

**IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE DIVISION, MAKHANDA]**

CASE NO.: 622/2023

In the matter between: -

THE INDEPENDENTS

APPLICANT

and

ENOCH MGIJIMA MUNICIPALITY

1ST RESPONDENT

**THE MUNICIPAL MANAGER OF THE
ENOCH MGIJIMA LOCAL MUNICIPALITY**

2ND RESPONDENT

**LULUMZI DEVELOPMENTS (PTY) LTD
(Registration NO. K[...])**

3RD RESPONDENT

JUDGMENT

NORMAN J:

- [1] The applicant is a political party registered with the Independent Electoral Commission. It has its registered address in Komani. The first respondent is Enoch Mgijima Municipality, a Municipality established in terms of section 12 of the Local Government: Municipal Structures Act 7 of 1998. The applicant also cited the Municipal Manager of the first Respondent as the second respondent. The third respondent is the successful bidder, Lulumzi Developments (Pty) Ltd.

- [2] The applicant moved this Court on an urgent and *ex parte* basis on 14 March 2023. It sought and was granted, interim relief, interdicting and restraining the respondents, with immediate effect, from giving effect to and pursuant to the award of tender in respect of contract number SM45/08/2022-Upgrading of Fletcher Street, Komani, Ward 10, contract, which was concluded with the third respondent, pending the determination of Part B of this application. It also sought a costs order against the respondents. In Part B of the Notice of Motion, the applicant seeks to review the tender award and the contract entered into between the first respondent and the third respondent. The first and second respondents anticipated the return day and sought the discharge of the rule.

Applicant's case

- [3] The deponent to the founding affidavit is Mr Kenneth Lisle Clark, a businessman and a director of companies. He is also a resident in Komani. He stated that he heard late in January that a tender had been awarded and that a contract had been concluded between the Municipality and the third respondent for the upgrading of Fletcher Street, Komani. He was further informed that the contract sum was in excess of R9 Million. That amount, according to him “triggered alarm bells”. He described the length of Fletcher Street and its condition and concluded that the section of Fletcher Street from Livingstone Road to Berry Street is approximately 138m long and 8m wide.
- [4] He stated that this part of the road is low priority for repair. He also concluded that this section of the road requires nothing more than minor repairs and chip and spray resurfacing. He stated that the section of Fletcher Street from Berry Street to Frost Street is used more frequently and is badly potholed and breaking up. It is 230m long and 8m wide. The final section of Fletcher Street from Frost Street to Haig Avenue and the entrance to Queens College is in a reasonable condition and will not require anything more than minor repairs and chip and spray resurfacing.
- [5] He stated that the section of Fletcher Street between Berry and Frost Streets is in a very poor condition and has been in that state for more than ten (10) years. He concluded that there can be no suggestion that roadworks to Fletcher Street

are an urgent priority. He stated that he endeavored to obtain further details about the contract. He obtained a copy of the agenda for the site handing over meeting which occurred on 13 January 2023. The duration of the contract was for five (5) months and the amount tendered by the third respondent was R9 283 536.78.

- [6] On 20 January 2023 he wrote to the Acting Municipal Manager, Mr Donovan van Wyk requesting further information relating to the contract. He complained that the contract did not seem to represent value for money. He received no response from Mr van Wyk. On 8 February 2023 he wrote again to Mr Mkangelwa. Mr Mkangelwa responded on the same day. He relied on a reasonable estimate made of the work from Mr van der Westhuyzen who estimated the costs to be R2.5 Million for repairing Fletcher Street. Mr van der Westhuyzen has a National Higher Diploma in Civil Engineering which he obtained in 1984. He had over twenty-five (25) years of experience in civil engineering work, he has experience as a Manager of civil and general hardrock quarry.
- [7] Based on the findings of Mr van der Westhuyzen, the applicant concluded that, the Municipality would not derive value for money in the contract. It alleged that it had no alternative remedy. It stated that it had a right to bring the application as the applicant is a resident of Komani. It argued that the balance of convenience favours the granting of the interdictory relief because the contract may well be finished by the time the review application is finalized. It also contended that the 3rd respondent may undertake work in respect of a contract which is set aside and may suffer prejudice in being in a position where it will not be paid for the work rendered.
- [8] The applicant submitted that Fletcher Street has been in a terrible state for ten (10) years and there can be no prejudice to the Municipality if the project is interdicted pending the outcome of the review. At paragraph 61 the applicant stated *'the fact that an independent evaluation of what is required to repair Fletcher Street has shown the price to vary so greatly from the contract price gives rise in my submission to at least prima facie question as to the soundness*

and lawfulness of the contract awarded to the 3rd respondent.’ It submitted that the Municipality is in a precarious financial position and is insolvent and it alleged that as a result service delivery has collapsed.

