FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: 5606/2015

In the matter between:

HT PELATONA PROJECTS (PTY) LTD	Applicant
and	
DIHLABENG LOCAL MUNICIPALITY	1st Respondent
SINETHEMBA CONSTRUCTION JV KLUS CIVILS	2nd Respondent

HEARD ON: 4 FEBRUARY 2016

JUDGMENT BY: DAFFUE, J

REASONS FOR JUDGMENT

I INTRODUCTION

[1] Applicant sought interim relief pending the outcome of review proceedings. On 4 February 2016 I dismissed the application with costs and mentioned that my reasons would follow in due course. These are my reasons.

II THE PARTIES

[2] Applicant is HT Pelatona Projects (Pty) Ltd a company duly registered and incorporated in terms of the relevant statutes of the Republic of South Africa with its main place of business at Welkom, Free State Province.

[3] First respondent is Dihlabeng Local Municipality, an organ of state as mentioned in s 239 of the Constitution and properly established as a municipality in terms of the Local Government: Municipal Structures Act, 117/1998. First respondent is situated in Bethlehem, but carries out statutory and executive functions, not only in Bethlehem, but also in surrounding towns such as *inter alia* Paul Roux, Rosendal and Fouriesburg. For the sake of convenience I shall refer herein later to first respondent as "the municipality".

[4] Second respondent is Sinethemba Construction JV Klus Civils, a joint venture comprising of Sinethemba Construction CC and Klus Civils (Pty) Ltd, the first partner being a close corporation and the second a company. I shall refer herein later to second respondent as "the JV".

III THE RELIEF CLAIMED

[5] Save for a prayer for condonation based on urgency which is not repeated, applicant sought the following relief *ex facie* the notice of motion:

> "2. Pending the finalisation of the proceedings contemplated in prayer 3 below:
>
> 2.1 the first and second respondents are interdicted and restrained from in any way further implementing the first respondent's decision to award Public Tender Contract No. **PW47B/2014 – Construction of Bulk Water**

Pipeline and Appurtenant Works Between Paul Roux and Rosendal to the second respondent;

2.2 The first and second respondents are likewise interdicted and restrained from giving further effect to any Service Level Agreement which may have been concluded between them and pertaining to the works mentioned in prayer 2.1 above.

2.3 The first and second respondents are interdicted and restrained from performing any construction related activity related to either the decision, or the contract already concluded between them.

3. The order contained in prayer 2.1 to 2.3 above, is to serve as in (*sic*) interim interdict with immediate effect, pending the finalisation of urgent review proceedings to be embarked upon by the applicant in terms of Rule 53.

4. The applicant is ordered to institute said review proceedings within five days after the granting of this order, failing which the interdict order granted in terms of prayers 2 and 3 above will lapse.

5. The first respondent is ordered to pay the costs of this application. Alternatively, and should the second respondent oppose, then and in that case, the second respondent is to pay the costs of the application, together with the first respondent, payment by one, the other to be absolved."

IV MATERIAL UNDISPUTED FACTS

[6] I shall briefly set out the factual background which appear from the undisputed facts.

[7] During November 2014 and in compliance with its constitutional mandate the municipality called for tenders for the construction of a bulk water pipe line and appurtenant works between Paul Roux and Rosendal. In future the pipe line will be extended to the neighbouring town, Fouriesburg. There can be no doubt that the municipality had to attend to the construction of the pipe line in order to comply with its statutory and constitutional obligations to provide the community with basic water services. Rosendal obtained its water from boreholes and a dam situated near the town, but these water sources became insufficient. Problems were exacerbated as a result of the extreme drought experienced in the Free State. The boreholes and dam have dried up and water tankers are used at present to transport water from Bethlehem to Rosendal. It is apparent that the community is in dire need of water and water services. Rosendal is for more than a year without sufficient water supplies.

[8] The aforesaid tender process was completed and Gridon Trading CC, trading as Sinethemba Construction, was awarded the tender. However an application for review followed and on 22 June 2015 the award was set aside and the matter referred back to the municipality to re-advertise

the tender.

