IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO. 5449/2011

REPORTABLE

In the matter between:

THERMAIRE INVESTMENTS (PTY) LTD	
t/a IMPROVAIR	**APPLICANT**
And	
PARETO LIMITED	**1ST RESPONDENT**
METROPOLITAN LIFE LIMITED	**2ND RESPONDENT**
TRIOCON CONSULTING ENGINEERS (PTY) LIMITED	**3RD RESPONDENT**
WBHO CONSTRUCTION (PTY) LIMITED	**4TH RESPONDENT**
TWO OCEANS AIR CONDITIONING (PTY) LIMITED	**5TH RESPONDENT**

Coram	:	**DLODLO, J**
Judgment by	:	**DLODLO, J**
For the Applicant	:	**ADV. I. JAMIE (SC)**
	:	**ADV. N. DE JAGER**
Instructed by	:	Webber Wentzel 15th Floor, Convention Tower Heerengracht, Foreshore CAPE TOWN TEL. NO. (021) 431 7000 (REF. R. Gootkin)

For 1st, 2nd & 3rd Respondents	:	**ADV. S.P. ROSENBERG (SC)**
	:	**ADV. K. PILLAY**
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		(REF. Mr. S. Rajie)
For 5th Respondent	:	**ADV. D.J. JACOBS (SC)**
	:	**ADV. A. COETZEE**
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		(REF. Mr. A. Adriaans)
Date(s) of Hearing	:	**30 MARCH 2011**
Judgment delivered on	:	**28 APRIL 2011**

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TWO OCEANS AIR CONDITIONING (PTY) LIMITED	**5TH RESPONDENT**

JUDGMENT DELIVERED ON THURSDAY, 28 APRIL 2011

DLODLO, J

[1] The Applicant is a private company with limited liability duly incorporated in accordance with company laws of South Africa (with registered office at Corner of Kelvin and Forge Roads, Spartan, Kempton Park, Gauteng) and is also described as a predominantly black-owned company with 95% of its shareholding owned by

previously disadvantaged individuals. The Respondents are all juristic persons in that they are either public or private companies registered in terms of the Company Laws of South Africa. Mr. Jamie (SC) (assisted by Mr. De Jager) appeared for the Applicant whilst Mr. Rosenberg (SC) (assisted by Ms Pillay) appeared for the First, Second and Third Respondents. Mr. Jacobs (SC) (assisted by Mr. Coetzee) appeared for the Fifth Respondent.

[2] The Applicant instituted this application on an urgent basis on 9 March 2011. In this application the Applicant seeks urgent interim interdictory relief (pending the determination of relief in Part B) to:

(a) Restrain the First and/or Second and/or Third and/or Fourth Respondents from signing or concluding a contract with the Fifth Respondent, pursuant to which the Fifth Respondent is appointed to carry out the HVAC installation in connection with the extension and refurbishment of the Tygervalley Shopping Centre (project C/1346/M3) ("the works");

(b) Restrain the First and/or Second and/or Third and/or Fourth Respondents from, in any manner implementing the award of the tender pertaining to the works.

This hearing relates only to the above-mentioned interdictory relief. It is important to mention that the First, Second, Third and Fifth Respondents resist this application. In Part B (which is not the subject of hearing presently) the Applicant seeks relief which *inter alia* declares that the bid by the Fifth Respondent was not compliant with the terms of the Bid Invitation; the First and/or Second and/or Third Respondents should have disqualified the Fifth Respondent; the First

and/or Second and/or Third Respondents were not entitled and should not have awarded the tender to the Fifth Respondent; and that it be directed that these three Respondents adjudicate the tender in accordance with the terms and conditions set forth in the Bid Invitation.

BACKGROUND FACTS

[3] The First and Second Respondents are the registered co-owners of the Tygervalley Shopping Mall. There is no dispute that they are private entities and not organs of state. The First and Second Respondents are in the process of undertaking an extension and refurbishment of the Tygervalley Shopping Mall and have appointed a Joint Venture (which the Fourth Respondent forms part of) as the principal contractor in respect thereof. One of the subcontracts (and to which this application relates) is that of the Heating Ventilation and Air Conditioning ("HVAC") for the extensions and refurbishments of the Tygervalley Shopping Mall. The First and Second Respondents applied their Procurement Policy in order to secure subcontractor for the HVAC.

[4] On or about 6 October 2010, the First and Second Respondents issued a document entitled "Prequalification Documentation for the HVAC Installation at Tygervalley Shopping Centre – Master Development Plan: Phase 1" ("the prequalification document"). The prequalification documentation was sent to six entities that were prospective tenderers. The tender documentation was made available to prospective tenderers on 15 October 2010. The tender documentation included:

(a) the Procurement Policy; (b) the tender specification. A pre-tender meeting took place on 20 October 2010 and a copy of those minutes is attached as DCE4 to the Founding Affidavit. Save for the Applicant and the Fifth Respondent, all of the other tenderers subsequently withdrew from the tender process.

[5] On receipt of the two tenders, the Third Respondent ("Triocon") did an initial assessment in respect of technical and financial compliance and recommended that the tender be awarded to Two Oceans. The Tender Evaluation Committee then verified the adjudication process used in terms of the Procurement Policy. The Tender Evaluation Committee scored Two Oceans 86.50 points and the Applicant 75.91 points and recommended Two Oceans for appointment. The tender was then referred to the Development Committee which made a recommendation to the Management Committee. The decision to award the tender to Two Oceans was taken by the Management Committee.

[6] On 7 March 2011 an agreement was concluded between the Joint Venture and Two Oceans pursuant to the award of the tender. I hasten to mention that there is a dispute between the parties with regard to the status and naming of the initial document that apparently set the whole bid in motion. The Applicant insists that its correct name is "the Bid Invitation" whilst the Respondents insist that it is a "Prequalification Documentation" for the HVAC Installation at Tygervalley Shopping Centre. The Applicant insists that the latter documentation formed part of the tender documentations in this matter. Importantly, the

Respondents hold a different view from that of the Applicant. It is of paramount importance to note though that this documentation is indeed entitled "Prequalification Document".

