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

**Case No: 6435/2022**

In the matter between:

**RODPAUL CONSTRUCTION (PTY) LTD**
**t/a ROD'S CONSTRUCTION** Applicant

and

**BREEDE VALLEY MUNICIPALITY** First Respondent

**THE MUNICIPAL MANAGER: BREEDE VALLEY MUNICIPALITY** Second Respondent

**CIVILS 2000 (PTY) LTD** Third Respondent

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**JUDGMENT DELIVERED ELECTRONICALLY ON 24 MARCH 2022**

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**MANGCU-LOCKWOOD, J**

## I. INTRODUCTION

[1] The applicant seeks an interim interdict preventing the first respondent from implementing the award of a tender to the third respondent, pending the final determination of a review of the tender which is sought as part B of the applicant's application. The application is opposed by the first and second respondents, (hereafter referred to as *"the first respondent"*), and while the third respondent delivered a notice of intention to oppose, no answering papers were delivered on its behalf, and I was informed from the Bar that it is no longer pursuing the opposition.

## II. THE FACTS

[2] The facts are common cause. On 1 October 2021 the applicant submitted a bid for a tender advertised by the first respondent as the *"Extension of wastewater treatment works: Rawsonville (Civil and Structural works)"*.

[3] On 1 February 2022 the first respondent addressed a letter to the applicant notifying it that its tender was non-responsive to participate further on price and preferential points, for failure to comply with the eligibility criteria of the tender (*"the outcome letter"*). The letter stated as follows: *"The eligibility criterion (b) required bidders to achieve the minimum local content for the listed designated products/items. [The applicant] did not complete Annexure C4 and annexure E of the local content declaration (Schedule 1P) to show the percentage local content for the designated products/items offered and therefore failed to show compliance with this requirement."* The outcome letter further drew attention to the applicant's right to lodge an objection within 14 days; alternatively, to lodge an appeal within 21 days in terms of section 62 of the Local Government: Municipal Systems Act 32 of 2000 (*"the Systems Act"*), and also advised the applicant of the format that an objection or appeal should take.

[4] On 21 February 2022 the applicant, through its attorneys, lodged an appeal against the decision contained in the outcome letter. In summary, the applicant stated that the tender document is ambiguous because Annexure C4 failed to list the item number or the items a calculation of local content is required for. By contrast, Annexures C1 to C3 in the tender documents do make provision for the items to be calculated with cross reference to the items listed on the bill of quantities. On the basis of the alleged ambiguity the applicant states that the first respondent should have rather sought clarity from it, as it was entitled to do, instead of declaring its bid non-responsive.

[5] On 25 February 2022 the first respondent notified the applicant that the internal appeal mechanism in terms of section 62 of the Systems Act was not applicable and/or available to it. The reason provided was the following: *"[D]ue to the pecuniary value of the tender offer, the final decision to approve the recommended award vested in the Accounting Officer and not in the Bid Adjudication Committee ("BAC"). The Municipal Manager, in his capacity as Accounting Officer, executed his*

*powers of approval in terms of regulation 5(2)(a) of the Municipal Supply Chain Management Regulations, 2017…. Accordingly, your client's tender remains non-responsive as per the reasons stated in the outcome letter dated 1 February 2022 and the matter is hereby regarded as finalized."*

[6] On that same day, 25 February 2022, the applicant's attorneys notified the first respondent of their instructions to launch review proceedings on the basis of the alleged ambiguity in the tender, and sought an undertaking that the first respondent would not implement the award of the tender pending the review proceedings. By letter dated 28 February 2022, the first respondent refused to give such an undertaking.

