



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case No: 038072/2022

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

15 DECEMBER 2022

SIGNATURE

DATE

In the matter between:

RMS JOINT VENTURE CC t/a RADD'S TRANSPORT

Applicant

and

**TRANSNET SOC LIMITED, EYAMAKOSHI
TRANSPORT (PTY) LTD, AQUA TRANSPORT
PLANT HIRE (PTY) LTD**

1ST Respondent

2ND Respondent

3RD Respondent

JUDGMENT

COWEN J

Introduction

1. The applicant, RMS Joint Venture CC, applied to this Court on an urgent basis for an interim interdict to prevent the respondents from implementing a tender

to provide a three year maintenance lease of materials handling equipment at the terminals of the Port of Richards Bay (the tender).¹ The first respondent, Transnet SOC Limited (Transnet) awarded the tender to the second and third respondents, respectively, Eyamakhosi Transport (Pty) Ltd and Aqua Transport and Plant Hire (Pty) Ltd. The interim interdict was sought (as Part A) pending a review of the decision to award the tender (Part B), which, it was prayed, should be case-managed and heard on an expedited basis. The applicant was excluded from the tender in circumstances where Transnet is in the process of blacklisting the applicant as a supplier due to concerns about tender collusion and issues that are under forensic investigation. These concerns do not relate to the tender itself but to prior tender processes. The concerns are detailed in the founding affidavit and in view of the basis of my decision, I do not detail them in full.

2. On 2 December 2022 I delivered my order in Part A in the following terms.

‘1. The forms and service provided for in the Rules of Court are dispensed with and the matter is heard as an urgent application in terms of Rule 6(12) of the Rules of this Court.

2. Pending the final determination of the relief sought in Part B of this application (the interdict period), the respondents are interdicted from taking any steps to implement the tender advertised under Request for Proposal tender iCLM HQ 628/TPT (the tender).

3. The parties are directed to prosecute the review (Part B) expeditiously and shall, after the commencement of the first term 2023, approach the office of the Deputy Judge President for the allocation of a hearing date and any expedited case management that may, at that stage, be required.

¹ The tender number is iCLM HA 628/TPT.

4. The First Respondent shall deliver the Rule 53 Record, if it has not already done so, by no later than 9 December 2022.
5. The Applicant shall deliver its supplementary founding affidavit and any amendment to the notice of motion in terms of Rule 53 by no later than 23 December 2022.
6. The Respondent shall deliver its answering affidavit by no later than 20 January 2023.
7. The Applicant shall deliver its replying affidavits by no later than 31 January 2023.
8. In the event that a dispute arises in connection with the production of the Rule 53 Record and the dispute is of such a nature that prevents the applicant from complying with paragraph 5 above, the dates set in paragraph 5 to 7 shall, with the necessary changes, apply to the delivery of affidavits in any application to compel production of a full record.
9. Without derogating from the parties' common law rights in any way, the parties are granted leave during the interdict period to apply to the Court, on good cause shown, to vary paragraph 2 of this order should such variation be necessary to prevent disruption to the operations of the Port of Richards Bay notwithstanding that the relevant facts may have existed at the time this order was granted.
10. Costs are reserved.'

3. I now explain my primary reasons for making this order.

Urgency

4. The application was instituted urgently on 25 October 2022. The applicant afforded the respondents until 11 November 2022 to deliver answering affidavits, with a replying affidavit to follow. The applicant enrolled the matter on the urgent roll for Tuesday 22 November 2022. I allocated the matter for hearing on Thursday 24 November 2022. The applicant followed the above time-table in circumstances where Transnet had finally notified it of the tender decision on 17 October 2022. Although Transnet initially notified the applicant of its exclusion from the tender process in correspondence dated 15 August 2022, the applicant took issue with the exclusion, and in correspondence dated

