REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION- POLOKWANE

CASE NO: 5922/2023

REPORTABLE: YES/NO

OF INTEREST TO OTHER JUDGES: YES/NO

REVISED

Date: 31/07/2023

In the matter between:

MUNSOFT (PTY) LTD	Applicant
And	
MUSINA LOCAL MUNICIPALITY	First Respondent
INZALO ENTERPRISE MANAGEMENT SYSTEMS (PTY) LTD	Second Respondent
CCG SYSTEMS (PTY) LTD	Third Respondent
OS HOLDINGS (PTY) LTD	Fourth Respondent

JUDGMENT

MAKOTI AJ

INTRODUCTION

[1] Yet again, this Court has had to deal with the unending tale of alleged unlawful government procurement. It is either that those who are in charge of tender processes act oblivious to their constitutional and statutory responsibilities, or that parties who don't succeed when tendering would stop at nothing to get an award. Whatever the cause, Courts are inundated with applications similar to the present. For the sake of convenience I shall refer to the parties as follows: the Applicant as Munsoft, the First Respondent as the Municipality, and the Second Respondent as Inzalo. The Third and Fourth Respondent are not participating at this stage of the application.

[2] The present application is an urgent application for interdictory relief. In it Munsoft seeks to interdict the implementation of a tender that was awarded by the Municipality to Inzalo. If granted, the interdicts will operate on an interim basis pending final determination of the review application which Munsoft intends to institute within 30 days of the Court's order. Munsoft intends to apply for the review and setting aside of the Municipality's decision to award the tender to Inzalo.

[3] Though both Respondents appeared in Court to oppose the application, and presented oral submissions, only Inzalo filed opposition papers. No explanation was proffered for the Municipality's failure to file answering papers. Urgency is in issue. So too are the merits of the application relating to whether the Court should grant interim interdicts applied for by the Applicant. I will deal first with the question of urgency. If the urgency hurdle is overcome, then I will deal with the merits of the application.

SUMMARY OF FACTS

[4] The Municipality advertised the tender (Tender No: 12/2022/23) on 13 March

2023. It invited interested bidders to submit bids to supply an integrated financial management system. The closing date for submission of bids was set as 17 April 2023, whereafter the submitted tender would undergo evaluation and adjudication by the Municipality's bid committees. The successful tenderer will render services for a period of five years. The Bid Evaluation Committee (BEC) evaluated the tender and decided on 19 May 2023 not to further evaluate Munsoft's bid. In the extract from the BEC minutes there is no information on why the other bidders were not favourably evaluated. It recommended the tender of Inzalo and the Municipality's Bid Adjudication Committee (BAC) on 25 May 2023 recommended that Inzalo be awarded the tender.

[5] Munsoft gained knowledge that its bid was not successful and that the tender was awarded to Inzalo on 08 June 2023. This triggered an exchange of letters with the Municipality. I will refer to the letters below, save to mention that Munsoft expressed its disquiet at the awarding of the tender to Inzalo. Amongst other things, Munsoft could not fathom the awarding of the tender for an amount of **R27 496 983-38** as compared to its bid of **R19 927 347-02,** inclusive of VAT. Part of its complaint with the Municipality's decision is that the awarding of the tender to Inzalo also overlooked a lower tender that was submitted by the Third Respondent in the amount of **R19 830 025-81.**

[6] The basis for the Municipality to award a tender for R27 496 983-38 is at the moment unknown and this is because it elected not to file any papers and to proffer an explanation. The letter written to Munsoft on 21 June 2023 lack specific details on this question, especially because there was also a tender of the third respondent. This raises a question whether the tender as awarded is cost effective and therefore in compliance with the broad spectrum of s 217(1) of the Constitution and the Municipal Finance Management Act[1] (MFMA). This was

[1] Act No. 56 of 2003.

critical information. It is on the basis of these facts mentioned above that Munsoft seeks the review and the setting aside of the awarding of the tender. I am not required to determine the merits of the review application.

URGENCY

[7] The principles governing urgent applications in terms of Rule 6(12)(b) of the Uniform Rules have become settled in our law. That the provisions of the sub-rule are to be read in conjunction with the practice directives of the Division is equally trite. The sub-rule enables the Court to dispense with the normal rules relating to the forms and service provided for in the rules and dispose of the matter at such time and place in such manner and in accordance with such procedure it may deem fit.