## III. THE BASIS FOR THE INTERIM RELIEF

[7] In the founding affidavit the applicant relies on section 217 of the Constitution of the Republic of South Africa (*"the Constitution"*), section 6(2) of the Promotion of Administrative Act 3 of 2000 (*"PAJA"*), and Regulation 8 of the Preferential Procurement Regulations, 2017 (*"the 2017 Regulations"*) which are made in terms of section 5 of the Preferential Procurement Policy Framework Act 5 of 2000 (*"PPPFA"*) for the review of the first respondent's decision, which is said to contain a material irregularity, namely the alleged tender document ambiguity, stating that the ambiguity renders the entire bidding process unfair. This, in essence, is said to be the applicant's *prima facie* right. Furthermore, it is stated in the founding affidavit that, having regard to the bill of quantities and the information supplied by the applicant as a whole, the purpose of annexure "C4" - namely to determine whether the first respondent required the supply of electrical cables - was in any event substantially achieved.

[8] Before the respondent delivered answering papers the applicant delivered a supplementary founding affidavit dealing with a recently delivered judgment of the Constitutional Court in *Minister of Finance v Afribusiness NPC [2022] ZACC 4 ("Afribusiness")* in which the introduction of pre-qualification criteria to the tender process introduced by the 2017 Regulations was held to be unconstitutional. In short, the applicant seeks to rely on the Constitutional Court's reasoning in *Afribusiness* as a further ground for review of the first respondent's decision in this

case, and seeks to have regulation 8 of the 2017 Regulations declared unconstitutional and invalid insofar as it requires local authorities to set local production and content as a threshold requirement for bidding, and also states that the requirement of electrical cables is superfluous. As a result, the applicant has also delivered an application to join the Minister of Finance in the review proceedings.

[9] In the replying affidavit the applicant raises the first respondent's failure to grant it an internal appeal in terms of section 62 of the Systems Act as an additional ground for the interim interdict.

[10] The first respondent denies that the tender is ambiguous. It firstly refers to the express terms of the Bid Notice and Invitation to Tender (*"the Invitation to Tender"*), which states that *"only tenderers who satisfy the eligibility criteria stated in the Standard Conditions… will be eligible to submit tenders. Tenderers who achieve the minimum threshold for local production and content as prescribed by National Treasury of 100% for Structural Steel Products, 100% for uPVC Pipes, 90% for cables, and 70% for valve actuator products will be eligible to submit tenders….[F2.1.1]* The first respondent states that it was clear from this clause that compliance with the eligibility criteria is mandatory, and that the bidder is required to meet the minimum threshold of local production and content for all the four mentioned categories, namely structural steel products, uPVC pipes, electrical cables, and valve actuator products.

[11] The first respondent also points to paragraph F.2.7 of the Invitation to Tender which provides as follows: *"Due to the national state of disaster a briefing session/clarification meeting will not be held. Bidders are requested to send electronic emails for any inquiries related to the bid to zaheer@bergstan.co.za..."*. Paragraph F.2.8 makes a similar invitation regarding requests for clarification of the tender documents. On the basis of these provisions the first respondent states that if bidders had any queries or clarification questions they were invited to submit them *via* the email address provided, and the applicant failed to avail itself of the opportunity to seek clarity if there was any such alleged ambiguity.

[12] In addition, the first respondent has attached to its answering affidavit the forms referred to as annexures “C1” to “C4” in the applicant's founding papers. They were introduced in the tender document by means of a document entitled *“Schedule 3G: Declaration Certificate for Local Production and Content” (“Schedule 3G”)* and, together with the Schedule 3G, are all marked as *“returnable documents”.* It is stated in Schedule 3G that regulation 8 of the 2017 Regulations makes provision for the promotion of local production and content. It is stated in paragraph 1.7 thereof that *“[a] bid will be disqualified if the bidder fails to achieve the stipulated minimum threshold for local production and content indicated in paragraph 3 below, and this declaration certificate is not submitted as part of the bid documentation”*. Paragraph 3 states as follows: *“The stipulated minimum threshold(s) for local production and content for this bid is/are as follows:*

| *Description of services works or goods* | *Stipulated minimum threshold* |
|---|---|
| **u PVC Pipes** | - **100%** |
| **Steel Products** | -**100%** |
| **Valve and Actuators** | - **70%** |
| **Cables** | -**90%**” |

[13] Attached to Schedule 3G are annexures for each of the four categories mentioned above. Annexure C1 relates to u PVC Pipes; annexure C2 relates to Steel Products; annexure C3 relates to Valve and Actuators; and annexure C4 relates to Electrical Cables Products. In turn, each of those annexures is accompanied by an Annexure E, which is headed *“Local Content Declaration: Supporting Schedule to Annex C”*, and is also marked as a *“returnable document”*. It is common cause that, in addition to failing to submit annexure C4, the applicant also failed to submit any annexure E with the annexures C1 to C3 that it did submit.

