The majority decision per Moseneke DCJ held:

> *"[45] It seems to me that it is unnecessary to fashion a new test for the grant of an interim interdict. The Setlogelo test[2], 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.*
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> *[46] Two ready examples come to mind. If the right asserted in a claim for an interim interdict is sourced from the Constitution it would be redundant to enquire whether that right exists. Similarly, when a court weighs up where the balance of convenience rests, it may not fail to consider the probable impact of the restraining order on the constitutional and statutory powers and duties of the state functionary or organ of state against which the interim order is sought.*
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> *[47] The balance of convenience enquiry must now carefully probe whether and to which extent the restraining order will probably intrude into the exclusive 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. It is neither prudent nor necessary to define 'clearest of cases'. However, one important consideration would be whether the harm apprehended by the claimant amounts to a*

[2] *Setlogelo v Setlogelo* 1914 AD 221

breach of one or more fundamental rights warranted by the Bill of Rights."

44. The applicant relies upon two *prima facie* rights to found interim interdictory relief.

45. The first asserted *prima facie* right,[3] which is relevant in the context of constructive contempt, is that the applicant, following upon its constitutional right of access to court enshrined in section 34 of the Constitution, is entitled to its dispute that forms the subject matter of the review proceedings being heard by a court. That right entails that when the court hears the dispute the relief that the applicant seeks can still be granted by the court as that relief must not have been rendered nugatory in the interim though the conduct of the respondent. And so should the respondent take steps in the interim to render that relief nugatory, that would amount to constructive contempt, and which in and of itself would found a *prima facie* right to interim interdictory relief.

46. In the present instance, the applicant asserts that when the review court in the main review proceedings hears the review application, its right of access to court entails that the relief that it seeks in its review proceedings can still be granted, particularly that the Cancelled Tender can be awarded to the applicant, alternatively that the applicant's bid can be reconsidered. If by then the Re-advertised Tender has already been finalised through the adjudication of bids, the award of the tender and the

[3] See para 50 of the founding affidavit, as developed in argument.

conclusion of a contract with the successful bidder, then the relief that the applicant seeks, the applicant argues, would largely have been rendered nugatory as the review court's ability to grant the relief sought by the applicant will have been severely, if not irreparably, compromised. And so, the applicant argues, the respondent in seeking to re-advertise the Cancelled Tender and implement that tender, which may result in the relief in the review proceedings being rendered nugatory, has acted in constructive contempt of the anticipated order to be granted by the review court.

47. I raised with counsel during argument whether the merits of the dispute that a party sought to be ventilated in the court (in this instance the applicant in respect of its review application) played any role in assessing whether there can be constructive contempt of an order that has not yet been made. The applicant's counsel's submission was that the merits do not play a role as the applicant is entitled to have its dispute be heard, whatever the merits, and so that the respondent cannot take steps to render nugatory the relief that is sought in those proceeding. I posited to counsel what the position may be if an applicant's claim palpably had no merit or if a respondent had an unanswerable defence. Common sense would seem to indicate that it should play a role, as can there be constructive contempt of an order that is unlikely to be granted? On the other hand, a court, particularly an urgent court, should not be called upon

to delve too deeply into the merits of the review application as the decision of the review court should not be anticipated.[4]

48. I need not resolve this issue because, after reflection I have decided, to determine the applicant's right to interim interdictory relief based on the more conventional *prima facie* right arising from its grounds of review in the review proceedings, rather than deciding whether a right to interim interdictory relief arises in the context of constructive contempt.

49. I do so because it is not clear to me that should I grant interim interdictory relief premised upon the applicant having established a *prima facie* right that its dispute be heard without the respondent having taken steps in the interim to render the relief the applicant seeks nugatory i.e. in the context of constructive contempt, that the interdictory relief would be interim rather than final in effect. The review court will decide whether the applicant is entitled to the relief that the applicant seeks in the review proceedings and will not necessarily decide whether the respondent has acted in constructive contempt. I refer to the distinction between interim and final relief as expounded in *Andalusite Resources (Pty) Ltd v Investec Bank Ltd and Another* 2020 (1) SA 140 (GJ).[5]

50. It also appears that whether the respondent may have acted in constructive contempt is more nuanced than may appear at first blush. While it may be that the respondent's conduct in re-advertising the

[4] See *Outa*, para 31.