26 August 2022, threatened an urgent application. On 29 August 2022, Transnet indicated that the bid process was ongoing and that all bidders, including the applicant would be notified of the final outcomes when the process was finalized including the process to be followed in cases of objections or complaints. Thereafter, on 9 September 2022, Transnet requested the applicant to confirm an extension of the validity of its tender until 5 December 2022. Following the notification of the decision on 17 October 2022, the applicant requested Transnet to give it an undertaking not to implement the tender pending a review, which Transnet did not do. Although the applicant truncated the time frames for the delivery of affidavits, the time afforded was adequate to enable a reasoned and substantiated response (13 court days). Although Transnet did not supply its intended time-line for implementation in its answering affidavit, it wishes to implement the tender. In my view, the applicant prosecuted the application for interim relief appropriately in terms of Rule 6(12) of the Rules of this Court.

Preliminary point: section 7(2) of PAJA

5. At the hearing, Transnet raised a preliminary point in terms of section 7(2) of the Promotion of Administrative Justice Act 2 of 2000 (PAJA) which prevents a court from reviewing administrative action unless any internal remedy provided for in any other law has first been exhausted. Section 3 of PAJA imposes a duty on administrators to provide persons whose rights or legitimate expectations are materially and adversely affected with adequate notice of any

right of review or internal appeal, where applicable.² This is part of the right to procedural fairness and the correlative duty on administrators to act in a procedurally fair manner under PAJA.

6. Before the applicant instituted the application, it requested Transnet to inform it of any available internal remedy. It did so in correspondence dated 26 August 2022, at which point the applicant had been notified of its initial exclusion. As indicated above, on 29 August 2022, Transnet advised that it would notify all bidders of the final outcomes of the process in due course including the process to be followed in cases of objections or complaints. However, in the letter of 17 October 2022, in which Transnet finally notified the applicant of the outcome of the bid process, there was no information supplied regarding the process to be followed in cases of objection or complaints. Although not traversed in the answering affidavit and apparent only from an annexure thereto,³ it appears that the only parties that were so advised (to the extent that they were), are the successful bidders, who were informed in their letters of 17 October 2022 that the award of the bid was subject to various terms and conditions including the 'expiry of a five (5) working day objection period afforded to unsuccessful bidders to object to the award of [the] bid to [the] company.' The first time that the applicant was informed of any process is in a letter dated 31 October 2022 from Transnet's attorneys. This was both after the urgent application was instituted and, through no fault of the applicant, after the lapse of the five (5)

² See section 3(2)(b)(iv).

³ A party cannot approach a case on this basis: the portions of annexures relied upon must be identified together with an indication of the case sought to be made out on the strength thereof. See *Swissborough Diamond Mines (Pty) Ltd and others v Government of the RSA and others* 1999(2) SA 279 (T) at 324F-H

working day objection period. Accordingly, Transnet is responsible for any failure on the part of the applicant to pursue any available internal remedy.

7. The applicant submitted that the internal remedy of which it was informed, albeit belatedly on 31 October 2022, does not constitute an internal remedy as contemplated by section 7(2) of PAJA as there is nothing to indicate that the process can result in any effective redress, entailing revisiting the decision to exclude it from the process. Alternatively, it was submitted that the defence is not available to Transnet in the application for interim relief: it would apply to the review itself.
8. The internal remedy upon which Transnet relies in its letter of 31 October 2022 is stated to involve a debriefing and an independent compliance review of the procurement process followed by Transnet.⁴ The letter explains that Transnet no longer has an internal Ombudsman, but there is an interim measure whereby complaints and objections are dealt with through an independent compliance review process as determined by the relevant operating division. The letter continues:

‘The internal remedy is available to your client in addition to the debriefing meeting where your client would be provided with the reasons for them being unsuccessful in the tender process, and is a further opportunity to provide it with clarity on the reasoning for its disqualification. This internal remedy process complies with the requirements of the applicable legislation and will entail a fair and transparent review of the applicant’s complaint and in no way obviates your client’s rights to approach a court after these remedies have been exhausted if your client is unsatisfied with the outcome thereof.’

