THE REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

(Coram: Henney, J)

Case No: 20263/2021

In the matter between:

THE QUALITY PLANT HIRE CC / EXPECTRA 388 CC JOINT VENTURE	First Applicant
QUALITY PLANT HIRE CC [Registration No. 2006 / 148357 /23]	Second Applicant
EXPECTRA 388 CC [Registration No. 2006 / 013606 /23]	Third Applicant

and

THE MEC FOR THE DEPARTMENT: TRANSPORT & PUBLIC WORKS, WESTERN CAPE GOVERNMENT	First Respondent
THE MEC FOR THE DEPARTMENT: TREASURY, WESTERN CAPE GOVERNMENT	Second Respondent
THE MINISTER OF FINANCE	Third Respondent
IMVULA ROADS & CIVILS (PTY) LTD [Registration No. 2007 / 035533 /07]	Fourth Respondent
ROYAL HASKONING DHV (PTY) LTD [Registration No. 1966 / 001916 /07]	Fifth Respondent

Date of hearing: 12 May 2022

Date of Judgment: 14 June 2022 (to be delivered via email to the respective counsel)

JUDGMENT

HENNEY, J

Introduction:

[1] This is an application for leave to appeal against the judgment and order given by this court, in an urgent application for interim relief, on 9 December 2021. I will refer to the parties as they were cited before me in the initial hearing. Mr I Jamie SC, with Mr Vassen, appears for the respondents. Mr Els appears for the applicant. The terms of the order granted on 9 December 2021 were the following:

> 1.1 that the first and fourth respondents be interdicted and restrained from giving effect to, or further effect to if it has commenced, Contract No. S034/21, C1105 in respect of the periodic maintenance of Trunk Road TR902-Du Toit's Kloof Pass, from km 0.21 to km 21.25;
>
> 1.2 that prayer 2 (set out in paragraph 1.1 above) shall operate as an interim interdict, with immediate effect, pending the finalization of Part B of the application;
>
> 1.3 that leave be granted to the applicants to supplement the application, in relation to the relief sought in Part B of the application, upon a date to be determined by the Registrar.

Background:

[2] The first respondent issued an invitation to tender for the repair of the Du Toit's Kloof Pass, as referred to in the paragraph 1.1 above ("the tender"). During the bidding process the second and third applicants entered their bid as a joint venture ("JV"). They specifically concluded a joint venture agreement for the purpose of executing the above-

mentioned project under contract No. C1152. The signed version of the JV agreement was included in the bid submitted by the JV in respect of the project.

[3] This tender, together with all the required documents, was timeously submitted to the first respondent. On 17 September 2021 correspondence was received from the fifth respondent ("the Royal Haskoning"), who is the first respondent's duly appointed agent on the project. In this letter, clarification was requested in terms of clause C .2 .17 of the Tender Data in respect of the JV's tender, and specifically clarification in respect of the construction program and construction equipment. On 2 November 2021 the JV received a letter from the first respondent, wherein they were advised that they were not successful in their bid, and that the contract had been awarded to the fourth respondent in a tender amount of R96 200 000 (VAT inclusive).

[4] On 4 November 2021 the JV wrote to the first respondent's representative to request clarification regarding their unsuccessful tender. On 15 November 2021 the JV received a response to this letter from the first respondent. In this letter the JV was advised that it had been unsuccessful due to the following reasons:

'As per the Conditions of Contract Clause C .2 .13 .4-the Joint Venture Agreement document of information was not authenticated by a Commissioner of Oaths/Public Notary/other official deputed the witness sworn statements. The bidder has thus failed to fulfil the requirements specifically highlighted and listed in clause C .2 .13 .4 and a tender offer are (sic) therefore deemed invalid.'

The disqualification of the JV was solely premised upon this non-compliance with clause C .2 .13 .4 of the conditions of tender, which reads as follows:

'. . . Tenders submitted by joint ventures of two or more firms shall be accompanied by the document of formation of the joint venture, authenticated by a notary public or other official deputed to witness sworn statements, in which is defined precisely the conditions under which the joint venture will function, its period of duration, the persons authorised to represent and obligate it, the participation of several firms forming the joint venture,

and any other information necessary to permit a full appraisal of its functioning. The document of formation of the joint venture shall state explicitly what the percentage participation in the joint venture will be of each party involved.'

[5] The applicants conceded that the signed JV agreement included in the bid was 'not authenticated by a Notary Public or other official deputed to witness sworn statements.' The applicants admit that this was overlooked in compiling the bid, and that their non-compliance was an innocent omission. It seems, however, that during this application the applicants' case was that because the JV agreement they submitted is an original document, there was no reason for it to be authenticated. The applicants' case during the initial hearing was that such an omission cannot conceivably amount to 'a material deviation or qualification' so as to render their bid as non-responsive, resulting in them being disqualified.

[6] This court, in an ex tempore judgment in the urgent motion court, after hearing the application on 9 December 2021, granted the interim relief and concluded that the applicants had established a prima facie right, and relied solely on *Webster v Mitchell* 1948 (1) SA 1186 (W). In its reasons, the court held that the issue as to whether the non-adherence to the requirement that the document be authenticated by a Notary Public, or an official deputed to witness statements, is a material requirement that results in the bid being non-responsive, is a determination best left to the trial court dealing with Part B of the application.

[7] It was further of the view that, given the circumstances of the case, the applicants' contention that this issue was highly technical and non-material, may be open to some doubt. On the other hand, the department submitted that the question whether it was a material issue justifying a conclusion that the bid was non-responsive, may also be open to doubt. It was on this basis that the court concluded that the applicants had established a prima facie right. The court also found that the balance of convenience favoured the applicants and, should the department start with the repair works, the applicants would have no other alternative remedy other than the relief sought in the application.