[14] In addition to the above, the first respondent points to further non-compliance with the tender specifications by the applicant. It states that if the applicant had progressed to scoring based on functionality, it would similarly have been disqualified for failure to comply with the experience requirement, namely the successful completion of wastewater treatment works with a water-retaining structure volume greater than 500 $m^3$ in the past five years.

[15] As regards the applicant's reliance on the Constitutional Court case of *Afribusiness* for the setting aside of the Regulations, the first respondent has delivered a supplementary answering affidavit stating, in essence, that this is an issue which relates to Part B of the applicant's application. Furthermore, according to the first respondent, it is unclear from the court order in *Afribusiness* whether the declaration of invalidity has taken place or not, and should in any event be assumed to be prospective and not retrospective. Moreover, the first respondent states that the effect of the relief sought in this regard means that if successful, the interim interdict would be extended until final determination of the applicant's constitutional challenge which could take years, at the expense of the provision of services to the residents of Rawsonville, who are the beneficiaries of the tender that is the subject of these proceedings.

[16] Regarding the challenge brought in relation to the first respondent's failure to afford the applicant an internal appeal the first respondent states that this is a belated case made out in reply and in the applicant's heads of argument.

**THE LAW**

[17] The requirements for granting an interim interdict were set out in *Setlogelo v Setlogelo*[1] and refined in *Webster v Mitchell*[2]. An applicant who seeks interim relief must establish (a) *prima facie* right even if it is open to some doubt; (b) a reasonable apprehension of irreparable and imminent harm to the right if an interdict is not granted; (c) the balance of convenience must favour the grant of the interdict and (d) the applicant must have no other remedy.

[18] A court may only grant a temporary restraining order against the exercise of statutory power only in exceptional cases and when a strong case for that relief has been made out.[3] It must be satisfied that the applicant for an interdict has good

[1] *Setlogelo v Setlogelo* 1914 AD 221 at 227; *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* (CCT 38/12) [2012] ZACC 18; 2012 (6) SA 223 (CC); 2012 (11) BCLR 1148 (CC) (20 September 2012) (*"OUTA"*) paras [41] – [45].
[2] *Webster v Mitchell* 1948 (1) SA 1186 (W).
[3] *Gool v Minister of Justice and Another* 1955 (2) SA 682 (CPD); *Molteno Brothers and Others v South African Railways and Others* 1936 AD 321 at 329 and 331; OUTA paras [41] – [45].

prospects of success in the main review, based on strong grounds which are likely to succeed.[4]

[19] However, the *prima facie* right that must be established is more than simply an applicant's right to approach the court for a review. The Constitutional Court has stated[5] that *"[u]nder the Setlogelo test, the prima facie right a claimant must establish is not merely the right to approach a court in order to review an administrative decision. It is a right to which, if not protected by an interdict, irreparable harm would ensue. An interdict is meant to prevent future conduct and not decisions already made. Quite apart from the right to review and to set aside impugned decisions, the applicants should have demonstrated a prima facie right that is threatened by an impending or imminent irreparable harm. The right to review the impugned decisions did not require any preservation pendente lite.*

[20] Furthermore, when a court weighs up where the balance of convenience rests, it may not fail to consider the probable impact of the restraining order on the constitutional and statutory powers and duties of the state functionary or organ of state against which the interim order is sought.[6] As the constitutional court stated further in OUTA:

