



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

Case No: **59/2024**

In the matter between:

H & I CIVIL & BUILDING (PTY) LTD

First Applicant

H & I CONSTRUCTION (PTY) LTD

Second Applicant

and

THE CITY OF CAPE TOWN

First Respondent

WILSON BAYLY HOLMES – OVCON LIMITED

Second Respondent

CVS CONSTRUCTION (PTY) LTD

Third Respondent

ASLA CONSTRUCTION (PTY) LTD

Fourth Respondent

BASELINE CIVIL CONTRACTORS (PTY) LTD

Fifth Respondent

MARTIN & EAST (PTY) LTD

Sixth Respondent

POWER CONSTRUCTION (PTY) LTD

Seventh Respondent

RUWACON (PTY) LTD

Eighth Respondent

Coram: Justice J Cloete

Heard: 18 January 2024, supplementary notes delivered on 22 and 23 January 2024

Delivered electronically: 30 January 2024

JUDGMENT

CLOETE J:

Introduction

- [1] This application, which is opposed by the first respondent (“City”) was launched on 8 January 2024. It is comprised of two parts. Part A came before me on the urgent motion court roll on 18 January 2024. The applicants carry on business in the building and construction industry, engaged in the construction of buildings, public roads and bridges, their maintenance, and related or similar large scale engineering projects throughout South Africa. On the undisputed evidence they are largely dependent for their economic survival on work derived from various governmental agencies, including local government agencies such as the City, through public procurement. The City, the Provincial Government of the Western Cape and the South African National Roads Agency Ltd (“SANRAL”) are their biggest clients.
- [2] The second to eighth respondents have been cited by virtue of their interest in the application as other contractors in the industry, and potential tenderers for the tenders which are the subject matter of the application. The similarly unchallenged evidence of the applicants is that these respondents also have an interest, as they themselves do, in the lawfulness and validity of the City’s new

scoring system for the awarding of (at least) these types of tenders. These respondents did not participate in the hearing before me.

- [3] In Part A of the notice of motion the following urgent relief is sought, namely that pending the determination of the review relief in Part B, the City be interdicted from proceeding with the adjudication and award of two tenders ‘...*in accordance with the tender scoring system for the awarding of preferential procurement as advertised by it respectively during September and October 2023 (“the new scoring system”)*’. In Part B the applicants seek to review two decisions by the City (on a semi-urgent basis). The first is the decision taken during or about September 2023 to implement the new scoring system for the tenders, and the second is that taken on or about 21 December 2023 dismissing the applicants’ internal appeal(s) against the first decision.

Relevant factual background

- [4] The two tenders are as follows. Tender no 54Q (I will use the abbreviated version for both) is for the redecoration, alteration, additions to and construction of new buildings and structures for Maintenance, Safety & Security and other City facilities. Tender no 91Q is for the construction of the IRT Metro South-East corridor (Phase 2A) stations infrastructure.
- [5] The first applicant submitted a conditional tender in respect of 54Q in which it recorded its objections to the new scoring system and requested the City to revert to the previous scoring system for preferential procurement points. This tender

closed on 27 October 2023. It is presently being adjudicated by the City's Supply Chain Management Adjudication Committee (its "BAC") and the City has refused to accede to the first applicant's aforementioned request. From the correspondence it appears that the City has formed the view that the first applicant's bid is non-compliant due to the condition it attached to its bid.

- [6] The second applicant wishes to tender for 91Q in a joint venture with the first applicant, in which the second applicant will be the major partner. The closing date for submission of bids at the time this application was launched was 26 January 2024. After service of the application the City decided it would be prudent to extend the closing date to 16 February 2024 for the following reason:

'The postponement will give the City's Bid Specification Committee sufficient time to issue a possible notice to prospective tenderers based on the outcome of the above referenced court hearing. The closing date postponement is proposed to mitigate against the risk of possible cancellation of the current process.'