[9] New tenders were invited and the tender was awarded to the JV. The municipality's internal project manager as responsible agent for the preliminary evaluation of the tenders, Mr. Machongoane compiled a report on 16 September 2015 and recommended that the tender be awarded to the JV. However the municipality's bid evaluation committee ("BEC") disqualified the JV as it did not provide the necessary audited financial statements. Another tenderer, Seripele Trading, was ranked first and applicant second. Hereafter the municipality's bid adjudication committee ("BAC") considered the tenders and ranked the JV first, Seripele Trading second and applicant third. On 1 October 2015 the BAC recommended that the tender be awarded to the JV and on 5 October 2015 the acting municipal manager of the municipality approved such recommendation. Following this decision the acting municipal manager informed applicant in writing on 9 October 2015 that its bid was unsuccessful. The applicant was informed that it *"… did not achieve the highest points under Financial Offer and Preference."* The letter indicated that the JV outscored applicant. It was furthermore advised of its right of appeal within 21 days of the date of receipt of the notification of the decision.

[10] Correspondence followed hereafter, the first letter by applicant's attorneys dated 22 October 2015, eleven days after applicant allegedly received notification on 11 October

2015 that its bid was unsuccessful. Full and adequate reasons were requested by applicant as to why the tender was not awarded to it. The municipality did not respond positively and it was necessary for applicant's attorneys to institute proceedings in order to obtain the required documentation which were eventually provided without the necessity to obtain a court order. By then the time for the lodging of an internal appeal in terms of s 62 of the Local Government: Municipal Systems Act, 32/2000 has lapsed.

[11] On 6 November 2015, i.e. after expiry of the appeal period and without any appeal against the award being lodged, but notwithstanding the correspondence between the parties, the municipality issued a letter of appointment to the JV. On 17 November 2015 a service level agreement was entered into between the municipality and the JV and site hand-over was done on 20 November 2015. The JV also complied with its other preliminary obligations and started with commencement of the contracts works thereafter.

[12] On 25 November 2015 applicant issued the present application to be heard on 3 December 2015. On that day urgency was argued, but the matter was struck off the roll by Ebrahim, J for want of urgency.

[13] The application for *interim* relief was again set down for hearing on 4 February 2016. In the meantime, as informed from the bar, the review application had been issued on 8 December 2015. The parties agreed to the hearing of the

review application on 7 March 2015, subject to approval of and directions by the Judge President.

V THE DISPUTES

[14] Both the municipality and JV are of the view that the applicant failed to allege and prove that it has complied with the four requisites for interim interdicts and therefore it is not entitled to the relief claimed. I shall herein later deal with the four requisites for interim relief under separate headings.

[15] Contrary to the respondents' version applicant submitted that a material irregularity in the bidding process occurred and this was truly the heart of the dispute between the parties. I quote from paragraph 1 of applicant's heads of argument which were filed before I allowed the supplementary affidavits referred to in paragraph 17 *infra*:

> "The Municipality took a decision to award a state contract to the JV on an incorrect guess of the law. It was entirely unaware – or chose to ignore – the provisions of section 58 of the Close Corporations Act, read with sections 30 and 30(2A) of the Companies Act. It opined that no matter what the extent of a CC's business, it is in law not obliged to have financial statements audited. It so excused the JV's bid for material non-compliance with a requirement to submit three years financial statements. This is a material irregularity in the bidding process, and is truly the heart of the dispute."

Notwithstanding the filing of the supplementary affidavits it was pertinently argued by applicant that the JV's reliance on Sinethemba Construction's Public Interest ("PI") score, which is such that no audit is required of its annual financial statements, is an afterthought which was calculated to *"rationalise a bad decision by the municipality"*.

[16] In support of its argument applicant referred in reply to Schedule M to the bid documents, it being the JV's declaration for procurement in respect of contracts with values in excess of R10 million and in particular questions 1 and 1.1 which read as follows:

> "1. Are you by law required to prepare annual financial statements for auditing?
>
> 1.1 If yes, submit audited annual financial statements for the past three years or since the date of establishment if established during the past three years."

In respect of both questions the bidder is required to respond by either marking the "Yes" or the "No". The JV encircled the "Yes" in both instances. Next to the last question someone wrote "in file". Contrary to the BEC's finding that "*(O)nly one set of audited financial statements was attached"*, the BAC adjusted the BEC's report, finding as follows pertaining to the two partners of the JV:

> "Klus Civil (Pty) Ltd: Attached audited AFS from 2013 – 2015. Sinethemba CC is not required by law to be audited as it is a close corporation."