[5] Particularly para 20 to 24.

Cancelled Tender could, ordinarily, be perceived as being in constructive contempt for the reasons described above, the respondent's argument is not without merit that an organ of state it is entitled, and obliged, to discharge its constitutional duties by taking such steps as are necessary consequent upon its decision notwithstanding that its decision may be under review.

51. For example, in *Outa*, SANRAL was intent on proceeding with the implementation of its controversial 'e-tolling' system consequent upon various decisions that had been made although those decisions were the subject of pending review proceedings. Outa sought interim interdictory relief, which was granted by the court *a quo* but overturned by the Constitutional Court. There was no suggestion, at least as appears from the judgment, that SANRAL was acting in constructive contempt in pushing ahead with the e-tolling system notwithstanding the pending review proceedings. Of course there are distinguishing features but the point is that an organ of state pressing ahead in implementing its decision whilst there are pending review proceedings must not too quickly be branded as constructive contempt. Especially so given the imperative that the court when considering whether to grant interim interdictory relief must be alive to the principle of separation of powers.[6]

52. And it may also be doubtful whether seeking to found interim interdictory relief on a form of constructive contempt achieves something meaningful,

[6] See *Outa* above, para 47.

in the context of interim interdicts *pendente lite*. If there is a real risk that the relief sought in the main proceedings would be rendered nugatory by the conduct of the respondent (i.e the conduct that forms the basis for constructive contempt), the requirement of a well-grounded apprehension of irreparable harm if the interim relief is not granted would in any event be satisfied. To put it another way, without the risk of the respondent conducting itself in a manner that may amount to constructive contempt of the order still to be granted, the usual requirements for interim relief *pendente lite* would not be satisfied. If peered at closely enough, founding interim interdictory relief on constructive contempt may prove to be a will-o'-the-wisp, having been subsumed in the usual requirements for interim interdicts *pendente lite*.

53. And so I rather proceed on the steadier grounds of whether the applicant has established a *prima facie* right based upon its prospects of success on its grounds of review in the review proceedings.[7] This is particularly so as these remain urgent proceedings where the parties, and the court, would have not had the opportunity they ordinarily would have had to explore these issues. To the extent that the respondent has conducted itself in manner that attracts an inference that it has deliberately timed the re-advertising of the Cancelled Tender and the disclosure thereof, that can be assessed in the context of the remaining requirements for interim interdictory relief.

[7] See para 44 to 49 read with para 40 and 41 of the founding affidavit.

54. Turning again to the instructive Constitutional Court decision of *Outa*:[8]

> *"[49] Second, there is a conceptual difficulty with the high court's holding that the applicants have shown 'a prima facie . . . right to have the decision reviewed and set aside as formulated in prayers 1 and 2'. The right to approach a court to review and set aside a decision, in the past, and even more so now, resides in everyone. The Constitution makes it plain that '(e)veryone has the right to administrative action that is lawful, reasonable and procedurally fair' and in turn PAJA regulates the review of administrative action.*
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> *[50] Under the Setlogelo test the prima facie right a claimant must establish is not merely the right to approach a court in order to review an administrative decision. It is a right to which, if not protected by an interdict, irreparable harm would ensue. An interdict is meant to prevent future conduct and not decisions already made. Quite apart from the right to review and to set aside impugned decisions, the applicants should have demonstrated a prima facie right that is threatened by an impending or imminent irreparable harm. The right to review the impugned decisions did not require any preservation pendente lite."*

55. It is therefore not sufficient for the applicant to simply show that it has a *prima facie* right to review the Impugned Decisions.[9] It must go further and show that the *prima facie* right is threatened by impending irreparable harm. But it does remain necessary for the applicant to show that it has

[8] Above, para 49 and 50.

[9] As an aside, this does give rise to misgivings as to the applicant's submission that its right to have its dispute determined in court regardless of its merits, in the context of its right of access to court and constructive dismissal, in and of itself can sustain a *prima facie* right worthy of protection by way of an interim interdict.

prospects of success on its grounds in the review proceedings in order to establish that right.[10] [11]

56. The applicant in its founding affidavit summarises its grounds of review of the Impugned Decisions.[12] While averments made in the founding affidavit in support of these grounds of review are sparse, the respondent does not squarely take issue with this in its answering affidavit and appears content, as does the applicant, for the battle on the merits of the review to be waged in the review proceedings. What also weighs heavily in favour of the applicant is that the respondent's defence in the review proceedings has been struck out.