⁴ The latter is confirmed in paragraph 18 of a document supplied in the answering affidavit described as PPM Directive 20/2020 dealing with the subject of interim procurement procedure changes.

9. The letter itself does not set out what the applicant is to do in order to follow this process, or processes, it does not explain whether the lodgment of any complaint would result in the suspension of the award of the tender and it does not explain the competent outcomes. Transnet's Supply Chain Management Procurement Procedures Manual (PPM), attached to the answering affidavit, only details the power of the now non-operational Ombudsman. The debriefing process is detailed in a further document attached to the answering affidavit titled 'Debriefing process'. On a consideration of its content, it entails a process whereby bidders are afforded a hearing before a Transnet committee (called a representation), which would result in the bidder's proposal being 'unpacked' 'in line with the evaluation process' and a detailed explanation given as to why and how they were disqualified. Questions would be answered. The process pertinently does not entail any revisiting of the decision itself and it is not suggested that the award of the bids is suspended in the meantime. There is simply no information to hand about the process entailed in the independent compliance review process and its competent outcomes.

10. The Constitutional Court has considered the value and need for internal remedies in our law and why they should be exhausted before approaching a court.⁵ In doing so, it has found that they provide immediate and cost-effective relief, provide administrators with the opportunity to correct their own irregularities, enhance the autonomy of the administrative process and the separation of powers, and have notable value where internal remedies require

⁵ *Koyabe v Minister for Home Affairs* [2009] ZACC 23; 2009(12) BCLR 1192 (CC); 2010(4) SA 327 (CC) (*Koyabe*) at paras 36 to 38.

specialized or technical knowledge or are fact intensive.⁶ The applicant's counsel correctly highlighted these considerations in her submissions.

11. On the information supplied in the affidavits, the debriefing process does not, on its own, constitute a remedy as contemplated by section 7(2) as it is not capable of redressing the harm complained of or providing an effective remedy.⁷ Rather it is what is claimed to be: a debriefing process. To the extent that Transnet relies, in tandem with that process, on a compliance review process, no information has been supplied about it. To the extent that Transnet relies on the remedy referred to in the letters of 17 October 2022 to successful bidders, as was submitted in argument, the applicants did not receive the relevant notification and the five-day period has lapsed due to no fault of the applicant. To the extent that the remedy remains available, notwithstanding the assurances given to the successful bidders, the applicant has not yet been given adequate notice of it. The applicant has not been told with whom it should lodge any complaint, it has not been given adequate notice of the procedure to follow and it has not been told what outcomes are competent. In my view, compliance with section 3(2)(b)(iv) of PAJA would, in this case, entail the provision by Transnet of at least such information to meet the standard of procedural fairness.

12. Thus, at least as matters stand, Transnet has not given the applicant adequate notice of any internal remedy that may be available to it and the point must fail

⁶ Id.

⁷ See *Koyabe* at para 42 to 44, Hoexter and Penfold *Administrative Law of South Africa* (3 ed) at p 746 and *Reed and others v Master of the High Court of SA and others* [2005] 2 All SA 429 E at para 20. Cf *Nichol and another v Registrar of Pension Funds and others* [2005] ZASCA 97; 2008(1) SA 383 (SCA) at para 22 and 23.

for this reason alone. In any event, on the facts of this case, the defence does not assist Transnet at the interim stage as there is no suggestion on the affidavits that the lodgment of any complaint at this point would suspend the operation of the award of the tender. In those circumstances, the applicant cannot be faulted for approaching the court for interim relief. If, however, an effective internal remedy remains available to the applicant of which Transnet is yet to give adequate notice, Transnet should do so and the parties can then conduct themselves accordingly. In this regard, it was apparent during the hearing that Transnet may not have fully canvassed these matters on the affidavits.