[9] The applicant contended that the 3rd respondent had started trimming trees in Fletcher Street and no earthworks had commenced. He stated that commencement of earthworks would prejudice the applicant and the citizens of Komani including the 3rd respondent. He submitted that *‘in my respectful submission the applicant has demonstrated that there is at least on the face of it an irregularity in the award of the tender and the conclusion of the contract for the repair of Fletcher Street to the 3rd defendant.’*

[10] The applicant compared the tender prices and the contract price to the price provided by Mr van der Westhuyzen. It is on that basis that it concludes that the prices are awfully uncompetitive and they do not represent value for money. That in turn, the deponent stated, gives rise to a *prima facie* right to obtain a review of the contract award. When addressing irreparable harm, it stated that the fact that R7 Million may be irretrievably lost to the citizens of the Municipality, R7 Million could go a long way to addressing other service delivery issues and it could be used to repair two (2) more streets in Komani.

The first and second respondents’ case

[11] The Acting Municipal Manager Mr Aphiwe Mkangelwa deposed to the answering affidavit. He stated that the adoption of the Infrastructural Plan by the 1st respondent occurred during 2021. That plan was made part of the budget of the 1st respondent which the Council of the 1st respondent adopted. In this regard the extract of the 1st respondent’s minutes was annexed to the answering affidavit. The essence of the extract was that the budget for 2022/23 financial year as revised was approved by the Council. The 1st respondent entered into an agreement for funding of the Infra-structural Plan with the National Treasury. One of the conditions attached to the grant from National Treasury was that once the funds are disbursed to a Municipality they are locked into that project. If the project is not proceeded with, the funds are to be returned to National Treasury.

- [12] During 2020 the National Treasury approved funding and that meant that the 1st respondent had to start with those processes. The 1st respondent procured an engineering expert to undertake geotechnical surveys, quantify the costs of the project, formulate the bill of quantities and to supervise construction of the project in line with the norms and standards applicable to the construction industry.
- [13] In this regard it appointed Emzantsi Engineers (Pty) Ltd, the estimate price for the project came to R6.8 Million. A procurement process was initiated and a contract PMB Projects JV Saracel was appointed at a contract price of R6 691 1158.65, VAT inclusive. The contractor canceled the contract on the basis that they would not be able to do the project profitably since the 2020 price estimates had changed drastically after the Covid 19 pandemic.
- [14] Emzantsi Engineers was approached to conduct further geo-technical studies and furnish updated price estimates. The 1st respondent had to embark on a new procurement process.

The tender process

- [15] The notice number SCM45/08/2022 with the project name upgrading of Fletcher Street was issued. There were 10 tenderers who reacted to the tender notice. The evaluation comprised of three (3) phases. Phase 1 dealt with mandatory requirements such as whether, for example, a valid tax clearance certificate had been submitted. Once a bidder complied with the mandatory requirements, it proceeded to Phase 2 which was for functional evaluation. This process entailed bidders achieving a minimum of forty (40) points for functional requirements. It is only those bidders who obtained 40 points who then proceeded to Phase 3 which was for evaluation on price and B-BBEE.
- [16] Only four (4) bidders out of ten (10) were eligible to advance to Phase 2. Only 1 bidder achieved the required forty (40) points for functional requirements. That bidder was the 3rd respondent, it qualified to be evaluated on price and B-BBEE. The Bid Evaluation Committee recommended the 3rd respondent as the

best bidder to undertake the works. The Bid Adjudication Committee also recommended the 3rd respondent for appointment.