57. Such argument as was made in these urgent proceedings by the respondent why the applicant would fail in the review proceedings is that the respondent's decision to cancel the tender does not amount to administrative action, and so cannot be set aside on review.[13] The

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[10] In *Ladychin Investments (Pty) Ltd v South African National Roads Agency Ltd and Others* 2001 (3) SA 344 (N) the court found that the court has to evaluate the prospects of success in the review application. See also *Capstone 566 (Pty) Ltd and Another v Commissioner, South African Revenue Service and Another* 2011 (6) SA 65 (WCC), para 53.

Binns-Ward AJ (as he then was) in *Searle v Mossel Bay Municipality and Others* [2009] ZAWCHC 9 (12 February 2009) described the test as follows:

> *"That means the prospects of success in the contemplated review proceedings - as far as it is possible at this stage to assess them - represent the measure of the strength or otherwise of the alleged right that the applicant must establish prima facie in order to obtain interim relief."*

[11] In *Outa* the Constitutional Court found that it need not consider whether the applicant had established a *prima facie* right as it would find that the applicant failed on the other requirements for interim interdictory relief: para 52.

[12] Paragraphs 40 to 41 of the founding affidavit.

[13] See para 58 of the answering affidavit; para 10 and 11 of respondent's further submissions.

respondent relies upon *Tshwane City and Others v Nambiti Technologies* (Pty) Ltd 2016 (2) SA 494 (SCA) where Wallis JA found that the cancellation of a tender by an organ of state prior to its adjudication did not constitute administrative action,[14] and that to effectively compel a state organ to consider and award a tender that it had decided not to proceed with, may infringe on the doctrine of separation of powers and should only be done in extreme circumstances.[15]

58. Without anticipating the decision of the review court, *Nambiti* may be distinguishable as in that matter the tender was cancelled before an adjudication of the bids that had been submitted.[16] In contrast, in the present instance, the respondent states that cancellation of the tender took place *"[f]ollowing a rigorous adjudication process"*, and with no bidder qualifying.[17] Also, in *Nambiti,* the tender was cancelled because the state organ no longer wanted the services that had gone out on tender[18] and so SCA found that it would only be in extreme circumstances that a state organ would be ordered to award a tender to procure services it no longer wanted.[19] In the present instance the tender was cancelled because,

[14] Para 24 and 31 to 34, as summarised in the headnote.

[15] Para 43.

[16] Para 24, 32 and 33.

[17] Answering affidavit, para 51.

[18] Para 26, 27 and 31.

[19] Para 43.

accordingly to the respondent, there were no responsive bids,[20] not because it no longer wished to let the farms.

59. To the extent that the respondent argued that the applicant cannot have a *prima facie* right as the respondent is not acting unlawfully in proceeding with the Re-advertised Tender as there is not yet (and may never be) an order finding that the Impugned Decisions are to be reviewed and set aside, this argument was rejected in *Transnet Bpk h/a Coach Express en 'n Ander v Voorsitter, Nasionale Vervoerkommissie, en Andere* 1995 (3) SA 844 (T).[21]

60. Turning to the remaining requirements for interim interdictory relief.

61. The irreparable harm that the applicant contends for if the interim relief if not granted is that if the Re-advertised Tender is awarded and then implemented, it is unlikely, if possible at all, that the review court when it hears the review application will be in a position to grant the relief sought by the applicant that it be awarded the Cancelled Tender, alternatively that the respondent be required to reconsider the applicant's bid in respect of that tender. This is because the tender would have been awarded to another bidder, pursuant to the Re-advertised Tender.

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[20] Answering affidavit, para 52.

[21] At 847J – 848A. Although this argument found favour in *Coalcor (Cape) (Pty) Ltd and Others v Boiler Efficiency Services CC and Others* 1990 (4) SA 349 (C), it was subsequently rejected in various cases, such as *Ladychin* above at 357D, which cases followed *Transnet*.

62. This is notwithstanding the wide powers afforded to the court under section 8 of PAJA to grant any order that is just and equitable or under section 172 of the Constitution to craft an appropriate remedy that is just and equitable.