The financial statements of Gridon Trading CC, trading as Sinethemba Construction, were attached to the bid documents. Each set of financial statements contained a report by its Chartered Accountants, Reyneke Erasmus and the relevant part of the one in respect of the 2014 financial year reads as follows:

> "We have performed the duties of Accounting Officer to Gridon Trading CC for the year ended 28 February 2014, as required by Section 62 of the Close Corporations Act, 1984. No audit is required by the Act to be carried out and no audit was conducted."

[17] On 22 January 2016 the JV caused a notice of motion to be issued, intending to apply at the hearing of the application on 4 February 2016 for leave to file a supplementary affidavit. Thereupon and in anticipation that the application might be granted, applicant filed a response thereto and this triggered the JV to file a further affidavit in response to applicant's new affidavit. At the hearing of the application I granted leave for filing of all three affidavits notwithstanding applicant's objection to the third and final of these affidavits. In the first supplementary affidavit the JV dealt in particular with the fact that the close corporation was not required by law to be audited on the basis of the auditors' report attached to the financial statements. It relied on the calculation dated 11 December 2015 as to how the PI score of the close corporation was calculated which was confirmed under oath as correct by the auditor, Mr Erasmus. Applicant did not accept the calculation of the PI score, but did not tender any

evidence to contradict the factual or other basis on which the auditor's calculation was done. Bearing in mind the PI score of the close corporation, respondents submitted that it was not required to file audited financial statements.

VI **REQUISITES FOR AN *INTERIM* INTERDICT**

[18] The requisites for an *interim* interdict are the following:

(a) A *prima facie* right, although open to some doubt;
(b) a well-grounded apprehension of irreparable harm if *interim* relief is not granted and ultimate relief is eventually granted;
(c) the balance of convenience favours the granting of an *interim* interdict and
(d) applicant has no other satisfactory remedy.

As mentioned *supra* the evidence and submissions will be considered under separate headings to ascertain whether these requisites have been met. It must be mentioned at this stage that the court has a wide discretion and may dismiss an application for an *interim* interdict even if all four requisites have been met. E M Grosskopf JA stated in this regard that *"…. the Court is entitled to have regard to a number of disparate and incommensurable features in coming to a decision".* **Knox D'Arcy Ltd and Others v Jamieson and Others** 1996 (4) SA 348 (AD) at 361 I and further.

VII **<u>ADJUDICATION OF FACTUAL DISPUTES IN THE CONTEXTS OF *INTERIM* INTERDICTS</u>**

[19] In **<u>Simon NO v Air Operations of Europe AB and Others</u>** 1999 (1) SA 217 (SCA) at 228G-H the Supreme Court of appeal confirmed the well-known test to be applied in adjudicating a *prima facie* right in the context of an application for an *interim* interdict in the following *dictum*:

> "The accepted test for a *prima facie* right in the context of an interim interdict is to take the facts averred by the applicant, together with such facts set out by the respondent that are not or cannot be disputed and to consider whether, having regard to the inherent probabilities, the applicant should on those facts obtain final relief at the trial. The facts set up in contradiction by the respondent should then be considered and, if serious doubt is thrown upon the case of the applicant, he cannot succeed."

VIII **<u>A *PRIMA FACIE* RIGHT</u>**

[20] The test to be applied in an application for an *interim* interdict pending the outcome of a review application was stated recently by Moseneke DCJ in **<u>National Treasury and Others v Opposition to Urban Tolling Alliance and Others</u>** 2012 (6) SA 223 (CC) ("the **<u>OUTA</u>** case") in the following terms:

"[43] A little less than 40 years before the advent of our Constitution, in Gool, a full bench of the Cape Provincial Division was called upon to grant an interdict restraining the minister pendente lite from exercising certain powers vested in him by a statute. Ogilvie-Thompson J, writing for a unanimous court, considered the requirements for an interim restraining order announced in Setlogelo, and said the following: 'The present is however not an ordinary application for an interdict. In the first place, we are in the present case concerned with an application for an interdict restraining the exercise of statutory powers. In the absence of any allegation of mala fides, the court does not readily grant such an interdict … The various considerations which I have mentioned lead, in my opinion, irresistibly to the conclusion that the Court should only grant an interdict such as that sought by the applicant in the present instance upon a <u>strong case</u> being made out for that relief. I have already held that the Court has jurisdiction to entertain an application such as the present, but in my judgment that jurisdiction will, for the reasons I have indicated, <u>only be exercised in exceptional circumstances</u> and when a <u>strong case</u> is made out for relief.