- [17] The former Acting Municipal Manager, Mr Donovan van Wyk, accepted the recommendation of the BAC and proceeded to appoint the 3rd respondent. The letter of appointment of the 3rd respondent shows that he was appointed on 2 December 2022 and he accepted the appointment on 5 December 2022. He was appointed at a total bid price of R9 283 536.78 inclusive of VAT.
- [18] It disputed the allegations that the price was not competitive because those allegations were based on a face value estimates of the work and not on scientific geo-technical surveys and bill of quantities. It contends that the contract had been put in place at great expense to the 1st respondent. It confirmed that the 3rd respondent had been appointed formally and the site had been handed over. It contends that any delays to this project would cause the 1st respondent to lose the funds advanced to it by the National Treasury. In support of this risk the 1st respondent put up a letter from National Treasury which expressed concern about the low expenditure in respect of the Municipal Infrastructural Grant and the fact that if not spent by the end of the financial year it may be forfeited.
- [19] The 1st respondent has already made a commitment to complete all the projects in the 2020/23 financial year. It contends that if the contractor has equipment on site, the 1st respondent will have to pay for it for each day it is on site. The interdict will render the contract more expensive and waste of money will be incurred. If the project is interdicted more service delivery protests will be experienced by the 1st respondent. It contends that the only victory for the applicant is simply political. The price fluctuations and price estimates shall have increased to 12 Million by the time the contract is awarded again next year.
- [20] They stated that as a result of failure to achieve the financial recovery targets, the Municipal infrastructure grant for delivery of basic services of R40 Million was taken back by the National Treasury. The grant for the Premier was almost

taken back in December 2021 for failure to achieve 40% target in terms of the grant conditions. These respondents listed what the shortcomings of the Administrator, Mr Somana did to worsen the financial position of the 1st respondent. For example, by 31 October 2021, the Eskom debt of R120 Million had increased to R700 Million.

- [21] The respondents denied any red-flags as suggested by the applicant. They submitted that Mr van der Westhuyzen did not have any experience in the preparation of geo-technical surveys and studies. He denied that Mr van der Westhuyzen's quotation is a reasonable yard stick to measure scope because even the tenderers who were not successful did not quote R2.5 Million. They stated that there were no grounds for review, let alone for an interdict. They contend that the applicant had failed to demonstrate exceptional circumstances for stopping the Organ of State from exercising its statutory powers. The respondents urged the Court not to allow the second-guessing of the findings of the experts based on a face value quotation.
- [22] They alleged that the urgency was self-created because the applicant was aware of the contract as early as January 2023. There is no explanation why the application was not brought during February 2023. They contend that the applicant has failed to demonstrate a *prima facie* right or establish that a balance of convenience favours it as opposed to the respondents. These respondents contended that there are no prospects of success on review.
- [23] The 1st respondent also relied on the confirmatory affidavit of Mr Sandile Kunene, a professional Civil Engineer who confirmed that Emzantsi Engineers was engaged by the 1st respondent in the process of site assessment, geo-technical studies, land surveys, compilation of design reports, project drawings and Bill of quantities. Mr Kunene confirmed that the price estimates provided are evidence based and are an outcome of a rigorous verification process which was overseen by him. Emzantsi assisted in the tender preparation specifications. He confirmed that the estimated tender price was R9.8 million. He further confirmed that the site was given to the contractor on 13 January 2023. He further confirmed that if there were delays, any standing time would

be paid for by the 1st respondent. This would result in punitive interest which must be paid by the Municipality. That interest cannot be charged from the project funding because the funding is re-imbursed only for the payment of costs incidental thereto.