63. The respondent does not contest that the relief that the applicant seeks in the review proceedings would most likely no longer be available as viable remedies should interim relief not be granted and the Re-advertised Tender is then awarded and implemented.

64. I therefore find that there is a well-grounded apprehension of irreparable harm if the interim relief is not granted.

65. The respondent's focus is rather on asserting that there is a satisfactory alternative remedy to an interdict, namely damages.

66. During argument, submissions were made by counsel as to whether damages or compensation would be available as an alternative remedy under PAJA should it be found that the Impugned Decisions must be reviewed and set aside, and the relief sought by the applicant in its review proceedings no longer available. The parties were in agreement that section 8(1)(c)(ii)(bb) of PAJA expressly provides that upon setting aside the administrative action, the court may in exceptional circumstances *inter alia* direct the respondent to pay compensation.

67. The respondent argued that this constituted an alternative satisfactory remedy in the circumstances and therefore the applicant had not made out a case for an interim interdict.

68. The applicant, on the other hand, submitted, in light of the recent Constitutional Court decision of *Esorfranki Pipelines (Pty) Limited v Mopani District Municipality*,[22] that in the absence of the respondent having engaged in deliberate misconduct or dishonesty (which is not the applicant's case in the review proceedings), damages or compensation could not be awarded, and so damages or compensation was not an available remedy.

69. I expressed some hesitancy during argument as it appeared to me that this may result in certain instances where a successful applicant on review could end up being denied any effective relief, especially if the horse had bolted in relation to every other form or relief.[23] Happily I need not resolve this issue because even if the applicant is able to claim damages or compensation in due course, in my view that does not constitute a satisfactory alternative remedy in these circumstances.

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[22] 2022 JDR 3614 (CC), at paras 55 and 56.

[23] Theron J says in paragraph 56 that "*But where the state's misconduct is deliberate and dishonest and where substitution or remittal are not viable forms of relief, or where this relief will not suitably remedy the loss sustained by a party, circumstances may exceptionally require compensatory relief in order to ensure a just and equitable result*" (my emphasis). I do not read this as necessarily excluding compensatory relief where there is no misconduct that is deliberate and dishonest, but rather as compensatory relief being available where substitution or remittal are not viable forms of relief, if the circumstances are exceptional.

70. The applicant is entitled, as least where it has established a *prima facie* case and the remaining requirements for an interim interdict, to require of the review court in due course to determine whether it should be granted the relief that it seeks, namely that the Cancelled Tender be awarded to it or alternatively that its bid be reconsidered by the respondent and that the applicant cannot, in the present prevailing circumstances, be compelled to content itself with a claim for damages or compensation.[24] This is particularly so where the extent of that claim will probably prove nebulous in its proof and where there is the legal debate whether it would in any event be available, in light of *Esorfranki*. At the very least, the applicant would have to show exceptional circumstances to claim compensatory relief,[25] and relief that requires such as threshold cannot be considered as a satisfactory alternate remedy.

71. In determining where the balance of convenience lies, and in the context of the principle of separation of powers, as stated in *Outa*,[26] the enquiry must carefully probe whether and to what extent the restraining order will probably intrude into the exclusive terrain of the another branch of

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[24] Analogously, see *Candid Electronics (Pty) Limited v Merchandise Buying Syndicate (Pty) Limited* 1992 (2) SA 459 (C) where the court, with reference to *Haynes v King William's Town Municipality* 1951 (2) SA 371 (A) at 378 E – F, reiterated that a plaintiff has a right of election whether to hold the counter-party into his contract and claim performance, or to claim damages for breach. The defendant does not have an election to insist that the plaintiff take damages instead of having an order for specific performance. This was affirmed by the Supreme Court of Appeal in *V&A Waterfront Properties (Pty) Limited v Helicopter and Marine Services (Pty) Limited* 2006 (1) SA 252 (SCA), para 23.

[25] *Esorfranki* above, para 56. See also section 8(1)(c)(ii) of PAJA, which requires *"exceptional cases"* for compensatory relief.

[26] Para 47.

government. Further, 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 and that it is neither prudent nor necessary to define 'clearest of cases'.[27]

72. In the present instance, the statutory power that the respondent, or more accurately the municipality who is the owner of the farms and has authorised the respondent to lease those farms, would be restrained from exercising is the letting of those farms. As the initial tender was cancelled, and as the cancellation has not been declared unlawful, the respondent's argument is that it is entitled to act consequent upon that cancellation and relet the farms.