[8] On proper consideration of the sub-rule, it enjoins an applicant seeking to be heard on truncated timeframes to:

> "... set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course."[2]

[9] What the sub-rule requires are facts, firstly, which the applicants rely on for alleging that the application is urgent.[3] Thereafter, the applicants are required provide the Court, with reasons why it will not be possible to attain substantial redress should the application be heard in a future date. The question whether an applicant will not be able obtain substantial redress in a process in due course will be determined by the facts of each case. In *Cekeshe And Others v Premier, Eastern Cape, And Others*[4] the court added that the substance of the case,

[2] Erasmus: RS 13, 2020, D1-50.
[3] Salt v Smith 1991 (2) SA 186 (Nm); Cekeshe v Premier, Eastern Cape 1998 (4) SA 935 (Tk) at 948F; also, East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others (11/33767) [2011] ZAGPJHC 196 (23 September 2011).
[4] Cekeshe And Others v Premier, Eastern Cape, And Others 1998 (4) SA 935 (TK)

factually established, is an important consideration as opposed to the form of the application. The duty falls on an applicant to make out a case for urgency.

[10] The facts relied upon by Munsoft are inter alia that:

[10.1] it became aware of the awarding of the tender to Inzalo on 08 June 2023. The tender was awarded for an amount of R27 496 983-38. This is in contrast to Munsoft's tendered amount of R19 830 025-81. The letter also sought an undertaking from the Municipality that it will not implement the tender;

[10.2] on 12 June 2023 Munsoft again objected to the awarding of the tender, raising issues of non-compliance with the Municipality's supply chain policy;

[10.3] when the Municipality did not respond to the letter, on 19 June 2023 Munsoft addressed another letter making similar demands as before. The Municipality responded on 21 June 2023 informing the Applicant that the SEC decided not to consider its tender for:

> "... further assessment due to the negative status on integration sub systems to the main system as required in the terms of reference."

[10.4] the Municipality's response led to Munsoft submitting a request on 23 June 2023 for certain specified information. The information included the minutes of the SEC as well as the reasons why the other two unsuccessful bidders were disqualified; and

[10.5] finally, on 23 June 2023, Munsoft's Attorneys wrote to the Municipality emphasising the objections that were raised previously and also demanding a written

undertaking by 26 June 2023 that the Municipality will not implement the tender.

[11] Prior to coming to Court, Munsoft had addressed the abovementioned written correspondences to the Municipality, most of which was not met with responses. During oral submissions Counsel for the Municipality argued that Munsoft ought have taken that to be signal of unwillingness on its part to accede to the demands. It was further contended that Munsoft should have acted sooner upon such realisation and that its failure must be read as delay on its part to institute the application.

[12] I pause to mention that I found the Municipality's stance to be lacking in accountability, aloof even. Not only is its attitude startling, but it is inimical to its obligations as an organ of state that should be responsive and accountable. It simply poured cold scorn on its constitutional and statutory obligations in terms of PAJA to timeously provide answers to Munsoft.

[13] Inzalo took a similar approach to that of the Municipality in that it contended that the application is not urgent and that, if there is urgency, such is contrived and created by Munsoft. It was then argued on its behalf that Munsoft should not be allowed to rely on the urgency that it has itself created.

[14] When countering the contentions raised by the respondents, Munsoft stated that a party does not lose urgency by trying to resolve a dispute before embarking on costly process of litigation. It was also argued that even if Munsoft can be said to have delayed, that did not mean that the door should be shut in its face. Munsoft anchored its submissions on the dictum made by Moseneke ACJ, as he was at the time, in *South African Informal Traders Forum and Other*[5] (Informal Traders) in which he stated that:

[5] South African Informal Traders Forum and Others v City of Johannesburg and Others; South African National Traders Retail Association v City of Johannesburg and Others (CCT 173/13; CCT 174/14) [2014) ZACC 8; 2014 (6) BCLR 726 (CC); 2014 (4) SA 371 (CC) (4 April 2014).