This application:

The following issues were raised for consideration in this application:

a) the appealability of an interim order, in light of the test laid down in *Zweni v Minister of Law and Order*[1] ("*Zweni*") and further expounded in *City of Tshwane Metropolitan Municipality v Afriforum and Another*[2] ("*Afriforum*");

b) whether based on the decision in *National Treasury and Others v Opposition to Urban Tolling Alliance and Others*[3] ("*OUTA*"), the granting of an interdict will intrude on the separation of powers in ordinary PAJA cases and especially where the interim order seeks to interdict the implementation of a tender by an organ of state.

[8] Mr Jamie submitted that, firstly, even though an interdict was granted for interim relief, the order made by the court was nonetheless subject to appeal. He submitted, with reference to *United Democratic Movement and another v Lebashe Investment Group (Pty) Ltd and others*[4] ("*Lebashe*"), that while the general rule is that interim interdicts are not usually appealable, the established questions to be posed when faced with such an appeal are whether it 'is in the interest of justice', whether 'special circumstances' exist for a court of appeal to determine whether the interim order has an element of finality which would prejudice the applicants, or whether the interim order has the potential to prejudice a party by preventing it from exercising its rights protected by the Constitution.

[9] He submitted that when an interim order prevented an organ of state from fulfilling its statutory functions, such a factor was crucial in determining whether the interests of justice required an appeal. The appealability of interim orders has been the subject of considerable judicial scrutiny. Most importantly those of the Constitutional Court, as well as that of the Supreme Court of Appeal. The factors that a court has to

[1] 1993 (1) SA 523 (A) at 532J–533A.
[2] 2016 (9) BCLR 1133 (CC).
[3] 2012 (6) SA 223 (CC).
[4] [2021] 2 All SA 90 (SCA) para 4.

consider in determining whether an interim order is appealable, have been clearly laid down. In *Afriforum* the court stated that '[t]he appealability of interim orders in terms of the common law depends on whether their final in effect.' The court went on to say that:

'[40] The common law test for appealability has since been denuded of its somewhat inflexible nature. Unsurprisingly so because the common law is not on par with but subservient to the supreme law that prescribes the interests of justice as the only requirement to be met for the grant of relief to appeal. Unlike before, appealability no longer depends largely on whether the interim order appealed against has final effect or is dispositive of a substantial portion of the relief claimed in the main application. All this is now subsumed under the constitutional interests of justice standard. The over-arching role of interests of justice considerations has relativised the final effect of the order or the disposition of a substantial portion of what is pending before the review court, in determining appealability.' (Internal footnotes omitted.)

[10] The Constitutional Court in *Afriforum* discussed the principles as set out in *OUTA.* In OUTA, Moseneke DCJ held that the factors generally to be considered regarding the appealability of interim orders, as endorsed in *Afriforum*, are the following:

1) that the operative standard is 'the interests of justice';

2) that in considering the 'interests of justice standard' the court must have regard to and weigh carefully all germane circumstances;

3) that whether an interim order has a final effect, or disposes of a substantial portion of the relief sought in the pending review, is a relevant and important consideration, yet it is not the only or always decisive consideration;

4) that it is just as important to assess whether the temporary restraining order has an immediate and substantial effect, including whether the harm that flows from it is serious, immediate, ongoing and irreparable;

5) that if appealability would best serve the interests of justice, then the appeal should be proceeded with no matter what the pre-Constitution common law impediments might suggest. This is especially so in a case where an interim order should not have been granted in the first place, by reason of failure to meet the requirements.

[11] The other important consideration which Moseneke DCJ dealt with, was the role of separation of powers in relation to the appealability of an interim order. On my understanding of the judgment, this aspect was clearly meant to be a consideration which a court should seriously take cognisance of. This is also a consideration that would be relevant in considering whether a prima facie right exists that would warrant the grant of an order for interim relief, which will be discussed later in this judgment. On a particular aspect, Moseneke DCJ held the following:

a) That a court must also be alive to and carefully consider whether the temporary restraining order would unduly trespass upon the sole terrain of other branches of government, even before the final determination of the review grounds. In this regard Moseneke DCJ heeded the warning that the court must be astute not to stop dead the exercise of executive or legislative power, before the exercise has been successfully and finally impugned on review. The Constitutional Court held that this approach accords well with the comity the courts owed to other branches of government, provided they acted lawfully.

b) Another important consideration is whether, in deciding an appeal against an interim order, the appellate court would in effect usurp the role of the review court, which should ordinarily be avoided.

c) With regard to this consideration (separation of powers) the interests of justice in such an application entails the need to ensure that form never trumps any approach that would advance the interests of justice.

d) In *Afriforum*, in emphasising the relevance of the separation of powers consideration, the court concluded that in a case where the separation of powers is implicated and forbids the grant of the order sought to be appealed against, the interests of justice demand that even an order that is not final in effect or does not dispose of a substantial portion of the issues in the main application, should nevertheless be appealable.

e) the role of the final effect of an interim order recedes to the background when an interim order impermissibly trenches upon the sole terrain of other branches of government.

f) an order that restrains a policy decision of an organ of state before the determination thereof on review, is too drastic a measure to take in the circumstances.

g) courts should operate with an ever abiding consciousness of the crucial role separation of powers plays in a constitutional democracy, and should thus be very slow to interfere with the legitimate exercise of governmental power save in "the clearest of cases", or where a bad faith or corruption of fraud was proved.

h) the common law recognised that an interdict restraining the exercise of statutory power should only be granted in exceptional circumstances, and when a strong case has been made out for relief. The grant of an interdict restraining government power cannot be treated as an ordinary run-of-the-mill application for an interim interdict.