Third respondent's case

- [24] The 3rd respondent also filed an answering affidavit which was deposed to by one Ongama Mponco. The 3rd respondent became aware of the order against it after it had been granted. It was granted leave to anticipate the *rule nisi* on 72 hours' notice. The application and an order was served on the 3rd respondent on site on 15 March 2023. He stated that the tender notice required a CIDB grading of 4CE or higher. The grading of 4 CE refers to a contractor capable of performing a contract with a maximum value of R6.5 Million. The 3rd respondent had a grading of 5CE which is a grading that the 3rd respondent is capable of performing a contract with a value of R10 Million.
- [25] He attached the completed bill of quantities which reflected the bid price to be R9 283 536.78. The 3rd respondent's bid was R583 593.38 less than the engineers estimate for the tender. He confirmed the acceptance of the bid and its award to it. He contended that the 3rd respondent was correctly awarded the tender in terms of section 217 of the Constitution and had accepted that appointment on 5 December 2022. He confirmed that approximately 20% of the tender had been performed by the 3rd respondent at the time of the interdict.
- [26] He listed factors which are causing prejudice to it as a result of the interim interdict, namely, personnel that had been hired and the costs thereof amounting to R70 000 per month; the 3rd respondent had paid for insurance for the tender from AC&E which is from 14 December 2022 until 15 May 2023; it had obtained and paid for the issuing of a guarantee by Maadima for the tender at a cost of R47 311.10. The guarantee is only valid for six (6) months from date of issue. It had sourced a plant and equipment from Mlayiza Trading Construction and a standing fee of R11 000 per day is payable to Mlayiza. He denied that the tender was for repairs. He avers the tender was for upgrading Fletcher Street and the bill of quantities detailed the works to be done. The 3rd

respondent's tender was substantially less than that of the engineer's estimates.

- [27] He referred to the bill of quantities which showed, amongst others, that the entire road surface of Fletcher Street was to be excavated and re-constructed which included drains and culverts. The current paving of stone had to be replaced with concrete kerbing. He contends that the upgrade of Fletcher Street has been in the pipeline for an extended period and should be completed. He prayed for the rule to be discharged.

Applicant's reply

- [28] In reply, the applicant attempted to analyze the costs on the bill of quantities and suggested that the calculations would be R3 Million less. At the hearing the 1st respondent filed an explanatory affidavit deposed to by Mr Zolile Vumazonke, who is employed by the 1st respondent as a Legal and Compliance Manager. He stated that upon his reading of the replying affidavit, he noticed that he had erroneously sent to the attorneys of the 1st respondent an incorrect first draft of the bill of quantities which had been formulated by the consulting engineers. He explained the error as genuine and had resulted from the fact that at the time of sending the information he was working on other matters that were also urgent.
- [29] He attached the correct bill of quantities from the contract and apologised to the Court for the mistake. He confirmed the bill of quantities forming part of the tender document are consistent with those filed by the 3rd respondent. The court allowed the filing of the correct bill of quantities and afforded the applicant time to consider the bill of quantities with its experts, as requested. The matter was accordingly postponed to Thursday, 6 April 2023 at 11h15 for hearing. The applicant filed a further replying affidavit dealing with the explanatory affidavit of Mr Vumazonke. It contends that the contract price was inflated and so was the scope of the work. It relies on what was conveyed to it by Mr van der Westhuyzen that the unit rates were excessive and that the bill of quantities are wholly inaccurate and do not represent reasonable prices. It prayed for the court to confirm the rule because should the applicant succeed on review the

citizens of the municipality and taxpayers would have funded a project that does not represent value for money. What became apparent was that the criticism of the bill of quantities was that Mr van der Westhuyzen through Mr Clark was of the view that certain items should cost a certain amount of money instead of what was on the bill of quantities.

Applicant's legal submissions

[30] Mr Brown submitted that the applicant has shown the irregularities that would warrant the setting aside of the tender award. He submitted that when there is an allegation of irregularity the Court will determine whether such irregularity occurred and to determine whether it constitutes a ground of review. In this regard he relied on **All Pay Consolidated Investments Holdings (Pty) Ltd v Chief Executive Officer, South African Security Agency and Others**¹. He submitted that where the applicant has established a *prima facie* case, and the right is founded on the Constitution, he argued, the applicant would have established its right to the requisite standard. He submitted that in this case the Municipality has not fulfilled its obligations to litigate honourably and relied for this submission on **Mlatsheni v Road Accident Fund**². He submitted that this court should confirm the Rule. He argued that if the Rule Nisi is not confirmed, the inflated contract sum would have been dissipated and the review would have no practical effect because the effects and consequences cannot be undone. In this regard he relied on **Tshwane City v Afriforum**³, where the Constitutional Court dealt with irreparable harm.