Interim relief

13. An applicant for an interim interdict must, ordinarily, establish a *prima facie* right (being a right *prima facie* established even if open to some doubt), that irreparable harm is likely to result if the remedy is not granted, that there is no other satisfactory remedy available and the balance of convenience must be in favour of granting the remedy.⁸ The remedy is a discretionary remedy.⁹ In cases where the interdict restrains the exercise of public power impacting on the separation of powers, the application of these considerations is qualified and 'the test must be applied cognizant of the normative scheme and democratic principles that underpin our Constitution.'¹⁰ In such cases, a court may grant an interim interdict if satisfied that an applicant has good prospects

⁸ *Setlogelo v Setlogelo* 1914 AD 221 at 227 and *Webster v Mitchell* 1948(1) SA 1186 (W) at 1186-90 approved in *National Treasury and others v Opposition to Urban Tolling Alliance and others* [2012] ZACC 18; 2012(6) SA 223 (CC) 2012(11) BCLR 1148 (CC) (*OUTA*) at paras 41 and 45 and *Tshwane City v Afriforum* 2016(6) SA 279 (CC) at para 49.

⁹ *Knox DÁrcy and others v Jamieson and others* 1996(4) SA 348 (A).

¹⁰ *OUTA* supra n 8 at para 45;

of success in the main review and the claim must be based on strong grounds likely to succeed.¹¹ Moreover, courts are required to consider what is described as separation of powers harm in assessing the balance of convenience. This entails, amongst other things, a consideration of the extent to which the restraining order will intrude into the exclusive terrain of another branch of government. Where the effect of an interdict is to prevent the exercise of public power, then a temporary interdict should be granted only in the clearest of cases.¹² Counsel did not draw to my attention to any authority in which these elevated standards have been applied in an application for an interim interdict restraining the implementation of a tender pending its review under PAJA. However, what is apparent from the authorities I have considered is that courts understand the principles, established by the Constitutional Court, to apply to the exercise of all public power, and not, as is sometimes argued, as being limited to executive or legislative powers. Moreover, I located one decision in which the elevated standards have been applied in context of a tender decision.¹³ The decision predates the decision of *EFF v Gordhan* which limits the application of the above principles to where there is a restraint on the exercise of power.¹⁴ It may be, as counsel for the applicant submitted, that there is no restraint on the exercise of power in the case before me as the tender process is complete and what is sought to be restrained is the resultant

¹¹ *Economic Freedom Fighters v Gordhan* 2020(6) SA 325 (CC) (*EFF v Gordhan*) at para 42 and OUTA.

¹² OUTA supra n 8 at para 46-47 and *EFF v Gordhan* supra n 11 at para 110.

¹³ I considered the cases referred to in Hoexter and Penfold Administrative Law in South Africa Juta 2021 3 edat p804 fn 813. The standards were applied in *Air France-KLM SA v SAA Technical SOC Ltd and others* [2016] ZAGPPHC 877 paras 15-22). The case concerned an award of a tender for aircraft components support. A similar though not wholly analogous scenario is *Vukani Gaming Eastern Cape v Chairperson, Eastern Cape Gambling and Betting Board* 2018 JDR 0553 (ECG) paras 65 – 67 (application for interim relief to suspend a gaming licence).

¹⁴ *EFF v Gordhan*, supra para 60 and see *Reaction Unit South Africa (Pty) Ltd v Private Security Industry Regulatory Authority* 2020(1) SA 281 (KZD) at para 33.

contract. But it is not necessary for me to decide this as I am satisfied that the elevated standards are met in this case.