44. … 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 inclusion is mandated by the Constitution itself.*

45. … However, now the test (the Setlogelo 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, spirits and purport of the Constitution.

49. … The Constitution makes it plain that '(e)veryone has the right to administrative action that is lawful, reasonable and procedurally fair' and in turn PAJA regulates the review of administrative action.

50. Under the Setlogelo test the <u>prima facie right</u> a claimant must establish <u>is not merely the right to approach a court in order to review</u> an administrative decision. <u>It is a</u> <u>right to which, if not protected by 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.</u> (emphasis added)

[21] In **<u>Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South</u>**

African Social Security Agency and Others 2014 (1) SA 604 (CC) ("the **1st Allpay** case") the Constitutional Court laid down the following test in dealing with irregularities in procurement processes at para [28]:

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

The court went on at para [58] to state:

> "The materiality of irregularities is determined primarily by assessing whether the purposes the tender requirements serve have been substantively achieved. …"

The purpose of the tender requirement in *casu, i.e.* that audited financial statements had to be filed by certain bidders, has been achieved insofar as the tender requirement was that only those that had to furnish audited financial statements by law had to submit them. The close corporation was not required by law to audit its financial statements and its alleged "non-compliance" could not be material.

[22] During argument on behalf of first respondent, applicant's counsel handed copies of an unreported judgment by Landman, J in the matter of **Cross Border Development Consultants (Pty) Ltd v MEC: North West Provincial Government: Department of Local Government and Human Settlements and Others**, case number M253/15, a judgment dated 7 August 2015, to his colleagues and to the court. Respondents' counsel did not have an opportunity to study the judgment, although they made certain submissions in respect thereof. In reply applicant's counsel tried to rely on this judgment to show that the **OUTA** judgment of the Constitutional Court should not be followed insofar as in the case of **OUTA**, the purpose was to prevent the legislature from enacting legislation. Therefore the **OUTA** judgment could not serve as binding authority in *casu*. This submission is wrong. In para [44] of the **OUTA** judgment the court referred to both the legislative and executive branches of government.

[23] In para [20] of the **Cross Border Development Consultants** judgment, Landman, J summarised the elements and considerations which he distilled from the **OUTA** judgment regarding the test for *interim* interdicts where a temporary restraint or interdict is sought against the exercise of statutory power well ahead of the final adjudication of the applicant's case in review. I deem it apposite to refer to some considerations, even though the other three requisites for *interim* interdicts are tabulated as well:

"(f) When a court weighs up where the balance of convenience rests, it must consider the probably impact of the restraining order <u>on the constitutional and statutory powers and duties of the state functionary</u> or organ of state against which the interim order is sought;

(g) The balance of convenience enquiry must now carefully probe whether and to which extent the restraining order <u>will probably intrude into the exclusive terrain of another branch of Government.</u> The enquiry must, alongside other relevant harm, have proper regard to what may be called separation of powers harm;

(h) 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 <u>clearest of cases</u> and after a careful consideration of separation of powers harm.

(i) Under the Setlogelo test, the *prima facie* right a claimant must establish <u>is not merely the right to approach a court in order to review</u> an administrative decision;

(j) The *prima facie* right is thus a right to which, if not protected by an interdict, irreparable harm will ensue;

…

(l) …. The right to review the impugned decisions does not require any preservation *pendente lite*;

…

(r) In evaluating where the balance of convenience rests, a court must recognise that it is invited to restrain the exercise of statutory power within the <u>exclusive terrain of the Executive or Legislative branches of Government</u>. It must assess carefully how and to what extent its interdict will disrupt executive or legislative functions conferred by the law and thus whether its restraining order will implicate the tenet of division of powers."

[24] In para [21] Landman, J stated that the **OUTA** judgment shifted the approach to be adopted by emphasising the mindset to be adopted where a temporary interdict is launched to curb a statutory power properly belonging to another branch of government. He then relied on **Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others** 2014 (4) SA 179 (CC) ("the **2nd Allpay** case") and the following *dictum* by Froneman J in para [42]:

> "There can be no doubt that the separation of powers attributes responsibility to the courts for ensuring that unconstitutional conduct is declared invalid and that constitutionally mandated remedies are afforded for violations of the Constitution. This means that the Court must provide effective relief for infringements of constitutional rights."