THE COMPLAINT BY THE APPLICANT

[7] According to the Applicant the decision by the First to Third Respondents to award the bid to Two Oceans falls to be impugned due to a "flawed tender process". The flaw in the tender process is alleged to arise from a single irregularity, *viz*, that the First to Third Respondents accepted a B-BBEE certificate from an entity that was not a SANAS accredited rating agency. According to the Applicant it was a peremptory requirement in terms of the tender documentation that a B-BBEE certificate be provided by an agency approved of by the South African National Accreditation System (SANAS). It should be emphasizes that Two Oceans did provide a Broad-Based Black Economic Empowerment (B-BBEE) certificate as part of its response to the HVAC. Accordingly, the issue in dispute is whether it was a peremptory requirement that a B-BBEE certificate be provided by a SANAS accredited rating agency or not. The Applicant contends that:

(a) By having committed to its Procurement Policy, the First, Second and Third Respondents gave an "undertaking" that a bidder who submits a compliant bid acquires "the right" and the Respondents are obliged to have its tender adjudicated on that basis.

(b) Upon submission of its bid, it obtained the contractual right to have its bid adjudicated upon the terms set forth in the Bid Invitation and Procurement Policy.

Consequently the Applicant contends in the Replying Affidavit and in oral submissions that the award of the tender and the conclusion of the contract pursuant thereto have occurred "in breach of the Applicant's contractual rights".

DISCUSSION

[8] It is important to note that in the first instance a valid and binding contract has been concluded between the Joint Venture (which the Fourth Respondent forms part of) and the Fifth Respondent (Two Oceans). It is common cause that the Applicant is not a party to that contract and has no rights in relation to it. The principle is stated by ***Christie*** **(The Law Contract** – 5th edition page 260) as follows: *"The basic idea of contract being that people must be bound by the contracts they make with each other it would obviously be ridiculous if total strangers could sue or be sued on contracts with which they were in no way connected. The doctrine which prevents this ridiculous situation arising is usually known as the doctrine of privity of contract: parties who are not privy to a contract cannot sue or be sued on it."* Any relief sought in this application regarding the implementation of the contract cannot alter the fact that a valid and binding contract remains in place. That contract in respect of which rights have vested and accrued cannot be the subject of a challenge by a third party. Indeed, there is no challenge to the validity of that contract in these proceedings. The Applicant itself in its Founding papers recognizes that the conclusion of a contract pursuant to the award of a tender stands in the way of it obtaining the relief it seeks in these proceedings, stating as follows:

"96. *If the urgent interim relief is not granted and Two Oceans concludes such a contract pursuant to the award of the tender, then the final relief sought herein will be moot and the applicant will effectively be deprived of the opportunity to enforce the rights which it is seeking to do in these proceedings.*

97. *Upon concluding such a contract, Two Oceans will acquire contractual rights to perform the services for which it has tendered. Once that occurs, even were the applicant to have a proper case for the final relief which it seeks (a declaration that the tender process was flawed and that the Two Oceans bid ought to have been disqualified for failing to furnish a B-BBEE certificate issued by a SANAS-accredited agency), that relief would be rendered moot."*

[9] It is correct that in the Applicant's written submissions an attempt is made to avoid this consequence because reliance is placed on the maxim *qui prior est tempore potior est iure*, asserting that the Applicant possesses a prior right inasmuch as it acquired its rights upon submission (on 1 November 2010) of its bid. The Applicant contends that the Fifth Respondent's right only came into existence on or about 7 March 2011 being the date of the execution of the contract. Suffice it to say for present purposes that the maxim is essentially based in equity, and it is of application in particular circumstances. Historically, this has for the most part been in the context of double sales where one is dealing with two competing, incompatible claims

for specific performance. In ***Wahloo Sand BK v Trustees, Hambly Parker Trust*** 2002 (2) SA 776 (SCA) at 788 D-E, the Supreme Court of Appeal dealing with the above-mentioned maxim stated the following:

"[11] .....Save in the respect just mentioned, I see no distinction between the present case and the other two cases decided by this Court and I do not consider the distinction to be one of principle. The maxim is essentially based in equity and, in my view, it would be both logical and equitable to extend its operation to cover a case such as the present. The maxim was undoubtedly of limited application in the Roman-Dutch law and of even more limited application in the Roman law (See Mulligan 'Double Sales and Frustrated Options' (1948) 65 SALJ 564). But as Lord Tomlin said in Pearl Assurance Co v Union Government 1934 AD 560 (PC) at 563 (in a passage subsequently quoted with approval by this Court in Alpha Trust (Edms) Bpk v Van der Watt 1975 (3) SA 734 (A) at 749 E):

'[The Roman-Dutch law] is a virile living system of law, ever seeking, as every system must, to adapt itself consistently with its inherent basic principles to deal effectively with the increasing complexities of modern organized society.'"

[10] Perhaps it is of importance to quote another portion of the Supreme Court of Appeal Judgment in ***Wahloo Sand BK v Trustees, Hambly Parker Trust*** *supra*, in order to demonstrate the difficulty faced by the Applicant in this matter. At 784 paragraph [13] of SCA Judgment the following appears:

"[13] Gevolglik het ons te make met twee aansprake op persoonlike regte, voorspruitend uit eise vir spesifieke nakoming van twee kontrakte, wat met mekaar in botsing is. Die onderskeie regte waarop aanspraak gemaak word is versoenbaar deurdat eiendomsreg en 'n saaklike serwituut naas mekaar kan bestaan. Nietemin is die aansprake onversoenbaar deurdat die eerste respondent oordrag van onbeswaarde titel eis wat uiteraard nie met 'n geregistreerde saaklike serwituut oor die eiendom versoenbaar is nie."