"[37] Another of the City's contentions was that the urgency the applicants relied on was self-created and ought not to be entertained. Even if it is accepted that urgency arose as early as October 2013, it was only prudent and salutary that the applicants first sought to engage the City before they rushed off to Court. That engagement, as mentioned above, produced the agreement of 2 November 2013." (Footnotes omitted)

[15] Taking the issue further, Modiba J accepted in *Maree Projects (Pty) Ltd and Another v City of Johannesburg Metropolitan Municipality and Another*[6] (Maree) that an applicant does not lose urgency simply because it did not take prompt steps to institute an application while attempting to avoid litigation. What makes a case urgent is the question, *inter alia,* whether by not hearing the application an applicant will be denied substantial redress if the matter was to be determined in due course.

[16] This case also involves the question of lawfulness or legality of decisions taken by the Municipality. A few years ago Gura J recognised urgency in a matter where the illegality of a decision was at issue. He held in *Groep and Others v Naledi Local Municipality and Others*[7] that:

"[46] The Respondents submitted that this matter is not urgent and that the Applicants did nothing to show urgency. One should not overlook the fact that throughout their papers, the Applicants aver that the Council meeting was not lawfully constituted and that all its decisions on 19 November 2020 had been tainted with illegality. Amongst others, the Mayor and the Speaker were removed in this meeting. It remains to be seen whether due process was followed to remove them. It is my view that the matter is urgent. otherwise a decision to the contrary may have the

[6] Unreported Case No: 33992/2019, Gauteng Local Division, Johannesburg.
[7] Unreported Case No: UM253/2020, North West Division, Mahikeng.

effect that a court of law allows the perceived illegality to continue." (Emphasis added)

[17] In my final consideration on urgency, I wish to comment on the approach that was followed by Tuchten J in the well quoted *Mogalakwena Local Municipality v Provincial Executive Council, Limpopo and Others*[8] in which he held that:

"[65] The case for the applicant is that the respondents are seeking unlawfully to take away its lawfully derived power to govern the municipality at a local government level. That case, if ultimately substantiated, is directed at redressing nothing less than a serious violation of the rule of law. The prejudice to the applicant is manifest. Every action taken by someone who is in law a usurper of power is unlawful and, especially where third parties are involved, might give rise to complex questions of fact and law. Where the funds of a municipality are disbursed by such a usurper, recovery might be attended by serious problems and even be impossible. I find that the applicant has shown that it will suffer prejudice which cannot be redressed at a hearing in due course." (Emphasis added)

[18] Having regard to the facts in this application, viewed in light of the applicable legal principles, I am unconvinced that urgency in this matter is self-created. Even if it was, this matter relates to an alleged but serious breache of or abdication of statutory responsibilities by the Municipality requiring some prioritisation by the Court. It is aimed at redressing serious alleged violations of the rule of law, amongst which is the allegation that the Municipality's awarding of the tender was in breach of the provisions of s 111 of the MFMA and the Supply Chain Management Policy, amongst others. I therefore accept and deal

[8] Mogalakwena Local Municipality v Provincial Executive Council, Limpopo and Others (35248/14) [2014) ZAGPPHC 400; [2014) 4 All SA 67 (GP) (19 June 2014).

with this matter on urgent basis.

APPROACH TO INTERIM INTERDICTS

[19] It is trite that an Applicant who comes to court for an interim interdict has to satisfy four requirements to be granted such relief. Failure to satisfy any one of them will lead to the application failing. Thus, it is an absolute requirement for such applicant to make out a case to the satisfaction of the court to grant the interdictory relief sought. I am fortified in this regard by what the SCA stated in *Memory Institute SA* CC *t/a SA Memory Institute v Hansen and Others*[9] in which it was held:

> "[I]nterim orders and rule nisi are not to be had simply for the asking. Courts should satisfy themselves that a proper case has been made out, more so if the subject is technical. The fact that a respondent may approach the Court for reconsideration of the Rule ... and that it may be set aside on the return day should serve neither as a sop nor a soporific."