*"The balance of convenience enquiry must now carefully probe whether and to which extent the restraining order will probably intrude into the exclusive terrain of another branch of Government. The enquiry must, alongside other relevant harm, have proper regard to what may be called separation of powers harm. A court must keep in mind that a temporary restraint against the exercise of statutory power well ahead of the final adjudication of a claimant's case may be granted only in the clearest of cases and after a careful consideration of separation of powers harm. It is neither prudent nor necessary to define "clearest of cases". However one important consideration would be whether the harm apprehended by the claimant amounts to a breach of one or more fundamental rights warranted by the Bill of Rights…"*

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[4] *Economic Freedom Fighters v Gordhan and Others; Public Protector and Another v Gordhan and Others* (CCT 232/19; CCT 233/19) [2020] ZACC 10; 2020 (8) BCLR 916 (CC); 2020 (6) SA 325 (CC) (29 May 2020) para [42].
[5] *OUTA* para [50].
[6] *OUTA* para [46].

## IV. DISCUSSION

[21] The ambiguity alleged by the applicant requires a contextual examination of the relevant tender documents, the detail of which is already set out above. It is clear from the requirements set out there that one of the legislative requirements for the tender was compliance with local content and production. Furthermore, the requirement of local content and production had four categories, namely structural steel products, uPVC Pipes, valve actuator products, and electrical cable products, each of which had an annexure - C1 to C4 - dealing with its requirements. It is furthermore clear from the documents that annexure C4, like C1 to C3, was a returnable document which required completion by the applicant. The fact that annexure C4 did not contain any specified items, did not change the requirement to comply in respect of all four categories. I am accordingly not persuaded that there is any ambiguity in the tender documents.

[22] I am furthermore of the view that, if there were such ambiguity, or if there was any doubt regarding the completion of annexure C4, the applicant should have availed itself of the invitation contained in the tender documents to seek clarification. The applicant was well aware of the consequences of the failure to properly complete the documents. The invitation to tender specifically stated as follows at paragraph F2.3:"*The Tenderer shall satisfy himself that the set of tender documents is complete and in accordance with the index. If any page has been omitted or duplicated, or if the script or dimensions, or anything else in the tender document is indistinct, or if doubt exists as to the meaning of any description, or if the tender document contains any obvious errors, the tenderer shall immediately notify the employer's agent accordingly, in writing, so that such discrepancy or indistinctness can be clarified or rectified, as the Breede Valley Municipality or the Agent will not accept any responsibility or consider any claim in connection with such discrepancy or indistinctness, which are not rectified during the tender."* When viewed together with the paragraphs referred to by the first respondent and already mentioned earlier, it is clear that the tender documents place considerable responsibility of seeking clarity regarding the tender documents upon the tenderer; caution the tenderer against the failure to seek such clarity; and attach serious consequences upon the tenderer for failing to do so.

[23] The applicant relies on paragraph F.2.17 of the Invitation to Tender for the argument that the first respondent should have requested clarity from it once it saw that the applicant had failed to submit annexure C4. Paragraph F.2.17 provides as follows:

*"Clarification of tender after submission*
*Provide clarification of a tender offer in response to a request to do so from the employer during the evaluation of tender offers. This may include providing a breakdown of rates or prices and correction of arithmetical errors by the adjustment of certain rates or item prices (or both). No change in the competitive position of tenderers or substance of the tender offer is sought, offered or permitted."*

[24] It is difficult to conclude that this provision relates to omissions such as a failure to submit documents that are necessary in order for a tender to be regarded as responsive. If the provision were interpreted in that way it would allow nonresponsive bids to be adjusted to be responsive, thus changing the competitive position of tenderers, which is the antithesis of the stated purpose of the paragraph. I am in agreement with the first respondent that paragraph F.2.17 provides for the first respondent to seek clarification in respect of obvious errors contained in a tender. But in any event, I am of the view that, on the whole, the tender documents place the bulk of the onus of seeking clarification upon the tenderer.