[12] This approach regarding the evolvement of the appealability of interim orders in general, had been endorsed by the Supreme Court of Appeal[5] after the decision of *Zweni*, and based on the broad interests of justice consideration. In *National Commissioner of Police and Another v Gun Owners of South Africa* the SCA found that:

[5] Ibid; See also *National Commissioner of Police and another v Gun Owners of South Africa (Gun Free South Africa as amicus curiae)* [2020] 4 All SA 1 (SCA) paras 15–17.

'It is beyond question that the doctrine of the separation of powers is implicated in this case: the interdict instantly prohibited the SAPS from demanding or accepting the surrender of firearms with expired licenses in terms of the Act, powers and duties granted to its members by the Legislature.'[6]

[13] The SCA found that when this happened, and in a case where an interim interdict has nationwide effect and constitutes an impermissible intrusion by the court upon executive authority, under circumstances where the SAPS is prohibited from exercising its powers in carrying out its obligations under the act, for this reason alone, the interim order is appealable. The court went further to state that aside from this, the interdict is also appealable since it is final in effect; and it will not be duly reconsidered in the main application.[7]

[14] Mr Jamie submitted that the granting of the interim interdict, in this particular case, has a similar effect. It implicates the doctrine of the separation of powers and prohibits the MEC from exercising his authority given to him in terms of the law and the Constitution. He submitted that this court erred in finding that the applicants established a prima facie right to the interdict, even though open to some doubt.

[15] He further submitted that the principles as set out in *OUTA* are not only restricted to purely executive decisions relating to high policy, or so-called polycentric decisions, but are equally applicable to administrative decisions, including where relief is sought in terms of PAJA. In this regard Mr Jamie relied on *Air-France KLM SA and Another v SAA Technical SOC Ltd and Others* ("*Air France-KLM*") and other similar decisions as referred to in his heads of argument.[8] In particular, in *Air France-KLM* it was said[9] that

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[6] Ibid, para 16.
[7] Ibid, para 17.
[8] (52406/2016) [2016] ZAGPPHC 877 (23 September 2016), paras 15-22, which sought to interdict the award of a tender for aircraft components; *TFM Industries and Another v Marce Projects (Pty) Ltd and Another* (33992/2019) [2020] ZAGPJHC 17 (30 January 2020), which sought to interdict the implementation of a tender; *Vukani Gaming Eastern Cape v Chairperson, Eastern Cape Gambling and Betting Board and Others* (226/18) [2018] ZAECGHC 29 (19 April 2018); *Educor Holdings (Pty) Ltd and Others v Council on Higher Education and Others* (89420/19) [2019] ZAGPPHC 963 (24 December 2019), which sought to interdict the refusal to re-accredit certain academic programmes; *Eskom Holdings SOC Limited v National Energy Regulator of South Africa and Others* (74870/2019) [2020] ZAGPJHC 168

'[w]hen an applicant seeks to interdict the implementation of an administrative decision it must, however, do more than indicate that it has a prima facie right to review the decision in question or that it has prospects of success in relation to such a review.' Also that it is only 'in the clearest of cases or where there are exceptional circumstances, that courts will interfere with the exercise of statutory power – as in this case, being the exercise of public procurement powers by the Board.' The court then proceeds to deal with the principles as laid down in *OUTA*, and concludes, at paragraph 22, that it should caution itself in granting the interim relief unless it is satisfied that *Air France* has made out a compelling case, and even then it should only do so if it is a clear case.

[16] As a second ground of appeal, Mr Jamie submitted that this court failed to apply the principles as set out in *Economic Freedom Fighters v Gordhan and Others*[10] ("*Economic Freedom Fighters*"), where the court stated that before dealing with an interim interdict [against the state], it must be satisfied that the applicant has good prospects of success in the main review. Such a claim for review must be based on strong grounds which are likely to succeed; which requires a court adjudicating the interdict application to peek into the grounds of review that would be raised in the main review application and assess their strength; it is only after a court is convinced that the review is likely to succeed that it may appropriately grant the interdict. In *Economic Freedom Fighters* the court said that the rationale is that an interdict which prevents a functionary from exercising public power conferred on it, impacts on the separation of powers and should therefore only be granted in exceptional circumstances.

[17] Based on these submissions, as well as further authority cited in his heads of argument, Mr Jamie contended that this court incorrectly found that the applicants established a prima facie right to the interdict, as it had failed to consider whether the

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(28 July 2020), which sought to interdict the approval of allowable revenue to be reflected in electricity tariffs for certain financial years; and *Medical Nutritional Institute (Pty) Limited v Advertisings Standard Authority* (15/30142) [2015] ZAGPJHC 317 (18 September 2015), which sought to interdict the finding of the ASA that its product was not proven to facilitate weight loss.

[9] Para 15.

[10] 2020 (6) SA 325 (CC).

applicants had good prospects of success in the main review. For this reason, similarly, he contended that another court would come to a different conclusion, therefore leave to appeal ought to be granted.