Landman, J then concluded in para [22] that without an *interim* interdict securing some space for the remedy in the main application, a hollow judgment may follow, but emphasized that *"the preservation of the space for an appropriate remedy is governed by the considerations set in the OUTA judgment."*

[25] Landman, J's judgment serves as a true reflection of the legal principles and I fail to follow applicant's argument that this court should not follow **OUTA** based on any authority laid down by Landman, J. The learned judge's conclusions and orders granted must be seen in proper context. The application for an *interim* interdict was dismissed in respect

of second to sixth respondents, but granted in respect of first, seventh and eighth respondents and I respectfully agree with the reasoning. The department in that matter made use of a data base on which the applicant was also listed. Therefore it was found in para [51] that applicant was *prima facie* entitled to complain about illegality. The court was prepared to accept that the applicant had established on a *prima facie* basis that the decisions to award contracts to seventh and eighth respondents were contrary to the requirements of the Construction Industry Development Board Act, 38 of 2000 ("the CIBD Act") and thus irregular and invalid. It found that notwithstanding the probable impact of the restraining order on the constitutional and statutory powers and duties of the department, an *interim* order had to be granted in respect of first, seventh and eighth respondents notwithstanding a housing shortage experienced in the province. The *"prima facie glaring illegality"* in respect of the contracts awarded to seventh and eighth respondents was sufficient for the court to find that the applicant had shown the *"clearest case"* in respect of first, seventh and eighth respondents. Pertaining to second to sixth respondents, the court found that applicant had not made out the clearest of cases for an interdict as regards their contracts, and in any event. insofar as the contracts of these respondents were far advanced, the balance of power favoured them. See paras [57] to [59] and para [61].

[26] The municipality's constitutional and statutory powers and

duties in respect of service delivery in the relevant field are beyond doubt. Section 156(1) of the Constitution reads as follows:

> "A municipality has executive authority in respect of, and has the right to administer -
>
> a. the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5; and
> b. any other matter assigned to it by national or provincial legislation."

One such matter listed in Part B of Schedule 4 is *"water and sanitation services limited to potable water supply systems and domestic waste water and sewage disposal systems."*

[27] It must be made clear that in order to evaluate the evidence and the submissions of the parties in order to establish whether a *prima facie* right has been established, it is not required of the court to adjudicate the application as if it is confronted by a review application. It is true that the parties have dealt in detail with their versions and that these would probably be put up again in the review application. The application papers in the matter before me consist of 809 pages and I doubt whether much more can be said by the parties on review in support of their respective cases. Although I am mindful of not adjudicating a review application, I may come to certain conclusions which will obviously not bind the review court.

[28] Applicant failed to allege and prove anything other than a *prima facie* right to review the decision of the municipality. It, for example, does not content that it should have been awarded the tender. On its own version, if the JV was excluded, applicant would have achieved the second highest points as Seripele Trading would have scored the most points. Applicant has therefore failed to satisfy the applicable test set out in para [50] of the **OUTA** judgment and the first requirement for a interdict has not been met. See also the unreported judgment of Makgoba, J in **Goodhope Textile Corporation (Pty) Ltd and Others v Government of the Republic of South Africa** case number 63108/2012 delivered on 27 November 2012 where the learned judge said at para [21]:

> "… that, had the contract items not been awarded to the fourth respondent, the applicant would still not have received any of the contract items." Hence there was "… no realistic prospect of it being successful in being awarded the tender should the assailed tender award be set aside."

The court eventually found that the applicant failed to establish a *prima facie* right.