First and Second respondents

[31] Mr Maswazi submitted that the urgency of the matter was self – created. In this regard he referred to the letter from the applicant dated 9 February 2023 but it only approached Court on 27 February 2023. He submitted that the applicant's reliance on PAJA was misplaced because applicant is neither a tenderer nor a competitor and therefore had failed to satisfy certain requirements, namely, that the decision adversely affected its rights, that the decision has had a direct and

¹ 2014 (1) SA 604 CC at para 18.

² (418/2005) [2007] ZAECHC at 108 also 2009 (2) SA 401 (E) at para 16 and 17.

³ 2016(6) SA 279 CC at para 59.

external effect on it and that the decision does not fall under any of the exclusions in PAJA. He argued that this review maybe properly categorized as a legality review and not under PAJA. He submitted that the review court has to walk the steps that the decision maker walked when making a decision. The report of Mr van der Westhuyzen was not before the decision maker, he argued, therefore the prospects of success on review are nil. He submitted that the applicant is not entitled to the protection that an interdict offers only for it to pursue a cause that is worthless.

- [32] Relying on the *Outa principle*, he argued that section 153 of the Constitution entrenches the constitutional sovereignty of the Municipality and an interdict against it must be granted under exceptional circumstances and in the clearest of cases. He submitted that the issue raised by the applicant is about the bill of quantities. He directed the court to the list of the ten bidders and the prices they offered. He submitted that they were way above the 2,5 million suggested by the applicant. He submitted that the applicants have failed to meet the *Plascon Evans* standard. He submitted that the respondents' version is explained by experts and that version is adequate enough for it to be accepted by the court. If the version of the respondents cannot be rejected then the applicant cannot succeed. The version of the respondents created serious doubt on the applicant's version and the relief sought should be refused. He further submitted that the court cannot find on the facts of this case that the decision was unconstitutional. He concluded that there is no basis to confirm the interim relief and it should be discharged with costs.

Third respondent's submissions

- [33] Ms Watt submitted that the applicant's alleged clear right can only emanate from section 217 of the Constitution which deals with the procurement system. She submitted that the procurement process in the tender in question was fair, equitable, transparent and competitive as can be seen from the bids received and the adjudication thereof. She submitted that the applicant's complaint is only directed at whether the award was cost effective. The bid was awarded to the bidder that scored the highest points and that bidder was the 3rd respondent.

- [34] Its bid was substantially cheaper than the 1st respondent's engineers estimate and was the only bid that was entitled to be adjudicated in terms of price and B-BBEE. She submitted that the quotation from Mr van der Westhuyzen cannot pass muster in circumstances in which it is not in terms of the bill of quantities. In any event, she submitted that the 3rd respondent's bid was substantially less than the 1st respondent's engineers estimate. There is no irregularity that was identified or that is relied upon by the applicant in its application.
- [35] She submitted that the applicant has not proved a right as alleged. Addressing the issue of irreparable harm, she submitted that the allegation of irreparable harm is that the money spent on the tender would be '*lost for the benefit of the citizens of the Municipality*'. She submitted that there is no irreparable harm in circumstances in which the funding for the tender emanates from the National Treasury and is not being funded by the 1st respondent. There is irreparable harm to the 1st and 3rd respondents if the interdict remains in place as the funding for the tender is at risk of being lost. She submitted that the balance of convenience favours the discharge of the interdict. The 3rd respondent has performed approximately 20% of the tender and is ready to proceed with the completion of the tender.
- [36] She submitted that the applicant does not enjoy good prospects of success in the review and its review is not based on strong grounds. She submitted that the *rule nisi* granted on 14 March 2023 should be discharged and the applicant should pay the 3rd respondent's costs.

Discussion

- [37] As a starting point, the Constitutional Court in ***Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others***⁴, held that where a litigant relies upon a statutory provision, it is not necessary to specify it, but it must be clear from the facts alleged by the litigant that the section is relevant and operative. It is common cause that the applicant was not a

⁴ (CCT / 27/03) [2004] ZACC 15; 2004 (4) SA 490 CC, at para 27.

dissatisfied tenderer. It does not purport to represent any of the unsuccessful tenderers. The applicant does not deny the fact that the upgrade of the Fletcher road is part of the Infrastructural Plan that had been approved by the Council of the 1st respondent. The applicant's case is premised on opinions of the applicant and those of Mr van der Westhuyzen who, admittedly, did not do a geo-technical survey. Mr van der Westhuyzen is not entrusted with the responsibility of running the 1st respondent. The Council of the 1st respondent where several political parties who represent the communities under the municipality, deemed it appropriate to approve the budget and the upgrade as stated by the 1st and 2nd respondents.