[18] Mr Jamie further submitted, as a third ground of appeal, that this court failed to apply the relevant principles as set out in *Allpay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer of the South African Social Security Agency and others (Corruption Watch and another as amici curiae)*[11] ("*Allpay 1*"), where the Constitutional Court emphasised that there has to be a compliance with tender requirements because it has an intrinsic value, and that any deviations from those requirements, and condonation of the failure to comply, could be symptomatic of corruption, while insistence on compliance with process formalities has a three-fold purpose. These are, firstly, that it ensures fairness to participants in the bid process; secondly, it enhances the likelihood of efficiency and optimality in the outcome; and lastly, it guards against a process skewed by corrupt influences.

[19] Mr Jamie therefore submitted that this court failed take heed of what was said in *Allpay 1* and incorrectly found that the applicants had established a prima facie right to the relief sought, and that the balance of convenience favoured the applicants. It also incorrectly found, so he submitted, that they will suffer irreparable harm even though, under the circumstances, they could not suffer harm as they had no right to the relief sought.

[20] In a further ground of appeal, Mr Jamie submitted that the court failed to follow the decisions in various cases[12] where it had been held that a failure to comply with certain peremptory provisions of a tender would render such a tender non-responsive. More particularly, what was said in *Dr. J S Moroka Municipality and others v Bertram*

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[11] 2014 (1) BCLR 1 (CC).

[12] *WDR Earthmoving Enterprises v Joe Gqabi District Municipality* 2018 JDR 1295 (SCA); *Dr JS Moroka Municipality and others v Bertram (Pty) Ltd and another* [2014] 1 All SA 545 (SCA); *Minister of Environmental Affairs and Tourism and Others v Pepper Bay Fishing (Pty) Ltd; Minister of Environmental Affairs and Tourism and Others v Smith* 2004 (1) SA 308 (SCA); Passenger Rail Agency of South Africa v Swifambo Rail Agency (Pty) Ltd 2017 (6) SA 223 (GJ).

(Pty) Ltd and Another,[13] which referred to *Minister of Environmental Affairs and Tourism v Pepper Bay*,[14] that it was the state (in that case the municipality) and not the court that decided the prerequisites of a valid tender, and that failure to comply with prescribed conditions would result in a tender being disqualified as an acceptable tender under the relevant legislation, unless those conditions were immaterial, unreasonable or unconstitutional. It was also emphasised that as a general principle an administrative authority had no inherent power to condone failure to comply with a peremptory requirement.

[21] The first respondent, in its submissions under this ground, also referred to *Gijima Holdings (Pty) Ltd and others v South African National Roads Agency SOC Limited and others,*[15] where the applicant failed to submit a duly attested B-BBEE contributor status level affidavit, as the document's signature date differed from the date it was commissioned. The court held that this requirement served a specific and necessary purpose, which was to show compliance with the statutory requirements to address and advance participation by previously disadvantaged persons or entities. The court upheld the decision that the bid was non-responsive. In *Halifax Group (Pty) Ltd v Mandela Bay Development Agency*[16] where the applicant also admitted an error in the submission of its bid, but claimed that there was no proof that the omission detrimentally affected the scope, quality, or performance of the work performed, the court held that it was for the organ of state to decide the prerequisites of a valid tender, and the failure to comply with the prescribed conditions would result in the tender being disqualified as an acceptable tender, unless these conditions were immaterial, unreasonable or unconstitutional.

[22] Mr Jamie concluded in this regard that the court, by failing to apply the dicta of the SCA in *WDR Earthmoving*,[17] incorrectly found that the applicants established that

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[13] Fn 12 above.
[14] Fn 12 above.
[15] [2021] JOL 50911 (GP).
[16] [2021] JOL 50906 (ECP).
[17] Fn 12 above.

they had a prima facie right to the relief sought, that the balance of convenience favoured the applicants, and that they would have suffered irreparable harm.

[23] Mr Els, on the other hand, submits, with regard to the appealability of the interim order, that the order is not final in effect, not definitive of the parties' rights and dispositive of a substantial part of the relief claimed in the review application. He further submitted that according to the well-known *Zweni*-test, the interim order was clearly not appealable. Mr Els also referred to the *Marce Projects* case, but referred to the judgment given by the court in the application for leave to appeal, which is reported under *TFM Industries v Marce Projects (Pty) Ltd*[18]*.* In his submission, he contended that the interests of justice will cut both ways, which means that in some cases it will only serve to emphasise why an interdict should not be appealable, and that this case was indeed one such. He submitted that in *TFM Industries* the court considered the interests of justice in the context of an interim interdict in a similar procurement matter.

[24] He further submitted that, this being a procurement matter, regulated by section 217 of the Constitution which states how organs of state have to deal with procurement contracts, with the aim to promote a system which is fair, equitable, transparent, competitive and cost-effective, the essence of the interim interdict in a procurement matter is aimed at preserving the status quo to ensure that an applicant will be in the position to be granted an appropriate remedy, in the circumstances in terms of section 172 (1) (*b*) of the Constitution. For these reasons that it would not be in the interests of justice for this court to conclude that the interim order is appealable.

[25] Regarding the question whether leave to appeal should be granted in terms of section 17 (1) of the Superior Courts Act 10 of 2013, he submitted that section 17 (1) (*b*) references section 16 (2) (*a*) of the act, which states that: 'When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.' He submitted that this appeal fell in this category, because there can be no doubt that the main review

[18] Fn 8 above.

application would be finalised before the hearing of any appeal, therefore leave to appeal should not be granted.