The Applicant's claim for specific performance lies against the First and the Second Respondents, and it bears on the Applicant's alleged entitlement that the bid process should be conducted according to what the Applicant argues were the agreed rules. The Fifth Respondent's right to specific performance is of a different character. It is a right enforceable against the Fourth Respondent, entitling the Fifth Respondent to perform the services provided for in the sub-contract agreement. One is not dealing with competing claims for specific performance being advanced against one party who in the nature of things cannot perform fully in each case.

[11] The Applicant's claim for specific performance is almost impossible to order. ***Christie*** *supra* explains this better where the following is stated at page 525:

"In accordance with the maxim lex non cogit ad impossibilia specific performance will never be ordered if compliance with the order would be impossible." See also ***Pretoria East Builders CC v Basson*** 2004 (6) SA 15 (SCA) at 21 where the following exposition appears:

"*[10] Secondly, Mr. Wagener argued on behalf of the appellants that the Court should not have issued an order for specific performance because, in the circumstances of this case, it cannot be carried out. The rule is set out in Shakinovsky v Lawson and Smulowitz (1904 TS 326 at 330) as follows:*

'Now a plaintiff has always the right to claim specific performance of a contract which the defendant has refused to carry out, but it is in the discretion of the Court either to grant such an order or not. It will certainly not decree specific performance where the subject-matter has been disposed of to a bona fide purchaser, or where it is impossible for specific performance to be effected; in such cases it will allow an alternative of damages.'"

The First and Second Respondents have considered the bids, made their decision and awarded the tender to the Fifth Respondent. Pursuant to that award, the contract between the Fourth Respondent and the Fifth Respondent has been concluded. The only way in which the Applicant could obtain specific performance is by setting aside the award of the tender and the conclusion of the agreement, and by commencing the process afresh. This, so the Applicant concedes, is beyond its reach, the remedy of judicial review not being available in the present context. However, what the Applicant in essence seeks in these proceedings is the setting aside of the contract between the Fourth Respondent and the Fifth Respondent. This also is clearly beyond its reach. It is apposite to bear the following dictum from ***Brisley v Drotsky*** 2002 (4) SA 1 (SCA) at 35 in mind:

"[94] On the contrary, the Constitution's values of dignity and equality and freedom require that the courts approach their task of striking down contracts or declining to enforce them with perceptive restraint. One of the reasons, as Davis J has pointed out, is that contractual autonomy is part of freedom. Shorn of its obscene excesses, contractual autonomy informs also the constitutional value of dignity.....

[95] The Constitution requires that its values be employed to achieve a careful balance between the unacceptable excesses of contractual 'freedom' and securing a framework within which the ability to contract enhances rather than diminishes our self-respect and dignity. The issues in the present appeal do not imperil that balance."

[12] In its heads of argument the Applicant suggests that the contract concluded *"is inchoate in as much as it is subject to a number of conditions."* In this respect Mr. Rosenberg (SC) correctly submitted that this is not borne out by the facts and that in any event, according to ***Christie*** (relying on ***Odendaalsrust Municipality v New Nigel Estate Gold Mining Co Ltd*** 1948 (2) SA 656 (O)), reference to an inchoate contract does not mean that either party can withdraw from the contract without impunity; indeed such a contract is binding. See ***Christie*** **– The Law of Contract in South Africa** (5th Edition) page 141. However, I must hasten to mention that Mr. Jamie did not, in his oral submissions, persist on the contract concluded being *"inchoate in as much as it is subject to a number of conditions."*

[13] It is so that the Applicant seeks to impugn the tender process notwithstanding the fact that it unreservedly accepts that the First, Second and Third Respondents:

(a) are private entities and not organs of state; (b) do not exercise a public power or perform a public function in terms of any empowering legislation.

In order to see that the Applicant seeks to set aside this tender process, one needs to have regard to the contents of the relief entitled Part B in the notice of Motion. Had the Respondents been organs of state then clearly section 6 (2) of the Promotion of Administrative Justice Act 3 of 2000 would have been invoked by the Applicant. Perhaps whilst I am on this point it is apposite to refer to a Judgment also referred to by Mr. Rosenberg, namely ***Fuel Retailers Association v D-G: Environmental MGT, Mpumalanga*** 2007 (6) SA 4 (CC) at 42-43 where the following elucidation is set out:

"[111] Section 6 (2) of the Promotion of Administrative Justice Act authorizes

'[a] court or tribunal ...to judicially review an administrative action if –

...

(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with'.

As Hoexter J observes:

'It would of course be delightfully simple if the failure to comply with mandatory provisions inevitably resulted in invalidity while ignoring directory provisions never had this consequence, but

the reality is not so clear-cut. From our case law one sees that some requirements classified as "mandatory" need not, in fact, be strictly complied with, but that "substantial" or "adequate" compliance may be sufficient. The reference in the PAJA to a "material" procedure or condition may indeed be read as recognizing this.'

(Footnote omitted.)

She goes on (correctly in my opinion) to support an approach which she believes sensibly links the question of compliance to the purpose of the provision, and quotes from Maharaj and Others v Rampersad where Van Winsen AJA stated the following:

'The enquiry, I suggest, is not so much whether there has been "exact" "adequate" or "substantial" compliance with [the] injunction but rather whether there has been compliance therewith. This enquiry postulates an application of the injunction to the facts and a resultant comparison between what the position is and what, according to the requirements of the injunction, ought to be. It is quite conceivable that a court might hold that, even though the position as it is not identical with what it ought to be, the injunction has nevertheless been complied with. In deciding whether there has been a compliance with the injunction the object sought to be achieved by the injunction and the question whether this object has been achieved are of importance.'