[20] The test applicable is long existing and was set out in *Setlogelo v Setlogelo*[10] being that an Applicant who is approaching Court for interim interdict must establish (i) a prima facie right; (ii) reasonable apprehension of harm; (iii) that balance of convenience favours the granting of the interdict; and (iv) that the Applicant has no other suitable remedy. In *Informal Traders,* above, it was held that:

> "[24] Once we grant leave to appeal our immediate concern becomes whether we should grant temporary relief. Foremost is whether the applicant has shown a prima facie right that is likely to lead to the relief sought in the main dispute. This requirement is weighed up along with the irreparable and

[9] 2004 SA (2) 630 (SCA) at 635G-H.
[10] 1914 AD 221.

imminent harm to the right if an interdict is not granted and whether the balance of convenience favours the granting of the interdict. Lastly, the applicant must have no other effective remedy."

[21] I deal with the requirements below.

Prima facie right

[22] The Court in *Informal Settlemets* went further to hold that a *prima facie* right might be established by a party demonstrating that it has prospects of success in the review application.[11] This application challenged the Municipality to at least show that its decision was lawful and sustainable. One would have expected it to provide some explanation why it excluded what appear to be cost effective bids, not only from Munsoft but from the third respondent as well, from further evaluation.

[23] As it was noted by Mogoeng CJ in *City of Tshwane Metropolitan Municipality v Afriforum and Another*[12] (Afriforum) the bar is set quite low for the establishment of the existence of a *prima facie* right. He held that:

"[50] ... it is acceptable that the right may be open to some doubt. For this reason, I will assume without deciding that Afriforum has established a *prima facie* right." (Emphasis added)

[24] Munsoft was one of the bidders that applied to be awarded the tender. It was not successful. Its bid did not make it past the initial stages of evaluation by the Municipality's BEC. As a tenderer, it cannot be gainsaid that it had the right to be treated to fair administrative action by the Municipality. I note without deciding this issue that the difference in the amount awarded to Inzalo as compared to

[11] Informal Traders, at par [25].
[12] City of Tshwane Metropolitan Municipality v Afriforum and Another (157/15) [2016] ZACC 19; 2016 (9) BCLR 1133 (CC); 2016 (6) SA 279 (CC) (21 July 2016).

what was tendered by Munsoft and the Third Respondent create an impression that the procurement was not cost effective as required by s 217 of the Constitution. The difference in the amounts could be the scarce resources that the Court in Tasima[13] said are to be protected in terms of that section of the Constitution. The Court noted also that:

> "[102] Finally, in extending the contract Mr Mahlalela violated the provisions of section 217 of the Constitution, our supreme law. This section obliges every organ of state, regardless of the sphere under which it falls, to procure goods or services "in accordance with a system which is fair, equitable, transparent, competitive and cost effective". Evidently, the purpose of section 217(1) is to eliminate fraud and corruption in a public tender process and to secure goods and services at the best price in the market." (emphasis added)

[25] The Municipality should at least have provided some information regarding why the tender complies with procurement laws despite the huge difference in the amounts tendered. My view is that out of the facts of this application, pieced together, there is sufficient information to lead to the conclusion that Munsoft has indeed shown that it has a *prima facie* right, which may be open to doubt, but which is protectable in law.

Well-grounded apprehension of irreparable harm

[26] At the outset, it is to be noted that the Municipality is bent on implementing the awarded tender. It has said so in its letter dated 23 June 2023. About this Munsoft averred that there will be migration of data from its system that is currently used by the Municipality. It went on to say that *'once data is migrated, the first respondent will no longer require the services of the applicant.'* That the services

[13] Department of Transport and Others v Tasima (Pty) Limited (CCTS/16) [2016] ZACC 39; 2017 (1) BCLR 1 (CC); 2017 (2) SA 622 (CC) (9 November 2016).

of Munsoft will no longer be needed by the Municipality is something that was known when it was not offered an extension as it had been in the past. I do not understand the case to be that the Municipality should not procure services when they are needed, but that it should act lawfully when doing so. It is the alleged failure to act lawfully that Munsoft says causes it harm.

[27] Argument by Inzalo is that the application is intended to hold the Municipality back in its endeavours to ensure the use of lawfully procured services. What it is actually advocating for, Inzalo's argument continued, is that Munsoft should be allowed to continuously render services to the Municipality by default. The default position will eventuate if the Municipality's procurement fails to yield positively and, because Munsoft has a system that is already integrated with that of the Municipality, it becomes an indispensable service provider. It seems to me that both Munsoft and Inzalo are canvassing for the same thing, just from different platforms. They both want to see the Municipality procuring services lawfully. Where they part company is on the question whether this tender was awarded lawfully. I intimated about this in my opening stanza to this judgment.