[29] I also take into consideration that the only material complaint lodged against the award of the tender to the JV is that its one partner, the close corporation, did not furnish

audited financial statements. Fact of the matter is that financial statements were furnished and based on the overall context of the tender documents, the municipality, acting through the BAC and eventually its acting municipal manager was entitled to accept the report of the auditor to the effect that the financial statements of the particular close corporation did not have to be audited. In any event not every "administrative slip" will be met with judicial sanction. See **Moseme Road Construction CC and Others v Kind Civil Engineering Contractors Pty Ltd and Another** 2010 (4) SA 359 SCA at para [21]. When the review is eventually considered issues such as public interest, pragmatism and practicality will become relevant in exercising a judicial discretion whether or not to set aside the award of the tender. The consequences of the setting aside of the award will play no part where the award is void because of fraud and/or corruption, or seriously tainted by illegality. However, there is no suggestion of such behaviour *in casu.*

[30] I'm not satisfied that applicant has established that a material irregularity had occurred during the tender process which constitutes a ground for review in terms of PAJA. I'm also not prepared to find that a *prima facie* case has been made out that applicant should succeed with its claim in the review proceedings. Based on the facts presently before me, there is no reason to find that the review court would be compelled to declare the award of the tender unlawful and in any event, the review court may in case that

unlawfulness is proven, suspend the declaration of invalidity until after completion of the works on the basis that it is just and equitable and in the public interest that the works be completed by the JV. Initially there has been a long delay caused by the first application for review and thereafter by the further litigation instituted by the applicant. I've been told that the parties agreed on a date for a hearing of the review application, being 7 March 2016, subject to the approval of the Judge President. However it is possible that the matter may not be heard during this term, bearing in mind that the term roll has been finalised long ago. If applicant simultaneously with the issue of the application for an *interim* interdict issued its review application, which could have been done in one application, the review application might have been heard by now. However, applicant decided to wait for approximately six weeks since having been informed of the award before it pursued its legal remedies by way of litigation. In the meantime the residents of Rosendal suffer due to a lack of water and huge extra costs have to be incurred by the municipality to transport water to the affected town. These and other factors mentioned by respondents will certainly be considered by the review court when its discretion is exercised. See: **Moseme** *loc cit* and the 1st and 2nd **Allpay** cases.

[31] One final point to be raised in respect of Schedule M, the declaration for procurement, which is heavily relied upon by applicant, is the following: The bidder is clearly a joint

venture, i.e. a partnership between two legal *persona*. Strictly speaking the JV is the one that should have responded to questions and submit audited financial statements. Insofar as it was only established a few months before the tenders closed, it would not be in a position to file any audited financial statements. It was argued on behalf of the municipality that schedule M does not distinguish between the partners of a joint venture and does not make provision for a separate declaration in respect of each partner. This is indeed true. The municipality, having been provided with the financial statements of partners of the JV, the one partner's statements being audited and the other's not, would have been perfectly within its rights to accept the report of the close corporation's auditor that it was not required by law to prepare audited financial statements. The reason advanced by the BAC, if it is read in isolation, that a close corporation does not have to prepare audited financial statements, would be wrong although the conclusion arrived at was correct. The full bid documents must be considered and read in context, particularly the report of the close corporation's accounting officer and auditors referred to *supra.*

IX A WELL-GROUNDED APPREHENSION OF IRREPARABLE HARM

[32] I referred to the **OUTA** judgment *supra* and wish to repeat that the issue of irreparable harm was dealt with in para [50]

thereof. I reiterate that according to the Constitutional Court, the right to review an impugned decision does not require any preservation *pendente lite* unless an applicant demonstrates a *prima facie* right that is threatened by an impending or imminent harm. Another bidder scored the second most points and even if the award of the tender to the JV is set aside on review, there is no reasonable likelihood that the tender might be awarded to applicant, especially bearing in mind that the JV will during a further tender process be entitled to bid again.

[33] In the event of (a) the review application being successful; (b) the setting aside of the decision of the municipality; (c) a new tender process be ordered; and (d) applicant eventually successful and appointed as contractor, it would be possible to re-measure the contract to calculate what has been done by the JV up till then and what is the amount of the work still to be executed. In such an event applicant as the successful bidder will then be entitled to execute the remainder of the contract and paid *pro rata* according to the contract price agreed upon.

X BALANCE OF CONVENIENCE

[34] I take into consideration that the contract which has been entered into with the JV was concluded in essence on behalf of the public. It is the public of Rosendal who will remain without sufficient water the longer this whole process is allowed to drag on and it is the public that will

benefit if the contract can be finalised within the period of twelve months agreed upon between the municipality and the JV in November 2015.

[35] Long before the severe drought that the Free State is experiencing this summer, the municipality resolved to set out tenders to construct a bulk water pipe line to towns like Paul Roux, Rosendal and Fouriesburg. The pipe line to Paul Roux has been finalised and the one to Rosendal is in the process of being constructed. Thereafter the extension to Fouriesburg will follow. I have no doubt that a real need for the construction of the pipe line was established long ago. The community of Rosendal is in dire need of water and at present water has to be transported to Rosendal by means of water tankers at great expense.