[38] The applicant has stated that what triggered alarm bells was the 9 million. The question is whether that fact alone would establish a legitimate ground to interfere with the tender award. The issue of price cannot be viewed in isolation as the applicant sought to do. A tender award and contract price is a result of a tender process. If there is no attack on the procedure leading up to the issuing of the tender, the advertisement, publication, tender briefing processes, the evaluation and adjudication thereof, focusing on the price alone and ignoring the tender process as a whole, is impermissible for the purposes of attacking the legality of the tender process. The applicant is clearly on a fishing expedition because when dealing with the functionality phase he stated '*I am informed and believe that the tender process is often unlawfully manipulated precisely to ensure the exclusion of tenderers. This is an issue which can be investigated and addressed in the review application in due course.*' This is just one of the examples where the deponent indicates that based on his suspicions matters will be investigated. Were the Courts to entertain applications where people would, depending on how they feel prices should be, rushed to Court to interdict processes that have been put up after a lot of effort and expense as explained by the 1st and 2nd respondents, that would, in my view, lead to unjust interference with tender awards.

[39] The monies that have been spent in preparation for the tender are also taxpayers' monies and the Court must ensure that those monies do not go to waste based on speculation. In ***Putco (Pty) Ltd v MEC for Road & Transport***,

Gauteng & Others⁵; Mudau J stated the established test that when considering a *prima facie* right is to take the facts averred by the applicant together with such facts set out by the respondents that are not and cannot be disputed and to consider whether having regard to the inherent probabilities the applicant should on those facts obtain final relief in the envisaged application. The facts set up in contradiction by the respondents should then be considered and if serious doubt is thrown upon the case of the applicant, the applicants cannot succeed. The same test applies herein.

[40] The applicant obtained an interdict *ex parte*. The effect of the interdict was that it restrained the exercise of statutory powers by an organ of State, in this instance the 1st respondent. In the absence of any allegations of *mala fides* Courts do not readily grant such interdicts.

[41] The Constitutional Court in **National Treasury & Others v Opposition to Urban Tolling Alliance & Others (OUTA)**⁶ held:

‘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 claimants case may be granted only in the clearest of cases and after a careful consideration of separation of powers harm.’(my emphasis).

[42] The Court must weigh up the damage, and inconvenience which the respondents would suffer if the interim interdict remains in place. And on the other hand the damage and inconvenience which would be suffered by the applicants if the interim order is discharged. The fears of the 1st and 2nd respondents that the grant may be forfeited are not far-fetched. They have put

⁵ Case Nos. 2021/49674 & 2021/51091 dated 7 December 2021 at para 67.

⁶ 2012 (6) SA 223 CC at para 47.

up facts to indicate that their fear is based on facts as they have given examples where the grant was actually taken back . The applicant, on the other hand, has failed to put up any facts in support of their alleged fears.

[43] I disagree with the submission made by Mr Brown that the applicant established a right or that the allegations of irregularity made meets the review standard. The allegations of irregularity must be based on facts and not on suspicions and conjecture. The applicant failed to do so herein. A proper example is what was pointed out by the third respondent that the applicant in its replying affidavit stated : “ *A residential road would require no more than a 13 mm Cape Seal which is currently priced approximately R110 per square me and would be considerably less expensive than that specified (incorrectly) in the bill of quantities.*” This statement is based on the advices of Mr van der Westhuyzen. If one has regard to the quotation submitted by the applicant which was prepared by Mr van der Westhuyzen on behalf of his company, Civil and General Contractors CC, he quoted : “ *3. Re- surface area with a 19 mm cape seal.*” This is just one of the examples that indicates that the applicant was trying to find some fault with the bill of quantities when there was none. The applicant failed to show any irregularity with the bill of quantities or with the tender process as a whole. The version of the respondents demonstrated that the tender process was conducted in a manner that was consistent with the provisions of section 217 of the Constitution.

