IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 23826/16

In the matter between: 19/4/2016

KGP MEDIA INVESTMENTS (PTY) LIMITED Applicant

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO

18/04/16
DATE

SIGNATURE

and

PASSENGER RAIL AGENCY OF SOUTH AFRICA First Respondent

PUBLIC PROTECTOR Second Respondent

JUDGMENT

Tuchten J:

1 The applicant, which trades as KG Media, applies for urgent relief. The issue before me arises from an agreement between the applicant and the first respondent (Prasa), an organ of state which operates passenger rail services within the Republic.

2 The agreement between the parties was described by them as a strategic partnership agreement. In law, however, it is nothing but a commercial agreement under which Prasa agreed to be locked in for a period (currently for three years expressed to end on 31 March 2018) to pay a substantial sum each month, presently R530 897,72, to the applicant in return for a commitment on the part of the applicant to promote Prasa's services in a publication put out by the applicant called Kwela Express.

3 It is common cause that the conclusion of the agreement was not preceded by any competitive bidding process as contemplated in s 217 of the Constitution and the national legislation enacted to provide a framework within which the policy prescribed by s 217 must be implemented. Section 217 itself reads as follows:

> (1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.
>
> (2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for-
>
> (a) categories of preference in the allocation of contracts; and

(b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.

(3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented.

4 A complaint in relation to this agreement was submitted to the Public Protector, who proceeded to investigate the agreement and other alleged irregularities within Prasa. In August 2015, the Public Protector provided a report in which she directed remedial action. Part of the remedial action so directed was that Prasa was required to terminate the agreement on the ground that it was void for failure to comply with the procurement legislation to which I have referred.

5 In a letter dated 10 March 2016, Prasa eventually complied with the Public Protector's direction by telling the applicant that it regarded the agreement as unlawful and thus invalid from the outset.

6 In the interim, the applicant, although well aware of the report of the Public Protector and the remedial action directed by the Public Protector which affected the applicant, continued to render the promotional services and invoice Prasa for those services at a monthly rate of R530 897,72.

7 But even though the last payment received by the applicant under the agreement was in September or October 2015 and the applicant claims that if it is not paid what it claims under the agreement it is likely to go insolvent, the applicant took no legal proceedings to enforce its alleged rights but contented itself with negotiating in an attempt to improve its position.

8 Finally, by notice of motion dated 22 March 2016, precipitated by Prasa's letter dated 10 March 2016 mentioned above, the applicant launched the present application. It is opposed by Prasa. The Public Protector abides.

9 The main relief to be sought by the applicant is for a review in which it will claim that what it describes as Prasa's decision (pursuant to the findings of the Public Protector that Prasa was not bound by the agreement) was unlawful and invalid or that the alleged termination of the agreement was invalid and that the Public Protector's report relating to the agreement be set aside.

10 The urgent interim relief, which is before me, is for interim interdicts, pending the reviews described, directed at compelling Prasa to pay the applicant the amounts invoiced and to be invoiced by the applicant to Prasa, all of which the applicant claims are due by Prasa or will

become due against the provision by the applicant of the promotional services described in the agreement.

11 The foundation for the review, as it appears from the papers which served and oral argument which was made before me, is that the "decisions" to terminate the agreement amount to administrative action, taken in each instance in violation of the applicant's alleged right to be heard before decisions affecting it were made. In addition, the applicant maintains that the competitive bidding procurement legislation is not applicable on the facts of this case.

12 The answer to this, on behalf of Prasa, is that the applicant had no right to be heard by the Public Protector and that Prasa's decision to terminate the agreement was purely commercial, as opposed to administrative, action and thus did not require affording the applicant a hearing before it was made and that the competitive bidding procurement legislation is indeed applicable.

13 I am prepared to assume, in favour of the applicant, that it may have grounds for a successful review although I do not think that the applicant has a strong case at this level. The question to which I turn is whether, on this assumption, the applicant has made out a case for interim interdicts.

14 The factors influencing the grant or refusal of an interim interdict pending a review in the constitutional era were set out by my brother Fabricius J in *Afrisake NPC and Others v City of Tshwane and Others*, a judgment delivered in this Division on 14 March 2014 under case no 74192/2014. As I cannot materially improve upon the exposition of Fabricius J, I shall quote the contents of paragraphs 8-10 of the judgment:[1]

> These requirements, which are often referred to as being "trite", conveniently appear in the Law of South Africa, Second Edition, Vol 11 at 411, the author being the respected former Judge of Appeal, LTC Harms. They are also dealt with, and their history, in the Law and Practice of Interdicts, CB Prest SC, Juta and Company 1996. As I have said, these requirements are often regarded as being "trite", but a careful reading of the Case Law will lead one to the conclusion that they are often misunderstood, and, as in the case before me, not applied to the facts correctly. I am not dealing with the requirements for a final interdict. One of the most important considerations is that an interim interdict must be concerned with the future only. It is not meant to affect decisions already made.
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> See: *National Treasury vs Opposition to Urban Tolling Alliance* ...[2]
>
> I say that this is of the utmost importance because it is interrelated to the second requirement, and it is in this

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1 Paragraph numbering omitted.