[25] Even if the applicant were correct regarding the alleged ambiguity as an explanation for its failure to submit Annexure C4, there remains no explanation for its failure to complete and return any of the annexure E documents accompanying each of the annexure C documents. It will be remembered that this failure was also mentioned in the outcome letter of 31 January 2022. As the first respondent states, this omission on its own renders the applicant's tender nonresponsive.

[26] The omissions highlighted above from the applicant's tender mean that the tender has failed to comply with the specifications and conditions of the tender set out in the tender documents, as defined in section 1 of the PPPFA.

[27] I now turn to the additional challenges based on the *Afribusiness* case and the first respondent's failure to afford the applicant an internal appeal in terms of section 62 of the Systems Act.

[28] Regarding the applicant's reliance on the Constitutional Court case of *Minister of Finance v Afribusiness,* it is clear that the Constitutional Court judgment must be read together with the Supreme Court of Appeal (*"SCA"*) judgment, because the former simply dismissed the appeal launched in respect of the latter. And the order granted in the SCA judgment was to declare the 2017 Regulations inconsistent with the PPPFA and invalid; and to suspend the declaration of invalidity for a period of 12 months from the date of that order. As appears from the SCA judgment[7], the suspension was to allow the Minister of Finance to remedy the defects, as contemplated in section 172(1)(b)(ii) of the Constitution. The operation of the declaration of invalidity is therefore currently in suspension to allow the Minister of Finance to remedy the defects, and the defects that were the subject of those proceedings directly related to Regulations 3(b), 4 and 9. Although the SCA did not make an order limiting the retrospective effect of the declaration of invalidity in terms of section 172(1)(b)(i), the judgment cannot be read to include the current tender within its ambit because the applicant's tender was invited, submitted, considered and determined before the Constitutional Court judgment was delivered. The consequence is that the applicant cannot claim to have a right - *prima facie* or clear - to the relief granted in *Afribusiness.*

[29] To put it differently, if the applicant wanted to launch proceedings challenging the constitutionality and validity of the 2017 Regulations, it could have done so before now. It did not need the Constitutional Court *Afribusiness* judgment in order to do so. Otherwise, the applicant would not need to launch fresh proceedings seeking the declaration of invalidity and unconstitutionality that it now seeks. And the constitutionality challenge that is now relied upon did not arise from the first respondent's decision of 31 January 2022. Although the applicant states in its supplementary founding affidavit that it decided to raise the constitutionality challenge as a result of the Constitutional Court's decision of 16 February 2022, the

[7] At para [46].

challenge to Regulation 8, which is the subject of these proceedings did not directly arise in *Afribusiness*. The impugned regulations in that case were Regulations 3(b), 4 and 9.

[30] Nevertheless, the applicant is of course entitled to launch proceedings challenging the constitutionality of Regulation 8 of the 2017 Regulations. However, that issue does not arise for determination before me, although it is relevant in the consideration of whether the applicant bears strong prospects of success in the review. As I have indicated above, that issue does not amount to a right for purposes of the interim relief sought in these proceedings because, amongst other reasons, it clearly envisages separate or additional legal proceedings from those in *Afribusiness*. It is not a right that is threatened by an impending or imminent irreparable harm, and to which, if not protected by an interdict, irreparable harm would ensue. On the whole, I am of the view that, although the constitutionality challenge might well have good prospects of success, it is not sufficient reason to halt the tender process and grant interim relief in this case.

[31] I now turn to the applicant's challenge regarding the applicant's failure to afford it an internal appeal in terms of section 62 of the Systems Act. As I have already indicated, this challenge was raised for the first time in the replying affidavit and was pursued further in its heads of argument. On the basis of this challenge the applicant states that, at the very least an interdict should be granted pending the outcome of the section 62 appeal which the first respondent should be directed to process immediately whilst the remainder of the review proceeds. The first respondent complains that the applicant's case in this regard should have been raised in the founding papers, in order to afford it (first respondent) an opportunity to deal with it. But in any event, the first respondent's stance is that the decision in respect of the appeal as contained in the letter of 25 February 2022, even if incorrect, is a decision already made, which can only be set aside by a court order, on the authority of *Oudekraal*[8].