73. Accepting then that the grant of an interim interdict will to this extent infringe upon the municipality's exercise of its statutory power, and so implicate the principle of separation of powers, I am of the view, in considering the balance of convenience and the other requirements for interim interdictory relief, that this is a case where an interim interdict should nevertheless be granted:

73.1. The respondent does not describe any specific harm that the respondent, or municipality, will suffer if the interim interdict is granted and the farms cannot be let in the interim. The respondent contents itself in its answering affidavit to vaguely referring to its

[27] *Outa*, para 47.

obligation to serve the millions of people within its jurisdiction through the income that would be realised from the letting of the farms.[28] But, for example, no details are provided of the income that the letting of the farms will generate for the municipality, particularly for the period that the letting of the farms will be sterilised while the interim interdict is place and the determination of the review proceedings awaited.

73.2. This can be contrasted to the detailed harm that was foreseen to the respondents in *Outa* if the interim interdict was granted in that matter preventing SANRAL from levying and collecting toll moneys from motorists while the outcome of the review proceedings was awaited, which included a downgrading of SANRAL's business rating and consequent impact on its ability to execute other projects, the risk of the executive government being called upon to honour a sovereign guarantee for the debt of SANRAL of R20 billion and the consequent impact upon the economy of the country as a whole, and the resultant need for the government to appropriate money from the national revenue fund budgeted for elsewhere to fund SANRAL's debt exposure while the interim interdict was in place and its consequent prejudice to the taxpayers.[29]

[28] Answering affidavit, para 52 and 74.

[29] Para 27 and 57 to 60.

73.3. The reasonably apprehended irreparable harm that the applicant will suffer if the Re-advertised Tender goes ahead has already been described above.

73.4. The duration of the interim interdict would not be lengthy. The main review proceedings are ripe for hearing. But for the respondent's dilatoriness in its opposition to the main review proceedings, the main review proceedings would probably have been heard by now. The respondent's defence has been struck out, opening the way for the applicant to proceed on a default basis. Whether or not the respondent seeks to reinstate its defence, the applicant should now be able to enrol its application, whether on the opposed or unopposed roll as may be appropriate, and so have the review application heard within the next two to three months. This can be contrasted to an interim interdict restraining the exercise of statutory power *"well ahead"* of the final adjudication of the review proceedings, as was the case in *Outa*.[30]

73.5. In any event, a complaint by the respondent about the delay and resultant (but unspecified) prejudice caused by the interim interdict while the determination of the review proceedings is awaited is cynical where the respondent has caused the delay in the determination of the review proceedings.

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[30] *Outa*, para 47.

73.6. The respondent makes out no case in its answering affidavit why there was pressing need in December 2022 to lease the farms in circumstances where the respondent had been content until then that the review proceedings run their course. The tender was cancelled by the respondent as long ago as 2020, and no steps were taken until December 2022 to readvertise the tender. The respondent's assertion that the interim interdict will prevent the municipality from generating income should the farms be let does not resonant where it was content to forego that income for some two years previously, since the cancellation of the tender in 2020.

73.7. Of relevance is the applicant's argument that the readvertising of the tender was deliberate and specifically to preclude the review court from being able to grant certain relief in due course. The respondent's re-advertising of the cancelled tender appears, upon a consideration of the factual chronology, to be motivated more as a strategic move in opposition to the review proceedings than as a pressing need to let the farms to generate revenue for the municipality.

73.8. The Re-advertised tender has not reached an advanced stage, and so should the interim interdict be granted, the effect thereof on the bidders for that tender is limited. The respondent is not forthcoming in its answering affidavit as to the stage that has been reached in the re-advertised tender, saying no more than there are four short-listed bidders that had complied with the bidding

requirements and that the adjudication process is underway.[31] During argument, upon enquiry by the court, the respondent through its counsel, after taking instructions, for the first time disclosed that the respondent would not complete the adjudication process and make an award by 19 June 2022. As there has been no adjudication, the prejudice that the shortlisted bidders will suffer if the interim interdict is granted and the adjudication cannot be completed is outweighed by the prejudice that the applicant will suffer if the re-advertised tender goes ahead and, after adjudication, is awarded to the successful bidder. It might even be that the shortlisted bidders will suffer no legally cognisable prejudice if the interim relief is granted as there has not been an adjudication of the bids, although I do not make any finding on this.[32]

73.9. As there would not have been an adjudication and an award of the Re-advertised Tender before 19 June 2022 even if the interim interdict was not granted, the granting of that interdict where the review proceedings are capable of being determined by that date also weighs in favour of granting the interdict.