The strength of the applicant's case

14. I am satisfied, on the papers before me, that the applicant has established strong prospects of success and that the review is likely to succeed.¹⁵ The founding affidavit is detailed and multiple grounds of review are advanced, both procedural and substantive. It is only necessary and desirable for me to detail my conclusions in respect of one animating feature of the review in order to decide the application for interim relief. This concerns whether Transnet has complied with its own processes in excluding the applicant from the tender, which processes are integral to ensuring that the process is procedurally fair. On the affidavits before me, the procedure has not been followed and the case on procedural unfairness is resultantly a strong one.¹⁶

15. The reason for the applicant's exclusion is recorded in the following terms in the 17 October 2022 letter.

'Due to the blacklisting process that is currently underway against RMS joint Venture t/A Radds, Transnet exercises its right made available to it in clause 5.1 and 5.2 of the Integrity pact by excluding RADDs from this process as a result of the Final Forensic Investigation Report which has evidence of corrupt and collusive bidding and bid rigging by RADDs in conjunctions with its associated companies SI Trucking and SI Logistics.'

¹⁵ A *prima facie* right may be established by showing prospects of success in the review application: *African Informal Traders Forum and Others v City of Johannesburg and Others* 2014 (4) SA 371 (CC) para 25.

¹⁶ A failure to act procedurally fairly is a ground of review recognized in section 6(2)(c) of PAJA.

16. Section 217(1) of the Constitution obliges Transnet, when it contracts for goods and services, to do so in accordance with a system which is 'fair, equitable, transparent, competitive and cost-effective.' Procurement is governed by the Preferential Procurement Policy Framework Act 5 of 2000 (the PPPFA). As regards Transnet's own tender system, most relevant for present purposes are Transnet's Supplier Integrity Pact (the integrity pact) and the PPM. During argument, Transnet's counsel pinned Transnet's case on paragraph 20.9.2 of the PPM which governs the position where a bidder or supplier is subject to a restriction process (which I explain more fully below) or a forensic investigation.

Paragraph 20.9 provides:

'20.9.1 Where a bidder is the subject of an ongoing restriction process, it is not advisable for Transnet to award new business to that entity if it is the highest ranked bidder in a bid process. This is considering that such supplier would already in the view of Transnet, be reasonably suspected to have abused the supply chain management system and the supplier could ultimately be restricted from doing business with organs of state. In such instances it is recommended that the restriction process be expedited, if possible. However, if it is not possible to delay the award, the risks associated with awarding to such a bidder must be considered. It may be considered whether objective criteria exist to justify award to another Bidder and such recommendation may be made to the relevant Acquisition Council. Should it be determined that it appropriate to apply objective criteria, the Bidder must be requested to make representations as to why it should not be awarded the business and the AC must consider such representations before making a final decision.

20.9.2 Similarly, it is not advisable for Transnet to award new business to a supplier that is the subject of a forensic investigation. The mere fact that a forensic investigation is commissioned against the supplier would indicate that there are significant allegations of wrongdoing against that supplier, which, if proven correct, could result in the supplier being restricted from doing business with organs of state. The process indicated in paragraph 20.9.1 should be followed where such a Bidder is the highest ranked bidder in a bid process.'

17. The integrity pact details conduct to ensure the integrity of the tender process and to which bidders must commit. In correspondence from Transnet to the applicant dated 27 May 2022, Transnet pertinently refer to Clause 3.4, 3.7, 4.2 and 4.3¹⁷ thereof to justify a proposed disqualification from the tender. In terms of Clause 5.1, where there is a breach of Clause 3 or in a form that puts the bidder's reliability or credibility into question, the bidder's application may be rejected. Clause 5.2 confers a power to exclude a bidder from future bidding processes where there is a breach of paragraph 3 or any material violation that puts the bidder's reliability and credibility into question after following 'due procedures'. The applicant understandably understood that this provision was being applied, but while relevant, Transnet ultimately relies on Clause 20.9 2. Notably, in its founding affidavit, the applicant pleads, amongst other things, the absence of any of the conditions required to trigger the provisions referred to as well as the absence of due process in the process of exclusion.

18. The process of restricting suppliers from business with Transnet is governed by Chapter 20 of the PPM in the following terms:

¹⁷ '3.4 The bidder / supplier will not enter into any illegal or dishonest agreement or understanding, whether formal or informal with other bidders / suppliers. This applies in particular to certifications submissions or non-submission of documents or actions that are restrictive or to introduce cartels into the bidding process ...