[36] If the execution of the work is suspended the municipality will become liable to the JV for standing time. According to applicant's submissions this is of no concern. In arguing in this manner, applicant shows insincerity as it will eventually be the Rosendal public that will have to settle the bill.

[37] The JV's tender is significantly lower, about 10%, than the applicant's tender. The value of the Rand has declined over the last few months and there is no prospect that it will improve in the foreseeable future. The decline in the value of the Rand, not to speak of a possible future decline, will have a serious and detrimental effect on the public purse in the event of further delays in the completion of the works.

Materials needed to execute the contract have to be imported from overseas and it is highly likely that, in the event of a fresh tender process in four to six months from now, bidders will increase their bids.

[38] It is true that the stronger the prospects of success, the less need for the balance of convenience to favour the applicant and the converse is also true; the weaker the prospects of success, the greater the need for the balance of convenience to favour applicant. As is apparent from paras [46] and [47] of the **OUTA** judgment a court must in this context carefully consider to which extent an *interim* order will intrude into the exclusive terrain of another branch of government. I take into consideration that an interim interdict as prayed for shall be granted only in the clearest of cases and after a careful consideration of what the Constitutional Court referred to as separation of powers harm. If the facts before me are properly considered, I am satisfied that the balance of convenience does not favour applicant.

XI NO OTHER SATISFACTORY REMEDY

[39] Applicant had the right to file an internal appeal and it could and should have done that *in casu*. It had 21 days to act accordingly and even if the municipality refused and/or failed to forward it with proper reasons and/or the relevant documents immediately, it could have applied to the High

Court on an urgent basis for an order directing the municipality to act accordingly. In fact, it issued an urgent application to obtain documents and information, but dragged its feet and by the time it obtained the relevant documents, the period of 21 days had lapsed. Applicant has only itself to blame for the fact that a satisfactory remedy was not pursued.

XII THE COURT'S DISCRETION

[40] I have mentioned *supra* the court's discretion to refuse an *interim* interdict even if all the requisites for the granting thereof have been established. I am satisfied that, bearing in mind all the features of the case referred to above, I should exercise my discretion against the applicant. At best for applicant and even if it is accepted that it has proven a *prima facie* right which I found not to be the case, there is merely a possibility of injury in the event of applicant eventually being successful with the review and when a fresh tender process is embarked upon. I take cognisance of the possible consequences, to applicant and the respondents, which will ensue if an interdict is granted or withheld. I have already referred to the fact that it is not the municipality's rights in particular that maybe negatively affected, but the public of Rosendal that the municipality serves. Insufficient reasons have been advanced as to why the public should be allowed to suffer any further whilst an unsuccessful bidder wants to prove that the municipality embarked upon an improper process in awarding the

tender. In this regard I also take cognisance of the well-known and often quoted judgment of Holmes JA in **Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton and Another** 1973 (3) SA 685 (AD) at 691C where the learned Judge of Appeal stated:

> "The granting of an interim interdict pending an action is an extra-ordinary remedy within the discretion of the Court."

Refer again to **Knox D'Arcy Ltd and Others v Jameson and Others** *loc cit* at 360C – 362D.

XIII CONCLUSION

[41] I conclude therefore by confirming that applicant has failed to prove any, some or all of the requisites for an *interim* interdict and therefore the application has to be dismissed. However, if I am wrong in this regard, I am still satisfied, even on the basis that the four requisites have been proven, that I should exercise my discretion against the applicant and dismiss the application on that ground as well. There is no reason why applicant should not be ordered to pay the costs of the application which includes the costs of opposition of the two respondents.

XIX ORDER

[42] Therefore I dismissed the application with costs as set out in paragraph 1*supra.*.

J.P. DAFFUE, J

On behalf of the applicant:	Adv. S. Grobler Instructed by: Peyper Attorneys BLOEMFONTEIN
On behalf of the 1st respondent:	Adv. D. J. van der Walt SC Instructed by: Symington & De Kok BLOEMFONTEIN
On behalf of the 2nd respondent:	Adv. X. Stylianou Instructed by: Lovius Block BLOEMFONTEIN

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