[26] Regarding the applicability of the *OUTA* principle, he referred to the decision of *Gool v Minister of Justice and Another* ("*Gool*"),[19] and submitted that both these matters dealt with the interdicting of a statutory power. In *Gool* the interdict restrained a Minister from exercising his powers in terms of section 5 of the erstwhile Suppression of Communism Act 44 of 1950. *OUTA* dealt with an application to interdict the implementation of the so-called E-tolling system in Gauteng. According to him, there have been numerous subsequent decisions that confirmed that an important distinction should be drawn between an organ of state exercising statutory power where policy issues are at stake, and ordinary procurement matters. In this regard, he referred to *Marcé Products (Pty) Ltd and another v City of Johannesburg Metropolitan Municipality and another ("Marcé Products")*,[20] where the court considered the appropriateness of an interim interdict in a procurement matter specifically taking into account the *OUTA* principle.

[27] He also relied on *Down Touch Investments (Pty) Ltd and Another v MEC: Provincial Government of the Gauteng Province: Department of Roads and Transport*, [21] where the court was of the view that *OUTA* was to be distinguished from a matter where interim relief was sought in a procurement matter, and that the only introduction *OUTA* brought about, was that the courts ought to consider whether the granting of an interdict would offend the doctrine of separation of powers. Mr Els further submitted that in the context of an interdict in a procurement matter, the balance of convenience inquiry would most often be the pivotal consideration, and that it was for the organ of state to place the necessary facts before court to put the court in a position to consider the matter appropriately.

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[19] 1955 (2) SA 682 (C).
[20] [2020] 2 All SA 157 (GJ).
[21] (2096/2022) [2022] ZAGPJHC 65 (7 February 2022).

[28] He submitted that the first respondent made sweeping statements regarding the necessity to do repair work on the road, and that if there truly existed a dangerous situation, nothing prohibited the MEC from utilising regulation 16A.6.4 of the Treasury regulations, which states that in a specific case, if it is impractical to invite comparative bids, the accounting officer or accounting authority may procure the required goods or services by other means, provided that the reasons for deviating from inviting comparative bids must be recorded and approved by the accounting officer or accounting authority.

[29] The applicants accordingly submitted that the first respondent wrongfully made a finding that their bid was non-responsive, based on what appears in clause C .2 .13 .4 of the tender, since it was nowhere alleged by the first respondent that the agreement between the second and third applicants was not the original, and therefore that it was necessary to 'authenticate' a copy. They submitted that the original cannot be authenticated, which is simply a legal issue that can be considered by the court, regardless of the fact that the legal argument was not addressed in the founding affidavit. They therefore submitted that the application for leave to appeal should be dismissed with costs.

Evaluation:

[30] This application raises two controversial issues. The first concerns the question whether leave to appeal should be granted pursuant to the granting of an interim order after this aspect has evolved in *Afriforum*, as discussed above. The second issue deals with the granting of an interim interdict in a procurement matter, based on the *OUTA* decision, where it implicates the doctrine of separation of powers. I will firstly deal with the question of the appropriateness of the *OUTA* decision in review applications dealing with procurement matters.

[31] It seems from the case law cited and relied upon by Mr Jamie, that the well-established common law requirements for an interlocutory interdict, ie a prima facie right (prima facie established though open to some doubt); that irreparable harm is likely to

result if the remedy is not granted; that the balance of convenience favours the applicant; and, lastly, that there is no other satisfactory remedy available to the applicant, still apply. What Moseneke DCJ however stated in *OUTA*, is that in a constitutional democracy a very important consideration should be taken into account when a court assesses the balance of convenience in an application for interim relief. This is, how it relates to the separation of powers.[22]

[32] In *International Trade Administration Commission v SCAW South Africa (Pty) Ltd*[23] Moseneke DCJ held as follows:

'. . . When a court is invited to intrude into the terrain of the executive, especially when the executive decision-making process is still uncompleted, it must do so only in the clearest of cases and only when irreparable harm is likely to ensue if interdictory relief is not granted. This is particularly true when the decision entails multiple considerations of national policy choices and specialist knowledge, in regard to which courts are ill-suited to judge.' (Internal footnote omitted.)

[33] In *OUTA*, as discussed earlier, it was held that an interim interdict may be granted to limit the exercise of a constitutional or statutory power only in the 'clearest of cases'. As has been submitted by Mr Jamie, it is not sufficient for the applicant, where an interdict will disrupt the executive in exercising its functions, to make out a proper and strong case for such relief, it must in addition to this qualify as one of the 'clearest of cases'.

[34] In my view, as will be shown below, in this particular case the separation of powers does not play any role in assessing where the balance of convenience rests. In *Economic Freedom Fighters*,[24] the Constitutional Court was of the view that the granting of an interim interdict where a public official has already performed his or her duties and functions as the Constitution requires, would not be impermissible, because it would not

[22] *OUTA* paras 63–65.
[23] 2012 (4) SA 618 (CC).
[24] Fn 10 above.

restrain the exercise of their functions. The court sought to distinguish *OUTA* from that particular case, and in my view from other cases, where it said:

'[59] While I acknowledge that *OUTA* is distinguishable on the facts from the present matter, it is this very distinction that highlights the lack of prospects of success in the present case. In *OUTA*, this court held:

> "The order prohibits SANRAL from exercising statutory powers flowing from legislation whose constitutional validity is not challenged. In particular, the order prevents it from raising revenue through tolls, a power the statute vests in it . . . At the behest of a court order, the national executive is prevented from fulfilling its statutory and budgetary responsibilities for as long as the interim order is in place."

[60] What is evident from the above is that the interim order sought in *OUTA* would thwart the executive from carrying out its statutory and budgetary duties as required by statute. Plainly put, it would prevent the executive from doing what it was meant to do. Here, the interim interdict sought is different. The Public Protector has already performed the duties and functions that the Constitution requires of her . . . Her powers have been exercised . . . The interim interdict sought in the High Court therefore did not have the effect of subverting her constitutional powers.'