2 *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 6 SA 223 CC para 50

context in particular where the misapprehension occurs as to what must actually be shown. The requisites for the right to claim an interim interdict are:

a) A prima facie right, though open to some doubt;

b) A well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted;

c) That the balance of convenience favours the granting of an interim interdict; and

d) That the applicant has no other satisfactory remedy.

None of these requisites must be judged in isolation.

See: *Olympic Passenger Service (Pty) Ltd vs Ramlagan* 1957 2 SA 382 D at 383.

These requisites have their origin, so it is often said, in *Setlogelo vs Setlogelo* 1914 AD 221 at 227. It is however clear from that judgment that the appeal before the Court concerned the granting of a final interdict, where the requirements are different. It was in the context of whether or not an interim interdict could be obtained even though a clear right was not shown, that Innes JA dealt with the need to show irreparable harm as set out by *Van der Linden, Institutes*, (3, 1, 4, 7). Van der Linden mentioned this only in the case of where the right relied upon was not clear, but was only *prima facie* established, if open to some doubt. In that instance the question would be whether the continuance of the thing against which an interdict is sought, would cause irreparable injury to the applicant. The better course would be, so it was said, to grant the relief if the discontinuance of the act complained of would not involve irreparable injury to the other party. The whole topic was again debated by *Clayden J in Webster vs Mitchell* 1948 1 SA 1186 W at 1189.

The right can be *prima facie* established even if it is open to some doubt. Mere acceptance of the applicant's allegations is insufficient, but the weighing-up of the probabilities of

conflicting versions is not required. The proper approach is to consider the facts as set out by the applicant together with any facts set out by the respondent which the applicant cannot dispute, and to decide whether, with regard to the inherent probabilities and the ultimate onus, the applicant should on those facts obtain final relief at the trial. The facts set up in contradiction by the respondent, should then be considered, and if they throw serious doubt on the applicant's case, the latter cannot succeed. In *Webster vs Mitchell supra* the test was actually whether the applicant could obtain final relief on those facts. The mentioned qualification was introduced by *Gool vs Minister of Justice* 1955 2 SA 682 C at 687 to 688. The Full Bench of the Cape Provincial Division agreed with the relevant analysis of the requirements in *Webster vs Mitchell supra*, subject to the qualification that the Court must decide, having applied the proper approach to the facts that I have mentioned, whether the applicant should (not could) obtain final relief at the trial on those facts. I may add at this stage, because I will return to that topic hereafter, that it was also held in that decision (at 689) that where an interdict was sought against the exercising of statutory powers, it will only be exercised in exceptional circumstances, and when a strong case is made out for relief. The mentioned qualification to the *Setlogelo*-test, if I can call it that, as subsequently adapted by *Webster vs Mitchell*, was held to be "a handy and ready guide to the bench and practitioners alike in the grants of interdicts in busy magistrates' courts and high courts." The qualification in *Gool* was given approval, and it was also said that the *Setlogelo*-test had now to be applied cognisant of the normative scheme and democratic principles that underpin

our Constitution.[3] This means in effect 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. For instance, if the right asserted in the claim for an interim interdict is sourced from the Constitution it would be redundant to inquire whether that right exists. As another example, the principle of the separation of powers must be applied in appropriate circumstances.

See: *National Treasury vs Opposition to Urban Tolling Alliance* supra at 236 par. 44.

I have said that the mentioned requisites are not to be judged in isolation and that they interact. It is no doubt that for this reason Moseneke DCJ in the *National Treasury* decision *supra* held at 237 par 50 that "under the Setlogelo-test the *prima facie* right a claimant must establish is not merely a 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 applicant must demonstrate a *prima facie* right that is threatened by an impending or imminent irreparable harm. The right to review the impugned decisions does not require any preservation *pendente lite*." The second requisite of irreparable harm, must be looked at objectively, and the question is whether a reasonable person, confronted by the facts, would apprehend the probability of harm; actual harm need not be established upon a balance of probabilities. This requisite in turn is closely related to the question of the balance of convenience. This is the third requisite and it must be shown that the balance of

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3 Fabricius J was quoting from and referring to *National Treasury and Others v Opposition to Urban Tolling Alliance and Others, supra*, para 45

convenience favours the grant of the order. In this context the Court must way the prejudice the applicant will suffer if the interim interdict is not granted, against the prejudice the respondent will suffer if it is.