- [7] In the founding affidavit the applicants state their complaint stems from the amendment to the City's Supply Chain Management Policy ("SCMP") that led to the formulation and implementation of a new Preferential Procurement Policy (the "new policy") by which "Specific Goals" may be identified for tenders, and preference points are awarded in respect of such goals. This they refer to as "the new scoring system" which differs from that previously used for the awarding of B-BBEE preferential procurement points. They learnt, subsequent to the

invitations to bid being advertised, that the City's SCMP had been amended on 26 January 2023 by the introduction and incorporation of the new policy.

- [8] They state they only became aware of the new scoring system when the first applicant considered the 54Q tender document on about 29 September 2023 for purposes of preparing its bid. The first applicant was then advised by its lawyers to submit a conditional bid in the hope of persuading the City of what the applicants consider to be an unlawful new scoring system. The second applicant raised a similar complaint with the City when 91Q was advertised. Their legal advice was also that they needed to exhaust any available internal appeal mechanism before approaching court. As previously stated their internal appeals were dismissed on about 21 December 2023 and this application was launched on 8 January 2024. It was served on the City on the following day, 9 January 2024. It is common cause that the value of each tender exceeds R50 million.

The previous and new scoring systems

- [9] Prior to the amendment of the City's scoring system, points were awarded on the basis of a tenderer's B-BBEE scorecard measured in terms of the Broad Based Black Economic Empowerment Act¹ (the "Empowerment Act"). Of the 100% scorecard points for tenders with a value of more than R50 million, 10% related to B-BBEE status ("empowerment score") and the balance of 90% to other requirements. The highest empowerment score would be a level one contributor

¹ No 53 of 2003, as amended by Act 46 of 2013.

who would get 10 out of 10 for that 10%. On the undisputed evidence the City has been satisfied for a number of years that both applicants qualified as level one contributors (and likewise for tenders for a value of less than R50 million for which 20 points equate to level one).

- [10] The new scoring system has introduced a different method to achieve that 10% which the applicants say is a fundamental departure from the measuring in terms of the Empowerment Act. As I understand it what the City has introduced is a system which, to achieve that 10%, involves awarding 3 points for sole women ownership, 3 points for sole black ownership, 1 point for sole disabled person ownership and 3 points for promotion of micro and small enterprises, which is basically subcontracting to persons who fall within the first 3 categories, but not on proven track record. (Naturally a tenderer will receive a lower score on a reducing sliding scale should there be a lesser degree of ownership in the first 3 categories).

- [11] Both applicants are wholly owned subsidiaries of H & I Group (Pty) Ltd ("HIG"). Again on the undisputed evidence, and according to the applicants:

'119. HIG has a strong philosophy of empowering its staff. This is achieved through an employee share incentive trust which holds equity in HIG (the holding company of the various companies in the group). This equity is held by three shareholder groups, one of these is the H & I Broad-Based Employee Trust ("HIBBET"), that was formed in 2006, when a portion of HIG's shares was sold to HIBBET at par value.

120. *This gift of shares to the HIBBET in 2006 was valued at R33.9 million. This set a benchmark within the industry for proper Broad-Based Black Economic Empowerment.*
121. *Every permanent employee in Haw & Inglis Civil Engineering (Pty) Ltd ("HICE"), the applicants, a third wholly owned subsidiary, and H & I Plant & Crushing (Pty) Ltd, a fourth wholly owned subsidiary, with more than two years' service, enjoys an equity stake in the business as beneficiaries of HIBBET.*
122. *Because 32.7% of HIG's shares are owned by an employee trust for the benefit of employees in the group, and even though the vast majority of these beneficiaries of the trust are black, Applicant [presumably both applicants] is not a 100% black owned business, one of the scoring requirements which has been introduced... for the awarding of tenders in general, and is to be used by [the City] for the awarding of the tenders in the present case.*
123. *The elevation of this requirement to 30% of the 10% or 20% of the marks for preferential procurement, with a further 30% of the score to be awarded for women ownership, and 10% of that score for physically disabled shareholders, and the introduction of sub-contracting of the intended work as part of the scoring for the tender award itself (as to a maximum of the balance of 30% of that part of the score) renders it commercially and practically impossible for companies such as the Applicants to compete for the work which forms the subject of the tenders against other companies who need only satisfy some of these requirements and need only promise to meet the sub-contracting requirement...*
130. *To date the beneficiaries of HIBBET, with more than 85% being black employees, have received over R132 million...*
134. *Notwithstanding the fact that it has the highest possible rating, which would have secured it 10 points in the past on the... preferential procuring scoring system for the award of tenders under the 90/10 system, in terms of the new scoring system... Applicants will get no score for its level 1 B-*

BBEE ranking, rendering its B-BBEE achievements under the Code [the Construction Sector Code promulgated under the Empowerment Act] for which it has worked so hard in the past negligible if not nugatory...'