[35] In *Economic Freedom Fighters'* second unanimous judgment by Jafta J, he stated that the *OUTA* standard is only applicable where the effect of the interdict is to prevent the exercise of public power. Where the interim interdict only suspends the implementation of administrative action, that had already been taken in the exercise of a statutory or constitutional duty, the *OUTA* standard does not apply. I agree with this contention.

Penfold & Hoexter*: Administrative Law in South Africa* (3rd Ed), at 806-807, holds the view that is unclear to them whether the 'clearest of cases' requirement is either useful or necessary. They are of the view that the imposition of this requirement in cases

involving the exercise of public power, skews the interim interdict inquiry in favour of the public authority and does not, in their view, pay sufficient regard to the (at least) equally important consideration of protecting and vindicating the rule of law and the fundamental rights of the applicant. Such a blanket approach, in all cases, deprives an aggrieved party on the receiving end of administrative action of the opportunity to exercise their right to fair administrative action, as guaranteed by the constitution.

[36] They are further of the view that there is much to be said for the proposition that – contrary to the approach adopted in *OUTA* and *Economic Freedom Fighters* – the 'clearest of cases' requirement should not apply to all interim interdicts seeking to restrain the exercise of statutory power, but should apply only to those cases that raised special separation of powers concerns. According to them, this approach finds support in the separate concurring judgment of Froneman J in *OUTA*. This would mean that the 'clearest of cases' requirement does not extend to interim interdicts implicating every exercise of public power, but only to cases involving executive-policymaking (of which *OUTA* is an example) and other cases raising pressing separation of powers concerns, either because of the nature of the subject matter or the nature of the remedy.

[37] The learned authors further contend that in those instances where the 'clearest of cases' test applies in the context of administrative action, *OUTA* may be read to suggest that its application should be less stringent than in the context of executive action. In this regard they contend that Moseneke DCJ remarked that one important consideration in deciding whether the 'clearest of cases' test has been met, is whether it involves a breach of the rights entrenched in the Bill of Rights.

[38] I respectfully agree with this approach which, in my view, would not undermine or subvert what was held in *OUTA*. It seems that this less stringent test was followed in a number of cases. In *Reaction Unit South Africa (Pty) Ltd and Another v Private Security Industry Regulatory Authority*[25] Olsen J said the following in this regard:

[25] 2020 (1) SA 281 (KZD).

'[33] The context in this case is quite different to the one under consideration in *National Treasury*. The respondent is ultimately an administrative functionary. It takes administrative decisions and the implementation of them is likewise administrative action. That is not in dispute. The provisions of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) are engaged and its remedies available if the respondent deviates from the standard set by PAJA in taking administrative action.'

[39] The court was further of the view that the facts and circumstances of that matter, when compared with the facts in *OUTA*, did not bring separation of powers harm to the fore.

[40] In *Marcé Products*[26] the court was also of the view that *OUTA* was distinguishable where an applicant seeks to interdict the implementation of a tender pending a review. The court said the following:

'[77] *OUTA* is distinguishable from the present facts. *OUTA* does not limit the *locus standi* of an applicant who seeks to interdict the implementation of a tender pending a review to a tenderer who contends that the bid was wrongly awarded to the successful tenderer in that it ought to have been awarded to it.

[78] In *OUTA*, the Constitutional Court set aside the interim interdict granted by the High Court on the basis that the impugned decisions fell within the framework of government policy. It was not the applicant's case in *OUTA* that the impugned decisions were taken unlawfully. The applicant sought to impugn the decisions on the sole basis that the costs of collecting e-tolls are unreasonably high and irrational. Hence, the Constitutional Court found that preventing the implementation of the decision under those circumstances will offend the doctrine of separation of powers.

[79] Here, Marcé contends that the impugned decision is unlawful as it was implemented contrary to the section 217 of the Constitution. No Organ of State may use the veil afforded to it by the doctrine of separation of powers to implement a decision

[26] Fn 20 above.

that was allegedly taken unlawfully. Therefore, the City's reliance on *OUTA* under these circumstances is misplaced.'

[41] The court further held that:

'[85] The harm to be prevented in the present circumstances is the continued implementation of a tender in the event that the review court finds it have been unlawfully awarded and the risk it places on the integrity of the review process. If the interdict is not awarded, the continued implementation of the tender will render the review academic as it will limit the just and equitable relief that the court may award. . . .

[86] Awarding of the interdict on the other hand, will prevent further implementation of the contract, thereby preserving the practical effect of the just and equitable relief that the reviewing court may award. . . .'

More importantly, the court said at para 87: 'Interdicting the further implementation of the tender does not offend the principle of separation of powers under the present circumstances.'

Just as in this case, the court in *Marcé Products* was of the view that the applicant was not asking the court to usurp or interfere with the exercise of the first respondent's (the MEC's) executive powers within the framework of the Constitution, the law or government policy. And I agree with the court's view that the doctrine of separation of powers does not provide for a total separation of the three arms of government; it does not allow or sanction the unfettered exercise of power by the three arms of government. It operates subject to a system of checks and balances.