[28] That the Municipality intended to bring to an end the services that were provided by the Applicant since 2017 is something that must have been foreknown by all the parties, more so the Applicant. I say this taking into account that, by advertising the tender on 13 March 2023, the Municipality clearly communicated its intention to have a fresh start. A fresh start could be achieved in a number of ways, even through the appointment of Munsoft under the new tender. The rationality of the decision to exclude Munsoft from further participation is central to the intended review application. Apart from the tersely worded letter of 21 June 2023, no further explanation was given by the Municipality. I do not suggest in any manner that Munsoft ought to have been awarded the tender.

[29] Munsoft further contended that it will be deprived of the right to fair

administrative action if it is not granted interim relief. This is so, according to it, because the installation of the newly procured system can be completed within a period of between two and six weeks. On the other hand, the contention went further, it would take up to two years for the review application to be finally determined. Thus, the envisaged review application will be an exercise in futility if interim relief is not granted. This cannot be disputed. Litigation is laborious and costly. Its right to challenge the lawfulness of the decision will be irreparably lost. Modiba J accepted this in *Maree* as a ground that the Court may consider in its determination whether to grant an interim interdict.

[30] That Munsoft has limited options which can yield suitable remedy in due course cannot be denied. A damages claim is not available. Although the right to review a decision does not on its own require for protection *pendente lite,* it is apposite what the SCA stated in *Steenkamp NO v Provicnial Tender Board of the Eastern* Cape[14] where it was held as follows:

> "[43] The 'alternative remedy' argument has some validity but the point must not be stretched to breaking point. Availability of review to an unsuccessful tenderer can hardly be an argument for conferring a damages claim on the successful tenderer. All that can happen on review is that the award may be set aside. The successful litigant does not acquire the benefits (or burdens) of the successful tenderer. Recently a disappointed tenderer, who was able to show that the award was seriously tainted, was vindicated on review, though only by an award of costs since setting aside the award was impractical as the contract work had already been performed. In other words, the suggestion that review is an adequate alternative remedy is a misconception." (Emphasis added)

[31] I have no difficulty, based on the above *dictum,* in accepting that Munsoft is

[14] Steenkamp v Provincial Tender Board of the Eastern Cape (528/2004) [2005] ZASCA 120; [2006] 1 All SA 478 (SCA) (30 November 2005).

likely to suffer harm by not being awarded the tender. However, I am also conscious that what is envisaged is not just any harm but harm that, if suffered, would be irreparable. The Court in *Afriforum, supra,* defined harm as follows:

> "[56] Within the context of a restraining order, harm connotes a common-sensical, discernible or intelligible disadvantage or peril that is capable of legal protection. It is the tangible or intangible effect of deprivation or adverse action taken against someone. And that disadvantage is capable of being objectively and universally appreciated as a loss worthy of some legal protection, however much others might doubt its existence, relevance or significance. Ordinarily, the harm sought to be prevented through interim relief must be connected to the grounds in the main application." (Emphasis added)

[32] The Respondents, more so Inzalo, contended that Munsoft's right to review the impugned decision did not call for protection on an interim basis. I have touched on this earlier. Inzalo's Counsel referred me to the *dictum* in *National Treasury and Others v Opposition for Urban Tolling Alliance*[15] in which the Court dealt with the question of irreparable harm and said the following:

> "[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." (Emphasis added)

[15] National Treasury and Others v Opposition to Urban Tolling Alliance and Others (CCT 38/12) [2012] ZACC 18; 2012 (6) SA 223 (CC); 2012 (11) BCLR 1148 (CC).