[12] At the heart of the applicants' complaint is the interplay between the Empowerment Act and the Preferential Procurement Policy Framework Act² (the "Procurement Act"). Section 3 of the Empowerment Act provides that:

'3. Interpretation of Act.—(1) *Any person applying this Act must interpret its provisions so as—*

- (a) to give effect to its objectives and purposes; and*
- (b) to comply with the Constitution.*

(2) In the event of any conflict between this Act and any other law in force immediately prior to the date of commencement of the Broad-Based Black Economic Empowerment Amendment Act, 2013, this Act prevails if the conflict specifically relates to a matter dealt with in this Act. (my emphasis)

[13] The amendment Act referred to in s3(2) came into effect on 24 October 2015. The Procurement Act came into effect 5½ years earlier on 3 February 2000. Accordingly on the plain wording of s 3(2) if there is a conflict between the two the Empowerment Act prevails. The applicants contend the new scoring system is based on a preference for the Procurement Act which, apart from being irrational, renders it unlawful.

² No 5 of 2000.

[14] In its answering affidavit the City interprets the applicants' complaint as follows:

- '39.1 The applicants contend that a bidder's B-BBEE ranking level should determine all of the preferential procurement points awarded. If this is the case, an organ of state will have no discretion at all to advance certain goals. The approach would be inconsistent with section 217(2) of the Constitution, section 2(1) of the PPPFA and the 2022 regulations to the PPPFA.*
- 39.2 It would render the discretion afforded to the organ of state meaningless, and it is not supported by the law.*
- 39.3 The City's formulation does not exclude a bidder's B-BBEE credentials. It forms part of the scoring system, but it is not dispositive of the entire scoring system. The City also advances gender, disability and the promotion of micro and small enterprises as goals.*
- 39.4 There is no reason at all why the City cannot advance these goals, particularly considering that its advancement is contemplated by section 2(1)(d) of the PPPFA.'*

The applicants' case

[15] The applicants say they are compelled to bring this application principally for two reasons:

- 15.1 The new scoring system is not only fundamentally flawed for the above reasons but is also unlawful when regard is had inter alia to s 217 of the Constitution, the Empowerment Act and the Procurement Act; and
- 15.2 The City has breached their right in s 33 of the Constitution to fair administrative action, and in so doing has also failed to consider the

applicants' legitimate expectation that the new scoring system would not be unilaterally adopted without, at least, first consulting with and giving them a hearing.

[16] The applicants accept that the requirement in s 217(1), namely organs of state (of which the City is one) must contract for goods and services in accordance with a system which is fair, equitable, transparent, competitive and cost effective, is subject to the proviso in s 217(2) that an organ of state is nonetheless entitled to implement a procurement policy providing for: (a) categories of preference in the allocation of contracts; and (b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.

[17] As I understand it, their point is that the City's new scoring system does not meet the main threshold requirement in s 217(1) and further does not comply with the legislative framework which s 217(3) prescribes be in place to give effect to s 217(1) and (2). As previously stated, they contend that changing the previous scoring system based on the Empowerment Act to a new one based on a preference for the Procurement Act is wrong as a matter of law, and thus unlawful.

The City's grounds of opposition to the Part A Relief

[18] In its answering affidavit the City says the applicants' case for the relief sought in both Parts A and B fails to leave the starting blocks (the Part B relief is obviously

relevant because if the case made out for that relief has no merit then the applicants cannot succeed in Part A).