She notes with apparent approval the suggestion that this approach shows a trend away from the strictly legalistic to the substantive. Hoexter above n 3 at 263 quoting Van Dijkhorst J in Ex parte Mothuloe (Law Society, Transvaal, Intervening) 1996 (4) SA 1131 (T) [1996] 2 ALL SA 342) at 1138 D/E-E (SA). See too Olivier JA in

Weenen Transitional Local Council v Van Dyk 2002 (4) SA 653 (SCA) ([2002] 2 ALL SA 482) in para 13. The importance of avoiding a narrowly textual and legalistic approach was underlined by this Court in African Christian Democratic Party v Electoral Commission and Others 2006 (3) SA 305 (CC) (2006 (5) BCLR 579) in para 25."

[14] The above, however, finds no application in the instant matter. We know the PAJA provisions are beyond the reach of the Applicant in this matter. The Application before me, however, exhibits features that compel me to perceive same as a disguised application of PAJA provisions to private entities. I know of no authority and none has been pointed out for my attention for the proposition that a Court may impugn a tender process in circumstances where Respondents are private entities (not organs of state) and as such do not exercise or purport to exercise a public power or perform a public function in terms of any empowering legislation. Because the First to Third Respondents are private entities (not organs of state) and do not exercise a public power or perform a public function in terms of any empowering legislation, any decisions taken by them or on their behalf cannot be challenged in terms of PAJA. This obstacle on the way of the Applicant is seemingly being overcome by the seeking of declaratory relief in Part B as opposed to the conventional reviewing and setting aside of an impugned decision. At the risk of repeating myself I mention that one would be forgiven if one views the relief sought in Part B as a thinly disguised attempt to afford the Applicant relief as if PAJA had applied. Importantly, this is not a case where the exercise of private power approximates public power or has a wide and

public impact. The effect of the relief sought by the Applicant translates to an attempt to hold private entities liable to the same standard as organs of state. It shall not be forgotten that the standard to which organs of state are held in respect of tender process emanates (as it were) from the State's obligations under Section 217 of the Constitution of the Republic of South Africa. These obligations do not of cause apply to private entities. The Applicant seemingly seeks to hold the First and Second Respondents accountable to their own internal regulatory framework.

[15] The Applicant is seeking declaratory relief which will have no bearing whatsoever on its rights because:

(a) even if tenders are non-compliant, the Procurement Policy specifically contemplates deviations and provides that any deviations in respect of tenders will be evaluated by the Tender Committee, which will make recommendations to Manco. See "DCE2" to the Founding papers; (b) the Procurement Policy provides that Centre Management reserves the right to accept, at its sole discretion, any tender in its entirety or only partly, to accept any tender, irrespective of whether or not it is the lowest bid and not to award a tender; (c) the Procurement Policy provides that the Management Committee decision in awarding the tender is final. Perhaps, to avoid confusion in this regard it is best to refer specifically to the relevant clause of the Procurement Policy. Clause 9.9 of the Procurement Policy Document (Annexure "DCE2" to Founding papers) provides that rights are reserved by Pareto regarding tenders and states *inter alia* in this regard:

"Centre Management reserves the following rights regarding acceptance of tenders:

9.9.1 To accept, at its sole discretion, any tender in its entirety or only partly.

9.9.2 To accept any tender, irrespective of whether or not it is the lowest bid.

9.9.3 The Management Committee decision in awarding a tender is final."

(Own underling)

These provisions of the Procurement Policy should not under any circumstances be overlooked. Mr. Rosenberg submitted that in his view the Applicant is mistaken in contending that a B-BBEE certificate issued by a SANAS accredited agency is a peremptory requirement under the Procurement Policy and the tender documents. In his view the application by the Applicant is misconceived.

[16] Mr. Jacobs prefixed his submissions by stating that the principal issue which the Applicant raises in its Founding Affidavit is that the Fifth Respondent's bid should have been disqualified solely on the basis that the fifth Respondent had failed to submit a Broad-Based Black Economic Empowerment Certificate (a B-BBEE certificate) from a SANAS accredited verification agency. This much is indeed clear. In the correspondence emanating from the Applicant's Attorneys of record shortly after an award of tender to Two Oceans and prior to the launching of the present application the only basis upon which the award of the bid was sought to be impugned was that the Two Oceans bid was non-compliant as it did not submit a B-BBEE certificate from

a SANAS authorized verification agency. In reply the content of the Government Gazette Number 32467 dated 31 July 2009, were brought to their notice. The Applicant's Attorneys of record responded *inter alia* as follows:

"Whilst we do not deny that the empowerment certificate submitted by Two Oceans may indeed be valid if viewed in terms of the ... [the notice], we are of the view that your client's ex-post facto reliance on the notice merely obfuscates the issue..."

[17] In the application itself the Applicant raised additional points *inter alia*:

(a) that Two Oceans' B-BBEE certificate was not issued by a SANAS accredited agency; (b) that the provisions of the Government Gazette do not remedy the "fatal defect" in the Two Oceans' bid; (c) that when its B-BBEE certificate is compared to that lodged by Two Oceans, the Applicant's is detailed and comprehensive whilst that of the Two Oceans contains sparse information; (d) that MPower8 (the verification agency which issued the Two Oceans' B-BBEE certificate) was placed in deregistration prior to the issue of the certificate; and (e) that the Two Oceans' B-BBEE certificate was signed by a person who was never a director of MPower8 Rating Agency (Pty) Ltd.

It is not necessary for purposes of this Judgment to deal with each of the above. The body of the Judgment will show that they all have been considered. Interestingly the Procurement Policy document annexed to the Founding papers as "DCE2" refers to a "Valid B-BBEE verification certificate (Expired certificates will not be considered)."