[8] *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA).

[32] Indeed, the manner in which the applicant has raised the challenge regarding the first respondent's failure to afford it an internal appeal has not been satisfactory. It is common cause that no appeal was afforded to the applicant, for the reasons stated in the letter of 25 February 2022. Yet the basis on which the applicant approached this Court for urgent interdictory relief did not include a challenge in that regard. The founding papers took the fact that no appeal was afforded as a fact. As the founding affidavit states, the basis for the interdictory relief sought is mostly similar to the content of the appeal that it lodged.

[33] The result of the manner in which the applicant has raised this issue is that this Court has not had the benefit of a version on affidavit from the first respondent in this regard. Instead, the Court has the benefit of the applicant's case, which is fully ventilated in the heads of argument. No explanation is given for why this ground, which would have been the foremost basis for the interdictory relief if it was challenged, is not mentioned in the founding papers. It is not a new fact which arose after the launching of the proceedings, or which arose from the first respondent's papers. The fact that it is common cause between the parties that no appeal was afforded to the applicant does not mean that the first respondent was supposed to assume in its answering papers that it is challenged. The prejudice to the first respondent in this regard is patent. It is trite that an applicant must make out its case in the founding papers. Contrary to this principle, the extent to which the applicant's case has evolved since the launching of the founding papers is apparent from the heads of argument delivered on its behalf. The principle is especially applicable to the facts of this case which was brought on an extremely urgent basis, thus giving the first respondent little time in which to deliver answering papers. It is patently unfair in those circumstances to amend the case as the applicant did here. In reaching a conclusion in this regard, I am mindful that the applicant may raise this issue as a ground of review in due course. I am also mindful of the first respondent's stance based on *Oudekraal* in this regard.

[34] Before concluding the discussion regarding the *prima facie* right requirement, it is my observation that the applicant's main basis in this regard is the merits of the review which is to be heard as Part B to this application. However, as the

Constitutional Court cautioned in *OUTA*[9]*, "the prima facie right a claimant must establish is not merely the right to approach a court in order to review an administrative decision. It is a right to which, if not protected by an interdict, irreparable harm would ensue. An interdict is meant to prevent future conduct and not decisions already made. Quite apart from the right to review and to set aside impugned decisions, the applicants should have demonstrated a prima facie right that is threatened by an impending or imminent irreparable harm."*

[35] I am similarly not persuaded that the balance of convenience favours granting the order in favour of the applicant. It is not disputed that the services that form the subject of these proceedings are critical, and amount to basic municipal services. In this regard, the first respondent states that the relief sought directly impacts on its constitutional obligation to fulfill its cardinal function of providing basic services to its residents in terms of section 152(1) of the Constitution. Concomitantly, the residents of Rawsonville have a right to a healthy environment as well as sufficient water, both of which would be affected by the relief sought by the applicant, together with the residents' right to dignity. In addition, the first respondent points to the nature of the tender, namely the extension of wastewater treatment works, stating that the interim relief sought by the applicant is far-reaching and would be catastrophic for the first respondent and its residents. This is especially the case since the relief sought by the applicant makes no provision for interim services to be provided once the interim interdict is granted. Furthermore, it is common cause that the first respondent does not have independent internal capacity to generate sufficient revenue from rates and levies for projects such as the tender that is the subject of these proceedings, and that it is reliant upon the Municipal Infrastructure Grant (*"the MIG"*), which is a once-off allocation that must be utilised within its allocation cycle. It is also undisputed that, the first respondent has in fact obtained the MIG funding for purposes of this tender, and that if the funding is not utilized now, during its allocation year, it will be lost and the project will have to be abandoned.