'3.5 The bidder / supplier will not misrepresent facts or furnish false or forged documents or information in order to influence the bidding process to the advantage of the bidder / supplier or detriment of Transnet or other competitors ...

'4.2 The bidder has arrived at his submitted bid independently from, and without consultation, communication, agreement or arrangement with any competitor ...

'4.3 In particular, without limiting the generality of paragraph 4.2 above, there has been no consultation, communication, agreement or arrangement with any competitor regarding:

- (a) Prices;
- (b) Geographical area where goods or services will be rendered [market allocation];
- (c) Methods, factors or formulas used to calculate prices;
- (d) Intention or decision to submit or not submit a bid;
- (e) The submission of a bid which does not meet the specifications and conditions of the RFP; or
- (f) Bidding with the intention of not winning the bid ...

‘20.1 What is restriction?

It is a mechanism used to exclude suppliers, shareholders and directors from future business with all organs of state, including Transnet, for a specified period. The decision to restrict must be based on one of the prescribed grounds for restriction allowed for in terms of National Treasury Instruction 3 of 2016/2017 on Prevention and Combatting Abuse in the SCM system and the PPPFA Regulations, 2017.

20.1.1 In terms of the Instruction Note, the final approver of the restriction is Transnet. Transnet is required to complete the restriction process and advise the entity of its restriction. Thereafter National Treasury must be requested to add the relevant bidder to its database of restricted suppliers.

20.1.2 In terms of the PPPFA Regulations, 2017, National Treasury grants final approval for the restriction. Where a restriction is sought in terms of the PPPFA regulations, Transnet must submit its request for restriction to National Treasury. Upon approval by National Treasury, Transnet must advise the bidder of such restriction.

20.2 Grounds for restriction

20.2.1 Grounds for restriction in terms of the NT Instruction Note 3 of 2016/2017 relate to general abuse of the supply chain management system, which includes the following acts of misconduct:

- * Where any person / Enterprise which has submitted a Bid, concluded a contract, or in the capacity of agent or subcontractor, has been associated with such Bid or contract has acted in bad faith toward Transnet, e.g. fictitious invoices, poor or nonperformance with adequate supporting evidence;
- * Any person / Enterprise which has offered, promised or given a bribe, including offer a facilitating fee in relation to obtaining or execution of the contract;
- * Any person or enterprise who has solicited unauthorized information relating to a bid.

20.2.2 Grounds for restriction in terms of the Preferential Procurement Regulations, 2017 are as follows:

- * False information regarding B-BBEE status levels, local production and content or another matter required in terms of the Regulations which will affect or has affected the evaluation of bid; or
- * Where a bidder has failed to declare any subcontracting arrangements.

19. It is common cause that the restriction process, which is in motion, is not yet finalized. In these circumstances, Transnet was compelled to rely on Clause 20.9.2. That in turn makes some sense of the content of the letter of 17 October 2022, cited above, which refers to the fact that the exclusion is 'as a result of the Final Forensic Investigation Report which has evidence of corrupt and collusive bidding and bid rigging by RADDs in conjunction with its associated companies SI Trucking and SI Logistics.'¹⁸

20. It is correct that Clause 20.9.2 permits Transnet to decline to award new business to a supplier that is the subject of a forensic investigation at least where the allegations, if proven correct, could result in the supplier being restricted from doing business with organs of state. Even assuming that the allegations in question may be of this sort, Transnet's difficulty is that it failed to follow the requisite process, which is integral to ensuring procedural fairness.