On the other hand, the Tender Specification document, also attached to the Founding papers as "DCE3" refers in its paragraph 5 (e) to a "Valid B-BBEE Verification Certificate prepared by a SANAS accredited B-BBEE Verification agency." It is true that in paragraph 5 of the Tender Specification document it is stated that: *"Any tender which does not comply with the requirements stated in these documents may be considered invalid."*

[18] There is merit on the submission by Mr. Jacobs that the provisions of the Procurement Policy read with the Tender Specification are by no means harmonious as regards the effect of non-compliance. Mr. Jacobs submitted as follows in this regard:

"In these circumstances, it can hardly be contended, as the applicant seeks to do, that the submission of a B-BBEE certificate from a SANAS accredited verification agency was a peremptory requirement." In his view all what the tender called for was a valid B-BBEE certificate. I hold the view that the issue relating to the validity of the B-BBEE certificate relevant to these proceedings is properly governed by the Government Gazette referred to above. It is common cause that the Government Gazette is and it remains a regulation promulgated in terms of Section 14 of the Broad-Based Black Economic Empowerment Act 53 of 2003 and it therefore constitutes what is known as subordinate legislation. It is apposite to set out the provisions of this Government Gazette:

"(a) from 1 February 2010, only BEE verification certificates issued by Accredited Verification Agencies or Verification Agencies

that are in possession of a valid pre-assessment letter from South African National Accredited System will be valid;

(b) despite the provision in paragraph (a) above, all verification certificates issued by non-accredited verification agencies before 1 February 2010, will remain valid for 12 months from the date of issue."

As can be seen from above, the Government Gazette makes provision in express terms for the status of B-BBEE certificate issued by non-accredited verification agencies. The Government Gazette seeks to regulate the validity of B-BBEE certificates issued by SANAS accredited verification agencies and it similarly deals with the validity of B-BBEE certificates issued by non-accredited verification agencies. In other words paragraph (b) of the Government Gazette quoted above is, in my view, a saving provision. A B-BBEE certificate issued by a non-accredited verification agency is by virtue of this paragraph (b) of the Government Gazette placed on the same footing as a B-BBEE certificate issued by a SANAS accredited verification agency.

[19] It is of paramount importance that the validity of a B-BBEE certificate submitted by Two Oceans was not [both in the Founding Affidavit and the Replying Affidavit] disputed by the Applicant save on one aspect only, namely that it was not issued by a SANAS accredited agency. An endeavour was made by Mr. Jamie to attack this certificate when he made his oral submissions. That obviously would not carry any weight because it was never the Applicant's case on the papers. There is indeed no need to spend time on the allegation that MPower8 agency that issued the Two Oceans B-BBEE certificate had been deregistered.

The fact of the matter is that the Applicant omitted to pay attention to the provisions of Section 73 of the Companies Act setting out the procedural aspects whenever deregistration is envisaged. If the provisions of the above-mentioned Companies Act are brought to the equation, then clearly MPower8 was only deregistered on 16 July 2010. When it issued the Two Oceans' B-BBEE certificate on 28 January 2010 (as shown on Annexure "DCE7") it was not deregistered. Maybe it needs to be mentioned that there were ordinarily other requirements that had to be considered before a decision was taken to award the tender to a particular tenderer. To mention but one, the Two Oceans' bid was for an amount of R43775 445.64 whereas the Applicant's bid was for an amount of R52752 096.80. The requirements for the granting of an interim interdict are well known indeed. See ***Eriksen Motors (Welkom) Ltd v Protea Motors Warrenton and Another*** 1973 (3) SA 685 (AD) at 691 C-E. These are considered hereunder.

PRIMA FACIE RIGHT

[20] It is well-established that an interdict will be granted if the Court is satisfied that the Applicant has a right established on a balance of probabilities and that the Respondent has invaded it or threatened to do so. The Applicant bears the onus to place sufficient evidence before the Court to show the existence of a right and that the right has been infringed by the Respondents. See ***Msunduzi Municipality v Natal Joint Municipal Pension/Provident Fund and Others*** 2007 (1) SA 142 (NPD) at 142 E-F.

[21] According to Mr. Rosenberg the Applicant misconceived two things, namely the contractual terms that it relies on regarding the adjudication of its tender and the contractual terms regarding the SANAS accredited certificate. It is common cause that in respect of the contractual terms for the adjudication of its tender, the Applicant submits both in Founding papers and in oral submissions that it was "entitled as a matter of contractual right:

(a) *"To assume that prospective bidders across the board would be required by the First and Second Respondents to submit bids in accordance with the Bid Invitation, Procurement Policy and Tender Specification.*

(b) *That the provisions and requirements of the First and Second Respondents' Bid Invitation, Procurement Policy and Tender Specification would be strictly, fairly and equitably applied; and*

(c) *To have its tender accepted and considered based upon the Bid Invitation supported by the Procurement Policy, Bid Specifications and other relevant documentation."*

I would agree with Mr. Rosenberg that none of the above constitutes "contractual terms" upon which the Applicant could place reliance particularly given that (a) a deviation from tender requirements is permissible under the Procurement Policy; (b) The Procurement Policy provides for a reservation of rights in respect of decisions taken; (c) The Procurement Policy specifically provides that it shall not operate in such a way as to confer any enforceable rights on a third party in relation to those aspects of the policy that relate to internal Pareto matters regarding procurement; and (d) the Management Committee decision in awarding the tender is final.