[36] Having regard to all the factors relied upon by the first respondent, I am not persuaded that there is prudence in halting those services pending final

[9] At para [50].

determination of the applicant's review which could span a considerable amount of time, especially given the applicant's additional reliance on the constitutional challenge discussed earlier. The prejudice to be suffered by the first respondent and the residents of Rawsonville if the relief were granted outweighs the prejudice cited by the applicant, which amounts to financial prejudice. The significance of the project itself to the residents of Rawsonville outweighs the financial loss to the applicant especially in circumstances where the applicant has failed to meet the stated requirements of the tender.

[37] I have considered the applicant's reply in this regard, to the effect that the work merely entails a physical extension to, and upgrade of the existing wastewater treatment works in Rawsonville, and that it does not mean that until such time as the work has been completed the citizens of Rawsonville will be without wastewater treatment plant at all. Nevertheless, the importance of the services involved cannot be underrated. The cardinal importance of these municipal services was highlighted in *Joseph v City of Johannesburg*, where the Constitutional Court stated as follows:
*"The provision of basic municipal services is a cardinal function, if not the most important function, of every municipal government. The central mandate of local government is to develop a service delivery capacity in order to meet the basic needs of all inhabitants of South Africa, irrespective of whether or not they have a contractual relationship with the relevant public service provider. The respondents accepted that the provision of electricity is one of those services that local government is required to provide. Indeed they could not have contended otherwise. In Mkontwana, Yacoob J held that "municipalities are obliged to provide water and electricity to the residents in their area as a matter of public duty." Electricity is one of the most common and important basic municipal services and has become virtually indispensable, particularly in urban society."*[10]

[38] By contrast, the loss to be suffered by the applicant is mostly financial in nature, although it also places reliance on section 217 of the Constitution, that the work awarded to a contractor must be in accordance with the procurement system which is fair, equitable, transparent, competitive and cost-effective. However, section

[10] Footnotes omitted.

217 also weighs in the first respondent's favour. Given that its case is that the applicant's tender was non-responsive and therefore failed to meet the requirements of the tender in terms of section 1 of the PPPFA, this too attracts the application of section 217 of the Constitution. On the whole, I am not persuaded that the balance of convenience weighs in favour of granting the interim relief to the applicant.

[39] The applicant's counsel argued that if the interim order is not granted, but it later turns out that it should have been, then the loss suffered by the applicant will be irreparable. Further, that if the interim relief is not granted it will suffer irreparable harm in that the third respondent will commence with the supply and installation of the works, which the applicant is entitled to do. Moreover, it was argued on behalf of the applicant that there is no loss to be suffered by the respondents if the tender award processes are temporarily stopped but the applicant is later proved to be correct. In this regard, the applicant relies on loss of income for which it will not be able to sue for damages. As I have already indicated, I am of the view that the prejudice to be suffered by the respondents and the residents of Rawsonville outweighs the alleged losses to be suffered applicant, which, I emphasise amount to financial loss. Furthermore, it is not correct that no loss is to be suffered by the first respondent. As I have already mentioned, it is not disputed that the MIG funding for the project will be lost if the project is halted. As the first respondent states, it is only the applicant that stands to gain something by the granting of the interim relief. The possible loss of its income is not adequate for this Court to come to its assistance on the facts before me.

[40] Given the shortcomings I have discussed in this judgment regarding the interim relief sought, I am of the view that an expedited review would provide adequate relief as alternative remedy to the applicant. In this regard, I take into account that most of the items raised by the applicant are issues that may properly be ventilated on review.

[41] I am cognizant of the body of caselaw which promotes the weighing up of a sliding scale of the relevant factors when exercising my discretion in granting an

interim interdict.[11] However, based on the considerations discussed above, I am unable to come to the applicant's assistance. I have not found grounds to halt the tender process and grant interim relief in the meantime.

[42] There is no reason why costs should not follow the result.

## V. ORDER

[43] In the circumstances, I make the following order:

a. The applicant's application in Part A is dismissed.

b. The applicant shall pay the first and second respondents' costs in Part A.

**N. MANGCU-LOCKWOOD**
**Judge of the High Court**

[11] See in this regard *Olympic Passenger Service (Pty) Ltd v Ramlagan* 1957 (2) SA 382 (D) at 383 C – F