[33] The case of Munsoft is that the irreparable harm that it stands to suffer is self-evident. A statement like this would be empty and meaningless in the absence of a clear, '... *discernible or intelligible disadvantage or peril that is capable of legal protection.'* It is worth stressing, even at the risk of repetition, that this requires an applicant to make averments as to the nature and extent of the harm that it says it will suffer irreparably if it is not granted interim relief. Mogoeng CJ put it thus in *Afriforum:*

> "[59] Irreparable implies that the effects or consequences cannot be reversed or undone. Irreparable therefore highlights the irreversibility or permanency of the injury or harm. That would mean that a favourable outcome by the court reviewing allegedly objectionable conduct cannot make an order that would effectively undo the harm that would ensue should the interim order not be granted." (Emphasis added)

[34] A period of two years and more undergoing litigation processes in the intended review application is not short by any stretch of the imagination. In that time Inzalo would be implementing what is arguably an unlawfully awarded tender, and deriving benefit out of it. By the time the review application is finalised, there is a possibility for a party that is aggrieved to take the matter further on appeal, which would extend the period further. By the time the application is finalised there would be no live issue remaining as substantial or full implementation of the tender would have been achieved. Munsoft would be left with no suitable remedy. An order declaring the awarding of the tender unlawful would not ameliorate any possible losses to Munsoft.

[35] The views expressed above should be understood in light of what was held by the Constitutional Court in *Steenkamp NO v Provincial Tender Board of the Eastern Cape*[16] in which the Apex Court held *inter alia* as follows:

[16] Steenkamp NO v Provincial Tender Board of the Eastern Cape (CCT71/05) [2006] ZACC 16;

"54. ... If public policy is slow to recompense financial loss of disappointed tenderers it should not change simply because of the name the financial loss bears. Second, even if there may not be a public law remedy such as an interdict, review or appeal this is no reason for resorting to damages as a remedy for out-of-pocket loss. This is so because first, as I found earlier, the loss may be avoided and second it is not justified to discriminate between tenderers only on the basis that they are either disappointed tenderers or initially successful tenderers. To do so is to allot different legal rights to parties to the same tender process. There is no justification for this distinction particularly because ordinarily both classes of tenderers are free to tender again should the initial tender be set aside." (Emphasis added)

[36] Time is of the essence. It defines whether a party in Munsoft's position will get a suitable remedy in the ordinary course. I have serious doubt that it will. As a result, I am persuaded that Munsoft has succeeded to show reasonable apprehension of irreparable harm.

Balance of convenience

[37] This requirement calls for the balancing of the affected parties interests to determine the harm that Munsoft will suffer if interim relief is not granted, against the harm likely to be suffered by the respondents if the interim order is granted. I will not repeat what Munsoft has stated in respect of the lifespan of the tender and the normal time it takes for a review application to be finally prosecuted.

[38] No explanation came from the Municipality. Inzalo indicated that it has already began with the implementation of the tender. This information was also conveyed to Munsoft in a letter from the Municipality on 21 June 2023. The letter

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2007 (3) SA 121 (CC); 2007 (3) BCLR 300 (CC) (28 September 2006).

stated *inter alia* that:

> "The request on stopping the award of the bid will not be possible to implement as the Municipality is already busy with the implementation of the new financial system."

[39] Furthermore, Inzalo stated in its answering affidavit that its system was active and that its staff have already workshopped the AS-IS and TO- BE Business Processes. It went on to mention that it has commenced with the hosted installation, setup, testing and configuration of the modules. Additionally, it said that it has already attended a project steering committee meeting with the Municipality on 14 June 2023. These are initial stages of implementing the tender. The tender is for a period of five years. Few weeks out of five years is not a lot and, in my view, the tender can be interdicted without costing Inzalo much. I do not have information, in any event, as to the cost of Inzalo having staff placed at the Municipality's premises.

[40] The Municipality has not confirmed any of these averments. Munsoft in reply stated that the suggestion that the tender has been fully implemented was misleading. That is not what Inzalo said. I did not understand it to have suggested that it has fully implemented the tender, but only that the implementation was already underway. Importantly, also, Inzalo indicated that it has already migrated the Municipality's budget data onto its system. I do not have any information whether these things cannot be reversed and, if they can be so done, what cost and effort it will take to reverse them.

[41] The Court in OUTA said that an order of this nature should be granted in the clearest of cases and after careful consideration of separation of powers harm. The balance of convenience favours the granting of an interim interdict if the prejudice that the applicant will suffer outweighs that which will be suffered by the respondent. I find it to be so in this application.

Absence of satisfactory alternative relief

[42] I have already said much about this when I addressed the question of irreparable harm. My intention is not to repeat what I have stated there, but to add to my statements.