21. Clause 20.9.2 requires that the process in Clause 20.9.1 be followed 'where such a Bidder is the highest ranked bidder in a bid process.' Transnet submitted that that process need not have been followed because the applicant was not the highest ranked bidder. But that submission cannot be accepted because on the evidence before me, it did not fully evaluate the applicant's bid. Notwithstanding an allegation in the answering affidavit suggesting otherwise, Transnet's counsel properly drew the Court's attention to the relevant documents which show that the applicant was excluded from evaluation before

¹⁸ It is not clear whether the forensic process is complete or not. There are suggestions it is. I did not hear argument on whether the provision is available when the process is complete.

that process was finalized. The tender process ensued in three stages. Stage 1 entailed testing for responsiveness (administratively and substantively). The applicant was positively evaluated in Stage 1. Stage 2 entailed compliance with minimum functionality and technical thresholds. The applicant was positively evaluated in Stage 2. But the applicant was then removed from the evaluation process and not evaluated at all in Stage 3 which includes, as the first step, the critical process of weighted scoring contemplated by the PPPFA having regard to price (90) and black economic empowerment scores (10). On price, the evidence before me, which is – at least at this stage – uncontested, shows that the applicant would have scored highest on price. In the circumstances, Transnet disabled itself from assessing whether the applicant was the highest ranked bidder (and on the applicant's uncontested evidence it would have been.) In consequence, it failed to follow the requisite procedures, being the due process provisions in Clause 20.9.1.

22. Transnet submitted, in the alternative, that in fact the due process procedures were followed when regard is had to several requests for submissions that Transnet addressed to the applicant prior to its exclusion. But these do not assist Transnet as none of these requests are directed at the proposed action in terms of Clause 20.9.2. There are potentially various difficulties with the process followed. For present purposes, it suffices that the applicant was pertinently not asked why it should not be awarded the business as contemplated by that section. Nor could it have been rationally engaged on the issue as it had not been finally evaluated and Transnet had not directed itself to the considerations that would have been relevant if it had been.

Alternative satisfactory remedy

23. Counsel for Transnet did not suggest that the applicant should pursue a remedy in damages if it is found in due course that the tender was unlawful. Nor could it in light of the case pleaded – the plaintiffs do not allege fraud or dishonesty.¹⁹ I have dealt with the availability of internal remedies above: on the information to hand, there is no currently available internal remedy that, if pursued would have the effect of suspending the award of the tender.

Irreparable harm

24. Transnet submitted that the applicant will not suffer irreparable harm in that the only harm is one of alleged loss of profit. But this type of harm can be protected by interdict.²⁰ Furthermore, there is a real risk that the dispute may become academic in the meantime. If so, the applicant will not only have lost the prospect of the award of the tender but will have been subjected to unlawful and unfair administrative action. It is also relevant that the impugned decision in this case has adverse reputational consequences for the applicant. I am satisfied that this requirement is met.

Balance of convenience

25. From the applicant's perspective, considerations of convenience obviously favour the grant of an interim interdict. However, considerations relevant to

¹⁹ See *Olitzki Property Holdings v State Tender Board* 2001(3) SA 1247 (SCA) (*Olitzki*).

²⁰ *Id.*

Transnet, the public and potential separation of powers harm have particular resonance in this case and warrant careful consideration.

26. First, Transnet embarked on the tender to support the operations of the port and its implementation is ultimately instrumental to its smooth running. In this regard, Transnet pleads a plethora of potential harms and disruption to the port if interim relief is granted. Transnet's difficulty is that it does so in the most general of terms without explaining why the harms will result or providing any evidence upon which the Court can conclude that there is any real risk that they will. For example, general statements are made that any potential non-award will create significant risk that the terminal will have a shortage of equipment and transport for mineral handling, supply will be disrupted, the inbound rail logistics leg and the outbound shipping leg will be brought to a standstill, contractual demand for various minerals will stall resulting in revenue loss and the port's licence may be affected. Other similar concerns are raised. None of these concerns are substantiated, for example by explaining why it is not possible to continue in the interim with the current contracts. The tender has a very long history and has been subject to a series of delays and in the interim Transnet has proceeded with shorter contracts which are, on the information before me are still in place, including with the applicant, and there is nothing to explain why they can't be temporarily extended if needed. In this regard, the applicant made a series of averments regarding the interim position and how the port would continue to be serviced. Transnet did not answer these allegations. In these circumstances, Transnet has failed factually to establish any likely inconvenience or disruption to the port.