[19] The City contends that:

19.1 First, the urgency is self-created (“not urgent”) since on their own version the applicants were aware of the manner in which “the tender” would be evaluated as early as 29 September 2023. This is a reference to 54Q (the first advertised tender). It maintains the applicants’ delay cannot be excused by having first exhausted a subsequent internal appeal remedy since there was no decision to be appealed against; but in any event the delay between 21 December 2023 and 8 January 2024 is unaccounted for;

19.2 Second, the case for interim interdictory relief is premised only on the right to a fair administrative process in circumstances where the Constitutional Court has repeatedly made clear that such a right may not be relied upon for purposes of an interim interdict;

19.3 Third, the applicants have not met the “exceptional circumstances in the clearest of cases” *OUTA* test³ which is the threshold for interim interdictory relief when an organ of state exercises a public or statutory function;

³ *National Treasury v Opposition to Urban Tolling Alliance* 2012 (6) SA 223 (CC).

19.4 Fourth, the other requirements for the interim relief sought have not been established; and

19.5 Fifth, Part B is incompetent as a matter of law because the applicants have challenged the wrong decisions and even if that relief was ultimately granted, it would have no practical effect.

Discussion

Urgency

[20] The City's protestations ring hollow. On the undisputed facts, on 15 November 2023 it specifically drew the applicants' attention to clause C1.6.5 of the 54Q tender document and informed them that they were to ensure compliance therewith. That clause deals inter alia with the procedure to be followed for an internal appeal in terms of s 62 of the Local Government: Municipal Systems Act⁴ which provides that:

'[1] A person whose rights are affected by a decision taken by a political structure, political office bearer, councillor or staff member of a municipality in terms of a power or duty delegated or sub-delegated by a delegating authority to the political structure, political office bearer, councillor or staff member, may appeal against that decision by giving written notice of the appeal and reasons to the municipal manager within 21 days of the date of the notification of the decision.'

⁴ No 32 of 2000.

[2] The municipal manager must promptly submit the appeal to the appropriate appeal authority mentioned in subsection (4).

[3] The appeal authority must consider the appeal, and confirm, vary or revoke the decision...; ...

[5] An appeal authority must commence with an appeal within six weeks and decide the appeal within a reasonable period...'

[21] The applicants duly complied with the City's unequivocal notification to pursue the internal appeal process and submitted the appeal(s). The City, as a fact, entertained the appeal(s) and dismissed them on about 21 December 2023. As to the communication of 15 November 2023 the appeal authority took the view that this was merely a "response"; 54Q had not yet been adjudicated and the appeal was thus premature. As to the second applicant, the appeal authority found there was no competent appeal since no bid had yet been submitted. In my view both of these were administrative decisions, action which stands until set aside.

[22] It is not necessary for me, in the context of urgency, to determine whether or not the City was correct in its approach in its communication of 15 November 2023. All that I need find at this stage is that the City itself certainly thought it was, and the appeal authority subsequently entertained both appeals before reaching its decision(s). For the City to now suggest, in the face of its communication of 15 November 2023, that this was just a "response" and not a clear instruction to the applicants to utilise the internal appeal process (which could only have been as a result of an earlier decision) is just contrived.

[23] Accordingly the applicants cannot be criticised for undue delay in launching their application. They became aware on 21 December 2023 that the BAC was proceeding with the adjudication of 54Q and also knew that the closing date for 94Q at the time was 26 January 2024. The period between 21 December 2023 and 8 January 2024, being the height of the festive season, consisted of six working days in all, and the matter is not straightforward. The applicants acted as expeditiously as reasonably possible in the circumstances. I am thus persuaded that the applicants have established the requisite degree of urgency for the Part A relief.

Whether the correct decision has been challenged

[24] The City's position that the wrong decision has been challenged by the applicants centres on the Part B relief, namely the review and setting aside of: (a) the City's decision taken in about September 2023 to implement the new scoring system for the tenders; and (b) the City's decision to dismiss the applicants' internal appeal(s) on about 21 December 2023. In its answering affidavit the City says that Part B is incompetent as a matter of law, for at least two reasons:

24.1 First, the applicants seek to review and set aside the decision to implement the new scoring system. They do not seek to set aside the policy which adopts it. The applicants cannot review the decision to implement the new system without challenging the lawfulness of that system as a whole. The new scoring system was adopted by the City's Municipal Council on 26 January 2023. It is therefore legislative action disciplined by the