[43] Public interest lies in the protection of the scarce public resources, and this is undermined whenever state tenders are awarded unlawfully, so said the Court in *Marce*.[17] This tender is for a long time- a period of five years. Strangely, as I have said, the Municipality has not taken the Court into its confidence, and it has said nothing about its compliance with internal policies and the law. It abdicated that responsibility to Inzalo, the successful bidder.

[44] I am mindful that Courts encourage parties affected by administrative decisions to exhaust internal remedies as created in terms of statute before embarking on litigation. In *Koyabe and Others v Minister of Home Affairs and Others*[18] the Court held that:

> "34. Under the common law, the existence of an internal remedy was not in itself sufficient to defer access to judicial review until it had been exhausted. However, PAJA significantly transformed the relationship between internal administrative remedies and the judicial review of administrative decisions. Section 7(2) of PAJA provides:
>
> > "(a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.

[17] Maree at par 82.
[18] Koyabe and Others v Minister for Home Affairs and Others (CCT 53/08) (2009] ZACC 23; 2009 (12) BCLR 1192 (CC); 2010 (4) SA 327 (CC) (25 August 2009).

(b) Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.

(c) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice."

Thus, unless exceptional circumstances are found to exist by a court on application by the affected person, PAJA, which has a broad scope and applies to a wide range of administrative actions, requires that available internal remedies be exhausted prior to judicial review of an administrative action." (Notes excluded)

[45] In *casu,* because the Municipality has not always been forthcoming with information when required to do so by Munsoft, I find it difficult to accept that the latter can lodge its appeal under the circumstances. For instance, the Municipality has not provided reasons why the Third Respondent was not successful in its tender. That seems to be a denial, whether calculated or unwittingly, by the Municipality of Munsoft's right to exercise its decision to either file for an appeal or to follow other routes as may be available. This defence does not avail for the respondents, not least the Municipality. The allegations made against it are so serious as to warrant the Court's intervention in the form of interdict.

[46] Having considered the application entirely, I am satisfied that this is a case where an interim interdict ought to be granted. The application succeeds.

COSTS

[47] Costs are usually in the discretion of the Court, which is to be exercised judiciously.[19] The default position adopted by our Courts is that costs follow the course as they are awarded to a successful party. Munsoft has succeeded and I do not see any reason why it should not be awarded costs. Both the Municipality and Inzalo opposed the application. I am satisfied that they should both bear the costs occasioned by the application.

ORDER

[48] On the basis of what I have set out above in this judgment, I make the following orders:

[i] The application is dealt with and adjudicated on an basis and the normal rules relating to service and time periods are dispensed with;

[ii] The respondents are interdicted from continuing with the implementation of the tender awarded by the first respondent under Tender No: 12/2022/23 to the second respondent on 08 June 2023;

[iii] The respondents are interdicted from entering into or concluding a service level agreement or any contractual document as a consequence of the awarding of the tender;

[iv] The orders in terms of [i] to [iii] shall operate on an interim basis pending the final determination of a review application to be instituted within 30 days by the Applicant; subject that this order shall lapse if the Applicant fails to institute the review within the said period of 30 days; and

[19] Trencon Construction (Ply) Ltd v Industrial Development Corporation of South Africa Ltd and another 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) para 88.

[v] The first and second respondents shall pay the costs of this application including the costs occasioned by the use of senior counsel.

M. Z. MAKOTI
ACTING JUDGE OF THE HIGH COURT
LIMPOPO DIVISION

HEARD:	**18 JULY 2023**
DELIVERED:	**31 JULY 2023**

APPEARANCES:

FOR APPLICANT :	**BM SWART SC** **VZLRINC** **APPLICANT'S ATTORNEYS** **C/O PRATT LUYT & DE LANGE** **POLOKWANE**
FOR FIRST RESPONDENT	**ADV RIP** **BRIAN MBELE ATTORNEYS** **RESPONDENT'S ATTORNEYS** **C/O DDKK ATTORNEYS INC** **POLOKWANE**
FOR SECOND RESPONDENT:	**E VAN AS** **DI SIENA ATTORNEYS** **RESPONDENT'S ATTORNEYS** **C/O HENSTOCK VAN DEN HEEVER** **POLOKWANE**