In respect of the contractual terms regarding the SANAS accredited B-BBEE certificate the following must be borne in mind. It remains correct that the pre-qualification document (as the Respondents prefer to refer to it) or the Bid Invitation (as the Applicant prefers to call same) stated that a valid B-BBEE verification certificate must be submitted and that non-SANAS registered agencies or expired certificates will not be considered. However, the First to Third Respondents have contended that this did not constitute a bid invitation, did not form part of the tender documents and therefore cannot constitute an offer. As I indicated earlier on in this Judgment this remains a debatable issue between these litigants. Importantly the Procurement Policy itself expressly states in its clause 7.1.3.1:

"Any purchase of assets, consumables and services require valid and comparable quotations from bona fide suppliers. Bona fide supplier can be defined as a registered entity with valid CIPRO, SARS registration and clearance certificate." It is significant that this definition of "bona fide supplier" in clause 7.1.3.1 does not refer to a B-BBEE certificate from a SANAS approved agency and differs from the definition provided in clause 6.4.1 of the Procurement Policy. The latter clause defines a "bona fide supplier" with reference to a B-BBEE certificate from a SANAS approved agency and applies only in relation to "quotation requirements", which would appear to have no relevance to the tender."

[22] Clearly the Procurement Policy itself does not require a B-BBEE certificate from a SANAS approved agency. I am of the view that it is correct to contend (as Mr. Rosenberg did) that there is no peremptory

requirement of a B-BBEE certificate from a SANAS approved agency in the Tender Specification. In truth the Tender Specification specifically states that a failure to submit *inter alia* such a certificate "may" result in a tender being declared non-compliant. It does not say "shall" result in a tender being declared non-compliant. One cannot find fault with the submission made on behalf of the Respondents that properly read and considered in context, there is no peremptory requirement for a B-BBEE certificate from a SANAS approved agency. Certainly, the pre-tender qualification documentation or Bid Invitation (whatever it is called) cannot provide for such a peremptory requirement, particularly when such an interpretation would be inconsistent with the Procurement Policy and the Tender Specification. In any event, if I were to arrive at a finding that a B-BBEE certificate from a SANAS approved agency is a peremptory requirement for a compliant bid (I do not make such a finding) there is a question of the Government Gazette Notice published on 31 January 2009 attached as Annexure "DCE11" to the Founding papers. It provides an unequivocal answer to the challenge lodged by the Applicant. In terms thereof, all verification certificates issued by non-accredited verification agencies before 1 February 2010 will remain valid for twelve months from the date of issue. It is apparent from Annexure "DCE7" to the Founding papers that the Fifth Respondent's (Two Oceans) certificate was issued on 28 January 2010 and expired on 27 January 2011. Clearly this non-SANAS approved certificate remained valid as at the time at which the bid was accepted.

[23] Indeed the Applicant contends that it has established a *prima facie* right founded in the contract. Both in its Founding papers and heads of argument, the Applicant maintained that its right is that the tender process will be carried out on the basis of the Bid Invitation and Procurement Policy and Annexures. This position was adhered to by Mr. Jamie in oral submissions. In support of the above proposition, Mr. Jamie relied on three cases. The first of these cases is a Canadian decision of the Supreme Court of British Columbia, namely ***Whistler Service Park Ltd v Whistler (Resort Municipality of) and Others*** [1990] 41 CLR 132 [BCSC] (1990 CanL1153 (The ***Whistler*** case). The extracts from the ***Whistler*** case relied on by Mr. Jamie are the following:

"Actions by parties who have not been awarded a contract after tendering are not based upon breach of the actual contract which they were competing for. Rather, they are based upon breach of the contract which is said to arise upon submission of a tender in accordance with the terms set out in the tender documents... In strict contractual terms, therefore, the call for tenders is the offer and the tender submitted constitutes the acceptance. It is important to note that submission of a tender bid only creates a contract if that bid complies with the terms and conditions of the call for tenders." The Court in the ***Whistler*** case *supra* also referred to the following dictum with approval:

"The court specifically held that there is an implied obligation not to award [the] contract except in accordance with the terms of the tender documents. The respondent's [the municipality's] obligation under [the] contract was not to award the contract except in accordance with

the terms of the tender call. The stipulation that the lowest or any tender need not be accepted does not alter that. The respondent might award no contract at all or it might award [the] contract to Tower, but it was under a contractual obligation to the appellant not to award Tower something other than [the] contract."

Another case on which Mr. Jamie placed reliance is ***Steenkamp NO v Provincial Tender Board, Eastern Cape*** 2006 (3) SA 151 (SCA) at 158 para 12. In last-mentioned case Harmse JA (as he then was) expressed the following view:

"Seen in isolation, the invitation to tender is no doubt an offer made by an organ of state 'not acting from a position of superiority or authority by virtue of its being a public authority, and the submission of a tender in response to the invitation is likewise the acceptance of an offer to enter into an option contract by a private concern who does so on an equal footing with the public authority."

The following at 170 para 51 was also stated, though obiter, in ***Steenkamp*** case *supra*:

"Submitting a tender involves more than merely making an offer. It amounts to the conclusion of a preliminary agreement, which is also a juristic act, in which the tenderer accepts the tender conditions imposed and undertakes to comply with them. For instance, in this particular case the tender had to be (and was) in the form of an option open to acceptance by the board during the given period."

Another case relied on by Mr. Jamie is ***Blackpool and Flyde Aero Club Ltd. v Blackpool Borough Council*** [1990] 3 ALL ER 25 [CA]. The extract relied on in ***Blackpool*** decision is the following:

"A tendering procedure of this kind is, in many respects, heavily weighted in favour of the invitor. The invitee may often, although not here, be put to considerable labour and expense in preparing a tender, ordinarily without recompense if he is successful. .....But where, as here, tenders are solicited form selected parties all of them known to the invitor, and where a local authority's invitation prescribes a clear, orderly and familiar procedure...the invitee is in my judgment protected at least to this extent: if he submits a conforming tender before the deadline he is entitled, not as a matter of mere expectation but of contractual right, to be sure that his tender will after the deadline be opened and considered in conjunction with all other conforming tenders or at least that his tender will be considered if others are."