[42] The same line of reasoning was followed in *Down Touch Investments (Pty) Ltd and Another v South African National Road Agency SOC Limited and Another,*[27] where once again the court had to consider the appropriateness of granting interim relief in a procurement matter. It was once again emphasised that: a) in *OUTA* the court was

[27] (2064/2020) [2020] ZAECGHC 120 (29 October 2020).

dealing with challenges to policy laden executive decisions, and not administrative action as was the case in that matter; b) that in a case where there was a challenge to the conduct of the decision-maker, such was not a case in which *OUTA* could be the basis for refusing an interdict, which would have as a consequence that constitutionally inappropriate conduct would become entrenched; and c) that our constitutional doctrine of legality allows no room for debate or doubt whether or not unlawful conduct should be interdicted in appropriate cases. *OUTA* could not be construed to mean that there was room for unlawfulness to be tolerated or accommodated, even by a state organ such as in that case.

[43] The court concluded that in applying such a restrictive test, it would be difficult to undo the consequences of the implementation of the tender at a later stage:

'[47] . . . It must be remembered that it might very well be well-nigh impossible to unscramble the consequence of an unlawful administrative action once it is allowed to reach a certain point.'

[44] In a different matter also referred to by Mr Els, *Down Touch Investments (Pty) Ltd and Another v MEC : Provincial Government Of The Gauteng Province : Department of Roads and Transport*,[28] a very recent decision of that court on this point, it was said:

'[29] In my view the *OUTA* decision is to be distinguished from the current matter. The issue in *OUTA* was to consider when a court would be entitled to interfere with the national executive from fulfilling its statutory and budgetary responsibilities. It was found that a court considering an interim interdict must take into consideration the doctrine of separation of powers, which barred the judiciary from meddling in executive or legislative matters unless the intrusion was constitutionally mandated. The court had to [take] into account the interest of the government and the extent to which the requested interdict would intrude on executive terrain, particularly if it interfered with the allocation

[28] Fn 21 above.

of public resources, which was a policy issue at the core of the executive domain. Such interference was unwarranted, except where there was proof of unlawfulness, fraud or corruption.

[30] In this matter the court is dealing with an administrative decision by the respondent. The Consortium's right to just administrative action is sourced by the Constitution itself. That is what section 217 determines. The true shift, brought about by *OUTA* is the consideration of the balance of convenience enquiry. That deals with the extent of the restraining order sought. The only introduction *OUTA* brought about was that courts are to consider whether the granting of the interdict would offend the doctrine of separation of powers.' (Internal footnote omitted.)

[45] From a summary of the above cases, it would seem that the separation of powers consideration would only be implicated in the assessment of the balance of convenience requirement for interim relief in the following circumstances:

Firstly, where such an interdict interferes in a policy or polycentric decision, where the court would enter on the exclusive terrain of the executive and legislative branches of government.

Secondly, where it prevents the executive or legislature from exercising a function directly granted to them in terms of the Constitution or the law.

Thirdly, where the interdict would have wide application and will effectively stop dead the exercise of executive and legislative power before it has been successfully impugned on review.

Fourthly, where in the assessment of the balance of convenience consideration, the harm to the separation of powers far outweighs any right an applicant may have.

[46] In this particular case, the first respondent is not prevented from exercising its powers in this regard. It did in fact exercise its statutory and constitutional

responsibilities. The question to consider by the review court would be whether the first respondent, in declaring that the bid submitted by the applicant was nonresponsive, came to such a conclusion in accordance with the provisions of section 217 (1) of the Constitution, which states: 'When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods and services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.'

[47] The Constitution permits the applicant to bring such a challenge where an applicant alleges that the decision to contract, in this case to render services to the first respondent, was not fair, equitable, transparent, competitive and cost-effective. Where such a decision is challenged in terms of the provisions of section 217, it cannot by any stretch of the imagination be construed to be an interference in the constitutional and statutory powers of an organ of state, such as the first respondent.

[48] In this particular case, the applicant's challenge was that the declaration of its bid as being non-responsive, was based on non-material grounds and, as set out in its founding affidavit, as also not being cost-effective if compared to other bids. The case prima facie made out by the applicant was based, firstly, on the materiality requirement of the bid. In this regard Froneman J, in *Allpay 1*, said the following:

'[28] Under the Constitution there is no reason to conflate procedure and merit. The proper approach is to establish, factually, whether an irregularity occurred. Then the irregularity must be legally evaluated to determine whether it amounts to a ground of review under PAJA. This legal evaluation must, where appropriate, take into account the materiality of any deviance from legal requirements, by linking the question of compliance to the purpose of the provision, before concluding that the review ground under PAJA has been established.'

The court went further and stated:

‘[30] Assessing the materiality of compliance with legal requirements in our administrative law is, fortunately, an exercise unencumbered by excessive formality. It was not always so. Formal distinctions were drawn between “mandatory” or “peremptory” provisions on the one hand and “directory” ones on the other, the former needing strict compliance on pain of non-validity, and the latter only substantial compliance or even non-compliance. That strict mechanical approach has been discarded. Although a number of factors need to be considered in this kind of enquiry, the central element is to link the question of compliance to the purpose of the provision. In this Court, O’ Regan J succinctly put the question in *ACDP v Electoral Commission* as being “whether what the applicant did constituted compliance with the statutory provisions viewed in the light of their purpose”. This is not the same as asking whether compliance with the provisions will lead to a different result.

(c) Procurement framework legality

[31] In *Steenkamp*, Moseneke DCJ stated:

> “Section 217 of the Constitution is the source of the powers and function of a government tender board. It lays down that an organ of State in any of the three spheres of government, if authorised by law may contract for goods and services on behalf of government. However, the tendering system it devises must be fair, equitable, transparent, competitive and cost-effective. This requirement must be understood together with the constitutional precepts on administrative justice in section 33 and the basic values governing public administration in section 195(1).”’ (Internal footnotes omitted.)