Constitution and the principle of legality, and not by administrative action. It must be applied by the City since otherwise this would contravene the principle of legality. The courts have repeatedly made clear it is incompetent to challenge the implementation of a policy, without first challenging the underlying policy; and

- 24.2 Second, the applicants have failed to challenge both tenders. The relief sought in Part B seeks only to set aside the decision to implement the new scoring system. Accordingly, even if the Part B relief is granted, the tenders will continue to exist because the applicants have not sought to set them aside. The City's decision to tender for the services required will nonetheless remain valid and lawful in accordance with the *Oudekraal* principle. The Part B relief will therefore have no practical effect because the tenders will remain in place.

[25] In the founding affidavit the applicants set out their position as follows:

'29. ... I state that although it is the [City's] decision to use a new preferential procurement scoring system for the evaluation and adjudication of these tenders which has given rise to the present application, it is the new scoring system itself which forms the subject of the intended review under PAJA...

32. The focus of the present application is on the new scoring system which [the City] has indicated it will be using to award both the tenders in question. It is not aimed at any future evaluation or adjudication of the tenders themselves: it is directed at the new scoring system which is to be employed in the tenders...

180. *The appeal authority misconstrued the nature of the Applicants' appeals – the appeals were not against the outcome of the tenders but rather against [the City's] decision to introduce a new procurement policy and apply a new preferential procurement policy/scoring system in respect of those tenders.'*

[26] The parties were given the opportunity to provide short supplementary notes on the issue. In the applicants' note *Mr Stelzner SC* submitted that the relevant decisions identified, namely those taken by City officials to change the previous scoring system based on the Empowerment Act to a new one based on a preference for the Procurement Act, were administrative actions and thus susceptible to review under PAJA.⁵

[27] He further submitted that the applicants have shown there are serious questions of law to be determined at the hearing of Part B, which relief is only foreshadowed for purposes of Part A, since once the City provides the rule 53 record the applicants will be in a position to supplement their papers and if needs be amplify, clarify or amend their Part B relief.

[28] *Mr Stelzner* also pointed out that in the founding affidavit, when referring to the City's decision to amend the SCMP on 26 January 2023, the applicants did say that:

'82. *Insofar as the current challenge should have been raised then already, and to the SCMP itself, the Applicants respectfully seek condonation for*

⁵ Promotion of Administrative Justice Act 3 of 2000.

any late bringing of this application to this Court under PAJA... (my emphasis)

[29] In the City's supplementary note *Mr Katz SC* and *Mr Perumalsamy* summed up its stance on the issue as follows:

‘4. *The applicants do not properly challenge the scoring system. The City submits that there are three separate, underlying and conclusive bases to this answer:*

4.1 *First, paragraph 2.1 of Part B [this is the September 2023 decision to implement the new scoring system] does not challenge the decision to determine the scoring system for the tenders;*

4.2 *Second, even if it does, the SCM policy must still be challenged; and*

4.3 *Third, in any event neither... overcome two insurmountable hurdles for the applicants: (a) their failure to challenge tender invitations 54Q and 91Q; and (b) their inability to demonstrate that the Broad-Based Black Economic Empowerment Act... repeals the PPPFA and its regulations by implication.’ (their emphasis)*

[30] In order to keep one's eye on the ball, as it were, I bear in mind the following. The crux of the main dispute is the City's new scoring system. Without the benefit of the rule 53 record the applicants are constrained to target decisions of which they are aware. These are that in 54Q and 94Q there is a new scoring system which the applicants seek to challenge primarily on the ground of unlawfulness.