74. To the extent that the respondent argued that it is not open to the court to grant an interdict that restrained the exercise of statutory power, this is

[31] Para 38 and 47 of the answering affidavit.

[32] *Nambiti*, para 32 and 33, and the discussion above.

too widely stated. As appears from *Outa*, the court does have the power to grant such an interim interdict, provided that the usual requirements for such relief are applied cognisant of the caution and imperatives expressed in *Outa*.

75. In the circumstances, I find that the applicant has satisfied the requirements for an interim interdict pending the outcome of the review proceedings.

76. The respondent also raises an issue of non-joinder, contending that the applicant had not joined the four shortlisted bidders who had bid in response to the Re-advertised Tender and whose bids were presently being considered by the respondent.

77. Although it not beyond doubt that these bidders would suffer legally cognisable prejudice if an interim interdict is granted as their bids have not yet been adjudicated,[33] I proceed on the assumption that they nevertheless may have a sufficient interest that they should be parties to these proceedings.

78. The applicant accordingly sought of this court to *mero motu* join these parties to these proceedings. No real opposition was put up by the respondent to this and in the circumstances I order that these bidders be joined to these proceedings.

[33] *Nambiti*, para 32 and 33, and the discussion above.

79. But this issue does not end there because what is to be made of these bidders' participation in these proceedings when they have only been joined now, and did not advance any argument before me? The applicant has detailed in its replying affidavit what steps have been taken since the respondent belatedly, only after the launch of these urgent proceedings, made known to the applicant sufficient details of these bidders to enable them to be identified and approached by the applicant's attorneys. The applicant argued that should these bidders have wished to participate in the proceedings, they would have already done so, especially given the lengths to which the applicant's attorneys have gone to inform these bidders as to what relief was being sought in the urgent court. The applicant submitted that these interested parties once joined should be left to ascertain for themselves by reference to *inter alia* the Uniform Rules what remedies they may have in relation to such relief as may be granted by this court in their absence as may adversely affect them. Reference was made, to Rule 6(12)(c) that provides for a reconsideration of an urgent order by a person in whose absence the order was made as well as to Uniform Rule 42 regulating the variation and rescission of orders.

80. As these urgent proceedings have been fully argued before me as between the applicant and the respondent and as the applicant cannot be faulted for not joining the bidders earlier, it would not be in the interests of justice that the application be postponed and another court burdened with hearing the application once the joined parties have been informed of their joinder. Rather I intend ordering that these joined parties are entitled to take such steps as they may deem appropriate to seek a re-hearing in

relation to the interim relief insofar as they may be affected thereby. It will be for those joined parties to ascertain what procedure should be adopted to advance their position.

81. The applicant has also asked that I join these bidders to the review proceedings given that they may have an interest in those proceedings. No argument to the contrary was made by the respondent. I will accede to this request as it will advance the determination of those review proceedings, and so assist in curtailing the potential impact that the interim interdict may have, as sooner those review proceedings determined, the better.

82. Turning to the issue of costs.

83. The respondent argues that the matter was not urgent as the applicant should have been alive to the re-advertisement of the tender as long ago as 5 December 2022, when the tender was advertised in the media, and so any urgency is self-created as the applicant should have approached the urgent court long before it did in February 2023.

84. The manner in which the respondent, as an organ of state, has gone about litigating and conducting itself in the context of the pending review proceedings is disquieting. The respondent has not adduced evidence to gainsay the evidence relied upon by the applicant in drawing the inference that the respondent deliberately readvertised the tender and did not inform the applicant. The respondent's response to this was that there was no obligation upon it to grant the applicant any "*special favours*" by

informing the applicant specifically that there was a readvertisement of the tender as that readvertisement of the tender took place in the media as is required by law. The respondent's submission is that should it have given such notice to the applicant, it would have resulted in preferential treatment to the applicant. I find little substance in this submission, as I do not see how giving notice that the Cancelled Tender would be readvertised to the person most directly affected by that readvertisement of the tender can constitute preferential treatment.