[49] In coming to these conclusions, the Constitutional Court in *Allpay 1* was all too aware of what Jafta JA said in *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board : Limpopo Province and Others*[29] regarding the materiality requirement, with reference to the case of *Chairperson: Standing Tender Committee and Others v*

[29] 2008 (2) SA 481 (SCA).

JFE Sapela Electronics (Pty) Ltd and Others[30] as it relates to the definition of an 'acceptable tender':

'[19] In this context the definition of tender cannot be given its wide literal meaning. It certainly cannot mean that a tender must comply with conditions which are immaterial, unreasonable or unconstitutional. The defect relied on by the tender committee in this case is the appellant's failure to sign a duly completed form, in circumstances where it is clear that the failure was occasioned by an oversight. In determining whether this non-compliance rendered the appellant's tender unacceptable, regard must also be had to the purpose of the declaration of interest in relation to the tender process in question.'

The court went further and said the following in this regard*:*

'[21] Since the adjudication of tenders constitutes administrative action, of necessity the process must be conducted in a manner that promotes the administrative-justice rights while satisfying the requirements of PAJA. . . . Conditions such as the one relied on by the tender committee should not be mechanically applied no regard for a tenderer's constitutional rights. By insisting on disqualifying the appellant's tender for an innocent omission, the tender committee acted unreasonably. It's decision in this regard was based on the committee's error in thinking that the omission amounted to a failure to comply with the condition envisaged in the Preferential Procurement Act.' (Internal footnote omitted.)

[50] In coming back to this case, and the dispute between the applicants and the first respondent as to whether this was a material condition that justified the decision in declaring the bid as non-responsive, based on these authorities, I was of the view that the applicants had, at the very least, established a prima facie right, which the court seized with the review application had to determine.

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[30] [2005] 4 All SA 487 (SCA).

[51] I have already given my reasons in my judgment as to why I said the balance of convenience favoured the applicants, which inquiry, as was pointed out by Mr Els, is a pivotal consideration, where the court is required to strike a balance between the applicants' right to fair administrative action, and the rights of the first respondent. The first respondent submitted that if some of the funding that had been committed to this project remained unused, there was a possibility that the funding may be withdrawn, and that the maintenance and repair of the road had to be undertaken urgently, because its current state was a source of danger to road users.

[52] I agree with the applicants' submission that in this regard the first respondent is not without a remedy, in contrast to the applicants, who would have been severely prejudiced if the interim order had not been granted. It was submitted that the first respondent could have utilised Regulation 16A.6.4 of the Treasury regulations, which provides that: 'If in a specific case it is impractical to invite competitive bids, the accounting officer or accounting authority may procure the required goods or services by other means, provided that the reasons for deviating from inviting competitive bids must be recorded and approved by the accounting officer or accounting authority.'

In this particular matter, it will be difficult to undo the consequences of a tender which might very well at a later stage be found to have been irregularly awarded.

[53] The next question to consider is whether this order, although interim in nature, is subject to appeal. Based on the discussion above it seems that the test to consider whether an order is appealable, is not limited to the question whether such an order is final in effect or dispositive of a substantial part of the relief claimed.

[54] The question that should be considered, in light of *Afriforum*, is whether the interests of justice dictate that an appeal against an interim order should be entertained. As referred to earlier, this expanded test for the appealability of interim orders was followed in *OUTA* and *Economic Freedom Fighters*. In this particular case, the purpose of the order was to preserve the applicants' rights by not allowing the further implementation of the tender, pending the review.

[55] The first respondent submitted that the interim order granted by this court was appealable for the following reasons: firstly, it infringed the separation of powers; secondly, it caused irreparable harm to the department; and thirdly, it was final in effect and would not be reconsidered in Part B of the matter.

[56] Regarding the first ground, I have already concluded that the granting of the order did not infringe on the doctrine of separation of powers in this particular case, for the reasons as stated above. I am also not convinced by the reasons given by the first respondent for why it would suffer irreparable harm - purely because, as a result of the interdict, the department stands to lose about R15 million that had been allocated to the contract, which should have been spent before 31 March 2022.

[57] This application was heard after 31 March 2022, and the first respondent presented no evidence that the amount of R15 million had been lost due to the first respondent being prevented from implementing the tender. I further said that I agreed with the applicants that the first respondent, being aware of the condition of this road, which it submits requires urgent attention since it imperils the lives and safety of road users, should not have invited tenders due to the urgency of the road repairs. It should have utilised regulation 16A.6.4 of the Treasury Regulations. As I said in my judgment, the first respondent placed themselves in this invidious position by having concluded the tender process only in November 2021, about two months before its implementation on 13 January 2022, and which should then have been finalised by 31 March 2022. The fact that the successful tenderer had already spent approximately R260 000 on surety and insurance, and would incur costs of R237 500 per month, in my view, was not sufficient justification not to grant to the interim order.

[58] I furthermore do not agree that the interim order is final in effect, and no case was made out that the same facts (ie the materiality of the bid) will not be reconsidered in the final review. In my view, the first respondent has not made out a case that this order is subject to appeal. And even if it is, I do not agree that in terms of section 17 of the Superior Courts Act, the appeal would have a reasonable prospect of success, for the reasons as stated above.

[59] There is also no other compelling reason why the appeal should be heard. There is no reason why, in the interests of justice, leave to appeal should be granted, especially in this matter, which was conceded by Mr Jamie, where there is a real possibility that the review in Part B may be concluded before the appeal in this matter has been heard, either by a full court of this division or by the Supreme Court of Appeal. For all of these reasons, this application is dismissed with costs.

R.C.A. Henney
Judge of the High Court