[31] In the answering affidavit the City gave two conflicting accounts of how the new scoring system came to be adopted. In paragraph 8.12.2 (the content of which I

referred to earlier) it said the new scoring system was adopted by its Municipal Council on 26 January 2023. It is therefore legislative and not administrative action. This was repeated at paragraph 17.1. However when dealing with the background to the new scoring system later in the affidavit, the City said at paragraph 33:

'The amendment adopted by Council on 29 January 2023 [I will accept that the date was 26 January 2023] to the SCM Policy, sets out the City's preferential procurement policy. The City has a discretion to promote certain goals in a particular tender, including the goals identified in section 2(1)(d) of the PPPFA.'
(my emphasis)

- [32] The amendment to the SCMP adopted on 26 January 2023 indeed sets out the new policy. What it does not do is set out the new scoring system under the new policy. Item 457 reads as follows:

'The tender document must stipulate –

457.1 The applicable preference point system as envisaged in Preferential Procurement Regulations 4, 5, 6 or 7; and

457.2 The specific goal in the invitation to submit the tender for which a point may be awarded, and the number of points that will be awarded to each goal, and proof of the claim for such goal.'

[33] In *Educare*⁶ the Constitutional Court, referring to *SARFU*,⁷ confirmed that

'[18]... in order to determine whether a particular act constitutes administrative action, the focus of the enquiry should be on the nature of the power exercised, not the identity of the actor... Policy may be formulated by the executive outside of a legislative framework... The formulation of such policy involves a political decision and will generally not constitute administrative action. However, policy may also be formulated in a narrower sense where a member of the executive is implementing legislation. The formulation of policy in the exercise of such powers may often constitute administrative action.'

[34] The court continued:

'[19] If it is decided that the exercise of the statutory power does constitute administrative action, the enquiry is not ended. It is necessary then to determine what the Constitution requires. For example, it will be necessary to decide whether the action has been conducted in a procedurally fair manner, whether it is reasonable and lawful. Determining what procedural fairness and reasonableness require in a given case, will depend, amongst other things, on the nature of the power.'

[35] Currently it is unclear whether the decision to implement the new scoring system (by its practical formulation) constituted legislative or administrative action in light of the two contradictory versions put up by the City. This will likely be clarified

⁶ *Permanent Secretary, Department of Education, Eastern Cape and Another v Ed-U-College (PE)* (s 21 Inc). 2001 (2) BCLR 118 (CC).

⁷ *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) at para [141].

once the rule 53 record is provided and the applicants can then supplement their papers and amend their Part B relief to the extent they consider necessary.

- [36] The City relies on *Barnard*⁸ where the Constitutional Court, referring to the decision of the Supreme Court of Appeal in the same matter, held as follows:

'[51] With respect, that court misconceived the issue before it as well as the controlling law. It was obliged to approach the equality claim through the prism of s 9(2) of the Constitution and s 6(2) of the Act. This is because the employment equity plan was never impugned as unlawful and invalid. It was not open to the court to employ the Harksen analysis of unfair discrimination, which presumed the application of the employment equity plan to be suspect and unfair. At stake before that court was never whether the employment equity plan was assailable, but whether the decision the national commissioner made under it was open to challenge.'

- [37] But similarly in the present matter the applicants have not at this stage challenged the SCMP in its amended form in Part B. They are instead concerned with the manner in which the City (or rather whichever of its officials) decided to formulate and consequently implement that policy and more particularly the “specific goal” decided upon in item 457.2. To interpret their case on the narrow construction for which the City contends is to place form and semantics over substance.

- [38] As to the second attack about the failure to challenge both tenders, on the one hand the City says the applicants' challenge is not ripe for hearing because the

⁸ *SAPS v Solidarity obo Barnard* 2014 (6) SA 123 (CC) at para [51].

tender process is not yet complete, but on the other the failure to attack the tenders themselves is fatal to the applicants' case. The City cannot have it both ways. Having regard to all of the foregoing I am persuaded that the City's contention that Part A can never succeed because Part B is doomed to failure cannot be accepted.

Whether prima facie right established albeit open to some doubt

[39] The City maintains the only right which the applicants assert is to lawful administrative action (s 33 of the Constitution) and that, as held in *OUTA*,⁹ the right to review administrative decisions does not require any preservation pendente lite. What *OUTA* held is that:

'[50] ...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...'

[40] In addition to their s 33 right the applicants also rely on s 217 of the Constitution. They say the City's officials cannot unilaterally decide to override, and require of the court to turn a blind eye, to the fundamental breach of s 217 from which the Empowerment and Procurement Acts derive their source. They make the point that complying with the law is not only in the applicants' interest, but also in the

⁹ fn 2 above at paras [49] to [50].

public interest and indeed the City's too; and the City of course accepts that its public procurement processes must comply with the law.