85. I put to the respondent whether the proposition that the respondent as an organ of state was not an ordinary litigant and should therefore take particular care that it litigated with transparency. The respondent had no difficulty with the proposition but rather argued that on the facts of this matter the respondent had acted transparently.

86. As appears above, I have considerable doubt that the respondent conducted itself transparently in relation to the litigation, and in going about readvertising the Cancelled Tender without giving the applicant any notice thereof, and then only doing so after that readvertised tender had already closed.

87. My sense of disquiet is reinforced by the manner in which the respondent has gone about delaying the review proceedings, to the extent that now shortly before the hearing of this urgent application the respondent's defence in those review proceedings has been struck out.

88. Also relevant is the respondent's reticence in these urgent proceedings to have disclosed that the adjudication process would not be finalised and an award made before 19 June 2023. Had that disclosure been made by the respondent before the applicant was compelled to launch urgent proceedings, these urgent proceedings may have been averted as the review proceedings could have been decided by then. At the very least, these urgent proceedings would not have to be proceed on the basis of severely truncated periods for the exchange of affidavits.

89. The disclosure was also only made during the course of the respondent's argument before me. Had this disclosure been made earlier, it may have been appropriate for this court to first have joined the four shortlisted bidders, provided for a timetable for the exchange of affidavits and have postponed the urgent application to facilitate their participation. But by the time the disclosure was made, the urgent application had largely already been argued before me.

90. It also follows that the applicant cannot be faulted for bringing this application urgently as it was kept in the dark by the respondent as to what progress was being made in relation to advancing the Re-advertised tender. The applicant did not know until well into the hearing before me that an award would not be made before 19 June 2023.

91. I therefore find that it would be appropriate that the respondent pay the costs of these urgent proceedings for an interim interdict rather than, for

example, the costs being reserved for determination by the court in the review proceedings.

92. Finally, there will have been a delay between when this matter was argued before me in urgent court on 22 February 2023 and I reserved judgment, and when this judgment is delivered. Once the respondent disclosed that the adjudication would not be finalised and an award made before 19 June 2023, the immediate urgency of the application dissipated. As appears above, it is questionable whether this matter required the attention of the urgent court at all if the award is not be made before 19 June 2023 but the applicant cannot be faulted for that.

93. The following order is granted:

93.1. The following parties,:

93.1.1. Kagiso Molebaloa Investments (Pty) Limited as the second respondent;

93.1.2. Majuba Technologies (Pty) Limited as the third respondent;

93.1.3. Blue Dot G Services as the fourth respondent; and

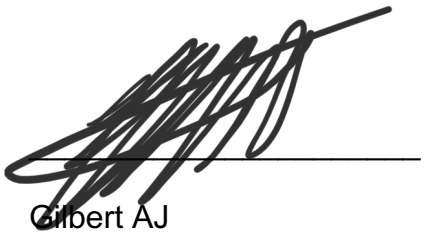
93.1.4. Thuso Skills Development and Training Centre as the fifth respondent,

are joined to both these proceedings and the review proceedings application under case number 11038/2021, and the applicant is granted leave to serve all process as may be required via email at the email addresses of such joined as referred to in the applicant's replying affidavit in these proceedings.

93.2. The first respondent Johannesburg Water SOC Ltd is interdicted, pending the final determination of the review proceedings between the applicant and the first respondent under case number 11038/2021, from appointing any third party (including the joined parties) and/or negotiating or concluding any contract with such third party (including the joined parties), and/or implementing or further implementing as the case may be, any contracts with such third parties (including the joined parties) in relation to or in connection with Tender No. JWOPS038/19R (Lease for Northern Farms).

93.3. The parties joined as the second to fifth respondents are granted leave to approach the court for such relief as may be appropriate, including a reconsideration of this order insofar as it may affect them prejudicially.

93.4. The costs of this application, which costs shall include the costs of two counsel, are to be paid by the first respondent.



Gilbert AJ

Date of hearing:	22 February 2023
Date of judgment:	20 March 2023
Counsel for the Applicant:	G Girdwood SC
	M Gwala
Instructed by:	Van Eeden Rabie Inc.
Counsel for the Respondent:	Ms C Makhajane
Instructed by:	SSM Attorneys