[44] In *casu*, the respondents have stated in clear and unambiguous terms what would befall the 1st respondent if the awarded tender is not executed within the prescribed period. I need not repeat those as I have dealt with them, above. Every organ of State is statutorily enjoined to determine its preferential procurement policy and implement same with specific goals. The 1st and 2nd respondents have dealt with the plans that the 1st respondent has for upgrading its infrastructure. It is not open to the applicant to decide that the upgrade of the Fletcher Street is not a priority. That determination lies with the Council of the 1st respondent. It does not lie with this Court.

[45] Mr Brown as aforementioned relied on the *Mlatsheni* decision that the municipality did not litigate honourably. That attack is unjustified in the circumstances of this case. In the Mlatsheni matter the RAF, according to the judgment, had raised a frivolous defence and had failed to perform the constitutional obligations they owed to the plaintiff diligently. Those findings do not arise in this case. The answering affidavit and the correspondence that the 1st and 2nd respondents exchanged with the applicant evinced respect and the respondents stated only facts that were sufficient to meet the case against them. The fact that the incorrect bill of quantities was attached, was sufficiently explained, hence the court allowed the correct ones to be put up. In urgent applications sometimes errors occur due to the fact that things are to be done in haste. In any event the correct bill of quantities was exactly the same as the one that was put up by the 3rd respondent and no prejudice was caused to the applicant. Any prejudice which might have occurred, which was not demonstrated, was ameliorated by the time afforded to the applicant to deal with the bill of quantities.

[46] In the *Tshwane City* case relied upon by the applicant, the Constitutional Court was dealing with an interdict that the High Court had granted pending a review, (instituted by Afriforum and one Mr van Dyk,) of the City's decision to change street names. Of importance is that in that judgment at para [68], Mogoeng CJ stated:

“[68] Sight should never be lost of the fact that courts are not meant or empowered to shoulder all the governance responsibilities of the South African State. They are co – equal partners with two other arms of state in the discharge of that constitutional mandate. Orders that have the effect of altogether derailing policy- laden and polycentric decision of the other arms of state should not be easily made. Comity among branches of government requires extra vigilance, but obviously not undue self- censorship, against, constitutionally forbidden encroachments into the operational enclosure of the other arms. This is such a case.”

[47] I am in agreement with the submissions made by Mr Maswazi that there is no basis to allow the interdict to continue because the applicant's version is not only doubtful but it is unreliable and speculative and it stands to be rejected.

[48] Having had regard to the relevant facts, I am satisfied that this application was ill- conceived. The applicant failed to establish a right that was adversely affected by the tender award. It alleged urgency that was self- made and obtained a drastic relief with drastic consequences which prejudiced the respondents as they have described in their answering affidavits. In certain instances, courts would come to the aid of the applicant where there are at least some reliable facts put up which, although open to some doubt, establish some right that is affected. This is not one of those cases. Even on the merits, the applicant failed to establish the irregularity complained of, instead it decided to criticize unjustifiably, the bill of quantities and not the tender process. In the circumstances I find that the separation of powers harm dictates that the interdict should be discharged.

[49] On the issue of costs, it is fair and just that costs should follow the result. However, the 1st respondent should bear the costs occasioned by the postponement of the matter on 4 April 2023. It was as a result of its error in attaching a wrong document that the matter had to be postponed.

[50] **I accordingly make the following ORDER:**

50.1 The Rule Nisi issued on 14 March 2023 and in particular the interim relief contained in paragraphs 1.1, 1.2 and 2 of the aforementioned Rule Nisi be and is hereby discharged, with the result that Part A of the application is dismissed.

50.2 The Applicant be and is hereby directed to pay costs of the 1st, 2nd and 3rd Respondents in respect of Part A of the application, which costs shall exclude the costs occasioned by the postponement of the matter on 4 April 2023.

50.3 The 1st Respondent be and is hereby directed to pay costs occasioned by the postponement of the matter on 4 April 2023.

T.V NORMAN
JUDGE OF THE HIGH COURT

Matter Heard on : 04 April 2023 & 06 April 2023

Order handed down on: 06 April 2023

Judgment delivered on : 11 April 2023

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