[41] Accordingly Part A seeks to protect the applicants' right (and those of others) to participate in a constitutionally compliant and lawful public procurement tender system, to prevent the Part B relief being rendered nugatory. As previously stated the applicants and the City are at loggerheads about whether or not the Procurement Act or the Empowerment Act should take preference in the new scoring system. This is not a simple legal issue as was amply demonstrated by their respective arguments, and by the time they concluded counsel for the City rightly did not suggest otherwise.

[42] In *OUTA* it was also held that:

'[44] The common-law annotation to the Setlogelo test is that courts grant temporary restraining orders against the exercise of statutory power only in exceptional cases and when a strong case for that relief has been made out. Beyond the common law, separation of powers is an even more vital tenet of our constitutional democracy. This means that the Constitution requires courts to ensure that all branches of government act within the law. However, courts in turn must refrain from entering the exclusive terrain of the executive and the legislative branches of government unless the intrusion is mandated by the Constitution itself.

[45] It seems to me that it is unnecessary to fashion a new test for the grant of an interim interdict. The Setlogelo test, as adapted by case law, continues to be a handy and ready guide to the bench and practitioners alike in the grant of interdicts in busy magistrates' courts and high courts. However, now the test must be applied cognisant of the normative scheme and democratic principles that

underpin our Constitution. This means that when a court considers whether to grant an interim interdict it must do so in a way that promotes the objects, spirit and purport of the Constitution.

[46] ...If the right asserted in a claim for an interim interdict is sourced from the Constitution it would be redundant to enquire whether that right exists...'

(my emphasis)

[43] In *Eskom*¹⁰ the majority of the Constitutional Court held as follows (I accept of course that Eskom is not an organ of state but the principle established provides valuable guidance):

'[249] In Geyser Van Oosten J held that "a legal issue should only be decided at the interlocutory stage of the proceedings if it would result in the final disposal of either the matter as a whole or a particular aspect thereof".

[250] I take the view that it does not help to be categorical one way or the other on this. The approach to be adopted must be dictated by the circumstances of each case. Sight should not be lost of the fact that a substantial number of applications for interim relief are brought by way of urgency. There is much to be said for the view that a judge sitting in a busy urgent court does not have as much time as does a judge who hears trials or decides non-urgent opposed matters. Although each judge must strive for the attainment of the best possible outcome in the circumstances, this reality cannot be ignored. Of course, this is not an invitation to judges considering urgent interim interdicts to avoid deciding legal questions which – with the necessary diligence – are capable of definitive decision.

[251] There are legal questions that are capable of easy resolution to any judge worth their salt. Those must be decided definitively. If, as a matter of law, the right asserted by the applicant for interim relief is held not to exist at all, that will be the end of the matter. And that will result in a saving in costs as there will be

¹⁰ *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd and Others* [2022] ZACC 44.

no subsequent litigation. On the other hand, the legal right may definitively be held to exist as a matter of law and all that may remain for determination at the later proceedings may be whether, on the facts, the applicant has made out a case. There may also be those circumstances where – either because of a combination of factors that include the complexity of the legal question, its novelty, little or no assistance from the litigants’ argument, the speed with which the outcome is required and lack of sufficient time for the judge to consider the matter as best they can – the judge may not be in a position to reach a definitive decision on a legal question. In Johannesburg Municipal Pension Fund Malan J held:

“Impressive and erudite arguments were addressed to me on all these grounds. I cannot do justice to all the considerations referred to. All the issues referred to involve ‘difficult questions of law’ and none of them can be described as ‘ordinary’. Nor is it desirable to rule at this interim stage that there is no prospect of success on any of these bases of review. The issues are simply too involved (‘a serious question to be tried’) and of such gravity that they cannot be, and should not be, disposed of in these interim proceedings. The City has disavowed reliance on the notices purporting to amend Notice 6766 and I do not intend dealing with their validity, but accept for the purposes of this judgment the applicants’ contentions.”