27. However, given the public importance, and importance to Transnet, of ensuring that the port is not disrupted, my order empowers Transnet to approach the court to vary the interim order on good cause shown notwithstanding that the relevant facts may have existed at the time the order was granted. This entitlement is in addition to any common law right Transnet has to approach the Court to vary the interim order.

28. Secondly, Transnet is concerned about the harm, reputational and systemic, that results from doing business with a party who is the subject of forensic investigation and under scrutiny for alleged collusive practices and other conduct. In my view, this concern cannot outweigh the demand for procedural fairness and legality in circumstances where no final findings have been made in the restriction process. The restriction process itself is designed to protect Transnet from these harms and it must ensue fairly and lawfully. Furthermore, it is far from clear why Transnet has failed to complete its restriction process at this stage: the issues under consideration are not of recent origin and the process has been long underway.

29. Thirdly, Transnet submitted that the court must give due prominence to potential separation of powers harm in this case. In my view, this is in part related to any potential disruption to port operations which I have dealt with above. Beyond this, I am satisfied that the order I made does not cause harm to the constitutional scheme or the separation of powers by intruding into the sphere of other arms of government. The tender process is complete and in

issue now is the implementation of the decision through the conclusion of contractual arrangements. Courts are frequently called upon to evaluate the lawfulness of tender processes, and in doing so, courts perform a vital function entrusted to them under the Constitution which both enhances the rule of law and ensures the observance of constitutional rights, not least section 33 of the Constitution, to which PAJA gives effect.

30. Fourthly, the applicant referred to the public harm that can result if the applicant's tender is not duly evaluated given that its price is, on the evidence before me, substantially better than the price offered by the successful tenderers. As against this Transnet submitted that the prices currently being paid are higher than what would be paid if the tender is evaluated, but this is not quantified. In my view, these are relevant considerations, but the ultimate cost / benefit is not adequately explained. Nevertheless, in circumstances where, on the evidence before me, the applicant's bid is significantly more cost-effective than the successful bidders, it seems to me that the public will ultimately gain if the tender is ultimately awarded lawfully, provided the parties co-operate to ensure that the review is expeditiously finalized.

Conclusion

31. Transnet submitted that the court must be mindful that in the current political environment, parastatals must be astute to ensure proper tender processes and not to do business with persons who may undermine these efforts. The country is, after all, trying to emerge from a period often described and recently investigated as a period of state capture. The public rightly demands that tender processes are above board and that no corrupt practices ensue. But

this submission does not assist Transnet in this case. This is for two reasons. First, whatever the merits of Transnet's concerns about the applicant, it has in place a restriction procedure which, if followed, is intended to ensure that its outcomes are not arbitrarily, unjustifiably or unfairly reached. Unless that process is properly followed, the public cannot have any confidence that the correct persons are being targeted for restriction or excluded from business notwithstanding offering competitive business. Second, on the information before me there are serious allegations levelled against the successful bidders, which, while not the basis of my decision in Part A, warrant due consideration in the review. Accordingly, in this case, there is a prospect that it is not only the restriction process but the tender award itself that has the potential to threaten the integrity of a tender process.



S COWEN

JUDGE OF THE HIGH COURT PRETORIA

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 15 December 2022.

HEARD ON 22 NOVEMBER 2022

ORDER GRANTED ON 2 DECEMBER 2022

JUDGMENT DELIVERED ON 15 DECEMBER 2022.

APPEARANCES

On behalf of the Applicant: Mr HF Oosthuizen SC, Mr T Scott and Mr Z Raqowa

Instructed by: Froneman Roux & Streicher Attorneys

On behalf of the Respondents: Ms S Mahabeer SC and Ms LR Naidoo

Instructed by: Livingston Leandy Attorneys