[24] Mr. Jamie submitted as follows after referring me to the above-mentioned three cases:

"In our case, it is apparent that the applicant accepted the tender conditions imposed and undertook to comply with them inasmuch it submitted a compliant bid. Therefore a preliminary agreement, as described in Steenkamp, came into existence. The bid was in the nature of an open offer to the first and second respondents which, upon acceptance, would have given rise to a binding contract to perform the works. This second contract is not to be confused with the first. In the Constitutional Court the viability of this two-contract approach to tendering was acknowledged: "Although an invitation to tender and its acceptance may be susceptible to common-law rules of contract, when a tender board evaluates and awards a tender, it acts within the

domain of administrative law." (***Steenkamp NO v Provincial Tender Board, Eastern Cape*** *2007 (3) SA 121 (CC) at para 21.) Where the tender concerned does not involve the state, the point seems to be that common law rules would govern the contractual position as between the parties."* Mr. Jamie also referred me to a textbook written by ***Geo Quinot – State Commercial Activity: A Legal Framework*** [2009] 166 fn 197 where the author expresses the following view:

"It seems axiomatic that a tenderer harbours the expectation that its tender will at least be considered along with all the other tenders. It is difficult to see why anyone, especially in commerce, will invest the time and cost in preparing and submitting a tender if it is not accompanied by such an expectation."

The difficulty I am faced with is that the ***Whistler*** case *supra* dealt with a municipality and not private parties or entities as pointed out by Mr. Rosenberg. It is true a tender procedure was impugned in the ***Whistler*** matter *supra*. In that context therefore the Court accepted that in strict contractual terms the call for tenders is the "offer" and the tender submitted constitutes the "acceptance". In the matter of ***Blackpool and Flyde Aero Club Ltd v Blackpool Borough Council*** *supra*, which dealt with the **Blackpool Borough Council** the Court indeed found that if the tenderer submits a conforming tender, he has a 'contractual right, to be sure that his tender" will be opened and considered with other conforming tenders. Similarly in ***Steenkamp*** case *supra* the Court dealt with tender by a state organ.

[25] In the matter of ***Steenkamp NO v Provincial Tender Board EC*** 2007 (3) SA 121 (CC), the Constitutional Court held that although an

invitation to tender and its acceptance "may be" susceptible to common-law rules of contract, when a tender board evaluates and awards a tender, it acts within the domain of administrative law. Its decision in awarding or refusing a tender constitutes an administrative action. That is so because, according to the Court, the decision is taken by an organ of State which wields public power or performs a public function in terms of the Constitution or legislation and the decision materially and directly affects the legal interests or rights of tenderers concerned. In this way the right to just administrative action is now a constitutional imperative. I have dealt with cases on which the Applicant placed reliance in support of its assertion that there exists a *prima facie* right. As mentioned already in this Judgment not a single one of these cases deals with a tender process in respect of a private entity. Mr. Rosenberg submitted as follows in this regard:

"In any event, the applicant's contention that it was contractually entitled to have its tender adjudicated together with all other compliant tenders strictly in accordance with the Bid Invitation, procurement Policy and Tender Specifications, is misconceived. If this Court is inclined to follow the dicta relied upon by the applicant regarding a contractual right on submission of the tender, then that right is limited to a consideration of the applicant's tender. The applicant does not have any rights in relation to how other tenders are considered and decided. Indeed, as stated: (a) a deviation from tender requirements is permissible under the Procurement Policy; and (b) the Procurement Policy provides for a reservation of rights in respect of decisions taken."

I agree with the above quoted submission. The fact of the matter is that there is no suggestion that the Applicant's tender was never opened and considered. It is accepted as a given that it was indeed opened and considered. The fact that the Applicant was not awarded the tender it tendered for hardly means that the tender was not considered at all. The principles relied upon by the Applicant do not necessarily find favour with academic writing on the subject matter. According to ***Christie – The law of Contract in South Africa*** (5th Edition) page 42, a call for tenders is normally no more than a request to submit offers and each tender is an offer which the employer calling for offers may accept or reject at will.

[26] In my judgment it cannot be contended that the Applicant in the instant matter has a contractual right, *prima facie* or otherwise. I have mentioned that the right it acquired was that its tender be opened and considered together with other tenders. That was done. Another serious difficulty in any event is that the *prima facie* right relied upon by the Applicant is one in respect of which the objective of granting this interdictory relief can no longer be achieved since the interdict would not serve the purpose of preventing the alleged wrong from being committed. An interdict is not a remedy for a past violation of rights. It is rather aimed at preventing or prohibiting future illegitimate activity. See the following authorities:

Philip Morris Inc and Another v Malboro Shirt Co SA Ltd and Another 1991 (2) SA 720 (A) at 735 B; ***Stauffer Chemicals Chemical Products Division of Chesebrough-Ponds (Pty) Ltd v Monsanto Company*** 1988 (1) SA 805 (T) at 809 F; ***Payen Components SA Ltd v***

Bovic CC and Others 1995 (4) SA 441 (A) at 451 F-G; ***Camps Bay Residents and Ratepayers Association v Agoustides*** 2009 (6) SA 190 (WCC) at 196 C-I.

It has been mentioned earlier on in this Judgment that what the Applicant effectively seeks in the main application, is the setting aside of the award of the tender (and by implication the conclusion of any contract between the Joint Venture and the Fifth Respondent – Two Oceans) and a reconsideration of the tender bids. It is trite that at interim stage, the Applicant must show, albeit on the basis of a *prima facie* right, an entitlement to have the contract and the preceding tender process set aside. The Applicant indeed does not have such a right, so much is conceded by itself in its Founding papers. *A fortiori*, the Applicant has failed to demonstrate any relevant *prima facie* right.