See: *Harms supra* par 406 and *Prest supra* at 73, where the learned author said, in my view quite correctly, that a consideration of the balance of convenience is often the decisive factor in an application for an interim interdict. He states that even where all the requirements for a temporary interdict appear to be present, it remains a discretionary remedy and the exercise of the discretion ordinarily turns on a balance of convenience. I agree with that approach and the view of Harms, JA in this context (at par 406), as well as the dictum in *Olympic Passenger Service (Pty) Ltd supra* at 383.

The fourth requisite for the granting of an interim interdict is the absence of another adequate remedy. This element is also a factor in the exercise of the Court's general discretion to grant or refuse an interim interdict. Before turning to the relevant facts and submissions made by the parties, it is said (see *Harms supra* par. 408) that the Court always has a wide discretion to refuse an interim interdict even if the requisites have been established. This means that the Court is entitled to have regard to a number of disparate and incommensurable features in coming to a decision, and not that the Court has a free and unfettered discretion. The discretion is a judicial one, which must be exercised according to law and upon established facts. I therefore do not agree with [counsel] that I have a so called "overriding" discretion.

See: *Knox D'Arcy Ltd vs Jamieson* 1996 4 SA 348 A at 361 to 362 and *Hix Networking Technologies CC vs System Publishers (Pty) Ltd* 1997 1 SA 391 A at 401. The exercise of the discretion must therefore be related to the requisites for the interim order sought, and not to any unrelated features.

15 It is by now trite that the applicant is not entitled to an interdict to protect its right to review. That right is afforded under the Constitution. What the applicant actually seeks to protect is its right to be paid under the agreement.

16 There is no suggestion that Prasa will not be able to pay any amount which it might in due course be ordered to pay the applicant. The applicant's case is that if it is not paid pursuant to its monthly invoices pending the final adjudication of the dispute, it will go insolvent.

17 Assuming this to be so, I find that the applicant has fallen short of making a case for interim interdicts on two grounds. Firstly, the applicant has a perfectly adequate alternative remedy: it can institute action against Prasa for what it claims is owed to it under the agreement. It was suggested in argument that Prasa did not put up facts on the strength of which Prasa might resist the applicant's claims for payment. I do not agree. But even if this were so, an action, culminating (so the applicant hopes) in an order against Prasa for payment, will provide adequate protection of the applicant's alleged rights. The fact that the applicant has delayed enforcing this obvious remedy for more than six months does not improve the applicant's position in this regard.

18 Secondly, the balance of convenience is strongly against the applicant. It is not disputed that if I order payment in the interim and the applicant is ultimately unsuccessful in the normal course, the applicant will probably be unable to repay such interim payments. Counsel for the applicant argued that this prejudice would be eliminated because Prasa would receive the promotional services contemplated in the agreement. I disagree. There is nothing in the papers to suggest that Prasa needs all the services contemplated in the agreement or that the value the parties apparently placed on these services in the agreement is truly cost effective. Nothing prevents Prasa from concluding further contracts, in accordance with the law as Prasa understands it to be, with the applicant for specific services.

19 It follows that the application for urgent relief cannot succeed. This is in essence a commercial dispute and costs must therefore follow the result.

20 The final matter with which I must deal relates to a counter-application brought by Prasa for an order declaring that the agreement was unlawful and null and void *ab initio*. I was asked to strike it from the roll for want of urgency. No grounds of urgency were expressly advanced in relation to the counter-application. However, in light of the conclusions to which I have come above, I do not reach the

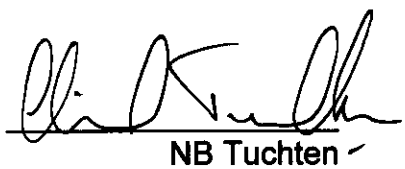
counter-application. I think that the proper order is simply to remove the counter-application from the roll with leave to Prasa to enrol it in the normal course, should it so wish.

21 I make the following order:

1 The application for the relief in Part A of the notice of motion is dismissed.

2 The applicant must pay the first respondent's costs, which are to include the costs consequent upon the employment by the first respondent of both senior and junior counsel.

3 The counter-application is removed from the roll. The first respondent is granted leave to re-enrol the counter-application for hearing in the normal course.



NB Tuchten
Judge of the High Court
18 April 2016

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