I see no legal impediment to a judge in such circumstances reaching a conclusion that says there is enough pointing to the determination of the legal question in the applicant’s favour in the envisaged later proceedings.’

- [44] In my view there is ‘presently enough pointing to the determination of the legal question in the applicant’s favour’ in Part B, particularly given s 3(2) of the Empowerment Act. Whether or not the City has complied with s 217 in introducing its new scoring system will be determined in Part B and it is in this respect that “some doubt” may lie.

Whether remaining requirements for interim interdictory relief met

- [45] In argument *Mr Katz* submitted the applicants have approached court purely in their own commercial interest, and this should not be a factor when considering balance of convenience and irreparable harm. It was also submitted the applicants will suffer no harm at all if Part A is refused, because they are entitled to approach court in due course seeking to set aside the tenders and any award made following their evaluation and adjudication.
- [46] The City further contends that serious consequences would arise from the grant of an interim interdict. First, it will prevent the City from conducting repairs and maintenance projects that are planned for the next three years. This will directly affect service delivery since “critical” infrastructure cannot be repaired and maintained (although the City provided no details). Second, an interdict against the evaluation and adjudication of 91Q will likely result in its cancellation. If the tender is cancelled the City is “unlikely” to obtain the grant funding which currently exists for “the tender” in excess of R7 billion. The evidence put up by the City is that this “budget” is divided across each financial year until 2027/2028 and that, if it is not able to spend the grant funding allocated because the procurement process is stymied, it will lose that funding. However the City relies on a letter from National Treasury dated 11 December 2020 to the effect that should the City underspend on its allocation in any given year, there is no guarantee that the funds will continue to be available. This does not equate to automatic forfeiture.

- [47] On the other hand the undisputed evidence of the applicants is the effect of the employee shareholding via HIBBET is that between 450 and 500 black employees benefit from the dividends HIG is able to declare as a consequence of profits generated by work. These employees' livelihoods will be directly adversely affected if the applicants are not afforded interim protection and the court hearing Part B finds the applicants have been correct all along.
- [48] Of course one does not know, if they succeed with the Part B relief, whether the applicants will ultimately be the successful bidders, but the uncontroverted evidence of their long successful history on this score cannot simply be ignored. In addition *Mr Stelzner* made the valid point that if the Part A relief is refused, it is open to the court hearing Part B to exercise its discretion to refuse that relief solely on the basis that the harm will already have been done at that stage.
- [49] To my mind the short answer to all of this is the applicants' undertaking to have the relief sought in Part B determined on a semi-urgent basis. This is clearly in the interests of all parties concerned; and, as I have indicated, the letter from National Treasury relied on by the City does not state, as it contends, that it will definitely lose the grant funding if the impugned tenders do not proceed as currently scheduled. I accept that the effect of an interim interdict may have serious consequences for the City in the short term, but the right to participate in a lawful procurement process, enshrined in our Constitution, must surely trump potential financial and other prejudice to the City on an interim basis. Finally, having regard to all of the foregoing, I am persuaded that, in respect of the

balance of convenience element, the applicants have also met the exceptional circumstances threshold laid down in *OUTA*.

[50] **The following order is made:**

1. Pending the determination of Part B of this application, the first respondent is interdicted and restrained from proceeding with the adjudication and the award of:

1.1 Tender no. 54Q/2023/24 (which is for the redecoration, alteration, additions to and construction of new buildings and structures for the Maintenance, Safety & Security and other City of Cape Town facilities); and

1.2 Tender no. 91Q/2023/24 (which is for the construction of the IRT Metro south-east corridor (Phase 2A) stations infrastructure) (“the tenders”)

in accordance with the tender scoring system for the awarding of preferential procurement points as advertised by it respectively during September and October 2023 (“the new scoring system”); and

2. The costs of Part A shall stand over for determination in Part B.

J I CLOETE

For applicants: Adv R **Stelzner** SC

Instructed by: Von Lieres Cooper and Barlow Attorneys (H Von Lieres)

For 1st respondent: Adv A **Katz** SC with Adv K **Perumalsamy**,

Instructed by: DEM5 Inc. (L Mathopo and C Heradien)