A WELL-GROUNDED APPREHENSION OF IRREPARABLE HARM IF THE INTERIM RELIEF IS NOT GRANTED

[27] In ***National Council of Societies for the Prevention of Cruelty to Animals v Openshaw*** 2008 (5) SA 339 (SCA) the Court held:

"[21] The test in regard to the second requirement is objective and the question is whether a reasonable man, confronted by the facts, would apprehend the probability of harm. The following explanation of the meaning of 'reasonable apprehension' was quoted with approval in Minister of Law and Order and Others v Nordien and Another: 'A reasonable apprehension of injury has been held to be one which a reasonable man might entertain on being faced with certain facts. The applicant for an interdict is not required to establish that, on a balance of probabilities flowing from the undisputed facts, injury will follow:

he has only to show that it is reasonable to apprehend that injury will result. However the test for apprehension is an objective one. This means that, on the basis of the facts presented to him, the Judge must decide whether there is any basis for the entertainment of a reasonable apprehension by the applicant."

In the Founding Affidavit paragraph 96 referred to *supra* the Applicant contends that if the interim relief is not granted and Two Oceans (Fifth Respondent) concludes a contract pursuant to the award of the tender, then the final relief will be moot and the Applicant will effectively be deprived of the opportunity to enforce its rights. It is doubtful that the Applicant has shown compliance with this requirement for the granting of an interim interdict in view of the following:

(a) the contract has now been concluded and accordingly on the Applicant's own version, the final relief is rendered moot; (b) none of the relief sought in this application seeks to challenge the validity of the contract that was concluded between the Joint Venture and the Fifth Respondent – Two Oceans.

BALANCE OF CONVENIENCE

[28] According to the Applicant (in its heads of argument para 96) the balance of convenience favours the granting of an interim interdict *inter alia* because a further delay of a few additional weeks to resolve the dispute is not unreasonable. Significantly, in its answering Affidavit the First to Third Respondents have stated *inter alia* as follows (which is admitted by the Applicant):

"86.1 The main contract is a substantial one which has been carefully developed both in terms of timeframes and design. The project is

developed on the basis of mitigating inconvenience to existing tenants and is therefore being undertaken on a phased basis.

86.2 All tenants want to trade before Christmas (and particularly the Food Court). Accordingly, if the project is delayed (even for a period of 2 to 3 weeks), it will have a knock-on effect on the overall completion dates of the project. In particular, it will result in: (a) tenants losing revenue over the Christmas period and prior thereto; (b) penalty provisions that may be invoked."

It has not been disputed (probably because it cannot be disputed) that the First and Second Respondents will not receive rental during the period that a tenant has vacated the premises and will thus suffer substantial financial loss. Nor has it been disputed that on a practical level, (as alleged by the First and Second Respondents) if the air conditioning is not completed in accordance with the contractual timeframes, the sprinkler system cannot be installed and nor can the ceiling and lighting. In other words, ultimately the units cannot be completed. How can it be contended therefore that the balance of convenience favours the granting of this interim interdict? It does not.

NO OTHER SATISAFACTORY REMEDY

[29] Mr. Jamie submitted quite correctly that in view of the fact that the Respondents are private juristic persons, the Applicant is not at liberty to seek the review and setting aside of the decisions taken beforehand. On this basis Mr. Jamie submitted that plainly no other satisfactory remedy exists in the circumstances. On the other hand Mr. Rosenberg submitted that the specific performance as a remedy is one which is

neither possible nor appropriate in the prevailing circumstances of this matter. In his submission there is no reason why the Applicant cannot and should not claim its damages if the First and Second Respondents are in contractual breach. The fact of the matter is that nowhere in its Founding papers does the Applicant address the question why a damages claim would not be the appropriate remedy for the contractual breach relied upon by it. Nor does the Applicant pertinently answer this question in its Replying Affidavit. If the Applicant's case is, but for the breach, it would have secured the contract, its claim for lost profits is no different in principle from damages claims which are regularly prosecuted in the Courts. The Applicant does not make any suggestion to the contrary. The fact that (if the Applicant is correct) it would have what appears to be a perfectly viable damages claim, is an obstacle not only to its claim for final interdictory relief (which forms the essence of what it seeks in the main application), but also constitutes a bar to the claim for interim relief. That the Courts will not, in general, grant interdictory relief when the Applicant can obtain adequate redress by an award of damages is well-established. See **Erasmus Superior Court Practice** at E8-7 and the authorities collected at footnote 7: ***Rivas v The Premier (Transvaal) Diamond Mining Co Ltd*** 1929 WLD 1; ***Transvaal Property & Investment Co Ltd v SA Townships Mining & Finance Corp Ltd*** 1938 TPD 512; *Van der Merwe v Fourie* 1946 TPD 389; ***Fourie v Uys*** 1957 (2) SA 125 (C); **Van Wyk v Steyn** 1963 (4) SA 814 (GW); ***Lubbe v Die Administrateur, Oranje-Vrystaat*** 1968 (1) SA 111 (O); ***Erasmus v Afrikaner Proprietary Mines Ltd*** 1976 (1) SA 950 (W); UDC ***Bank***

Ltd v Seacat Leasing and Finance Co (Pty) Ltd 1979 (4) SA 682 (T) at 695 D- 696 C.

ORDER:

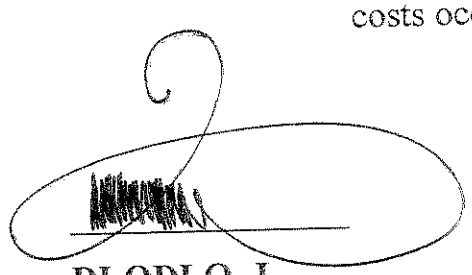
[30] In the result I make the following order:

(a) The application is dismissed.

(b) The Applicant shall pay the costs as follows:

(i) It shall pay the First, Second and Third Respondents' costs including the costs occasioned by the employment of two counsel.

(ii) It shall pay the Fifth Respondent's costs including the costs occasioned by employment of two counsel.



DLODLO, J