FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: 4411/2011

In the matter between:

COMPASS WASTE SERVICES (PTY) LTD	Applicant
and	
THE MEC: DEPARTMENT OF HEALTH OF THE FREE STATE PROVINCE	1st Respondent
SOLID WASTE TECHNOLOGIES SA (PTY) LTD	2nd Respondent

JUDGEMENT: RAMPAI J

HEARD ON: 26 OCTOBER 2011

DELIVERED ON: 16 FEBRUARY 2012

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[1] The matter came to court by way of motion proceedings. The applicant initially sought to have the respondent immediately interdicted and restrained from implementing the decision of the Free State Provincial Tender Board to award a tender bid to the second respondent pending the outcome of its application to have such an administrative decision subsequently reviewed by this court in due course.

[2] The application was opposed by the second respondent.

The interim relief was framed in the form of a rule *nisi* calling upon the respondent to show cause why such an interim interdict and ancillary relief should not be granted. The first respondent adopted a neutral stance but only sought costs against the unsuccessful party be it the applicant or the second respondent.

[3] The applicant's papers or rather notice of motion consisted of two parts. The first part, described as part 'a', concerned the interim relief, in other words, the interim interdict while the second part, labelled part 'b', concerned the ultimate relief, in other words, the final review. This judgment is concerned only with the interdict component of the combined application.

[4] First the profile of the applicant. The applicant was the previous service provider of medical waste management services for the Free State Province. It rendered such services, technically called health care risk management services, by virtue of a public tender contract awarded it by the responsible Provincial Tender Board under the auspices of the first respondent. The applicant has

rendered such services since September 2007. The rendering of the services entailed the supply, by the applicant, of containers for medical waste generated by the institutions such as hospitals, clinics, morgues, psychiatric complexes and laundries, for the removal of such waste, the transportation of such waste containers to a central treatment facility, the treatment and ultimate disposal of such waste.

[5] The applicant renders such services elsewhere throughout this country. The consumers of such services are public as well as private institutions. The Free State Province has five regions, namely: Xhariep, Motheo, Lejweleputswa, Fezile Dabi and Thabo Mofutsanyana districts. Initially only the region of Motheo was awarded to the applicant in September 2007. The other four regions were contractually awarded to a different business enterprise, EnviroServ, at the same time. Through cession, tender contracts in respect of the four regions were subsequently transferred by EnviroServ to another business enterprise called Psychem. The transfer was prompted by the inability of the aforesaid competitor, EnviroServ, to execute

the tender contract.

[6] By 8 February 2010 the public functionaries of the first respondent became aware that the second competitor, Psychem, was also not satisfactorily rendering the services in the region of Thabo Mofutsanyana. A week later, on 16 February 2010 they also realised that there were widespread similar problems in the regions of the Lejweleputswa, Fezile Dabi and Xhariep as well. The services had collapsed in those regions as well. The first respondent then approached the applicant and requested the applicant to provide quotations in respect of the four regions that were in a crisis.

[7] Up to then the four troubled districts had been serviced by a substitute competitor of the applicant. On 30 April 2010 the applicant, stepped forward with an emergency rescue operation. The take-over meant that the applicant was required to service all the five regions, in other words, the entire Free State Province. The applicant did so. The subsequent agreement, just like the original agreement, between the applicant and the first respondent was

supposed to endure until 31 October 2010. However, the applicant remained on site afterwards by agreement between the parties. The contract was extended from month to month. The final extension was on 31 October 2011.

[8] Meanwhile the first respondent publicly invited bids for a new three-year tender contract for the provision of medical waste management services at various institutions in the province (annexure "b"). The second respondent and some other competitors tendered to render the services. The applicant submitted two separate bids. The second respondent rendered one bid.

[9] The first respondent presented a schedule of its expenditure relative to the medical waste services for the previous calendar year, 1 January 2009 – 31 December 2009 (annexure "d"). The following statistical information may be gleaned from the annexure:

- From Xhariep district with 4 collection facilities a total of ± 6 054kg of medical waste was collected at the total costs of ± R3 648 for the year.

- From Motheo district with 10 collection facilities a total of ± 640 691kg of medical waste was collected at the total costs of ± R3 433 967 for the year.
- From Lejweleputswa district with 8 collection facilities a total of ± 183 618 kg of medical waste was collected at the total costs of ± R1 140 265 for the year.
- From Thaba Mofutsanyana district with 14 collection facilities a total of ± 136 536 kg of medical waste was collected at the total costs of ± R1 022 819 for the year.
- From Fezile Dabi district with 8 collection facilities a total of ± 193 909 kg of medical waste was collected at the total costs of ± R1 266 267 for the year.

[10] On 10 November 2010 the applicant addressed a letter (annexure "e") to the first respondent and complained about certain anomalies. Firstly, the applicant complained that the tender document itself was ambiguous. It was concerned about the packaging discrepancies or inconsistent specifications. The applicant asserted that the tender document was unclear as to whether the successful bidder would be required to package the medical waste

using the plastic bags only or cardboard boxes in addition to such plastic bags. Obviously the way the waste was to be packaged was a factor which would have an impact on the pricing of items and on the transportation costs of the waste from any local collection facility to the central treatment site.

[11] Secondly, the applicant also complained that the statistics as per expenditure schedule (annexure “d”) were materially inaccurate as regards the actual costs expended during the previous year. The complaint was that, although tonnage statistics were reasonably accurate, the pricing statistics were hopelessly inaccurate. The applicants’ concern was that such low and wrong prices would induce potential services providers or bidders to bid low, gain an unfair advantage, and win a tender contract at the expense of the applicant whose bid was based on accurate and actual pricing rates of the previous year. The danger of all this, the applicant maintained, was that any bidder who based its pricing on those wrong statistics could win the tender contract but would fail to execute the contract. In that event, the required services would collapse as they once

did.

[12] Notwithstanding the applicant's concerns, the first respondent took no further action. The first respondent did not even acknowledge the applicants' concerns. On the 26 September 2011 the first respondent informed the applicant that its bid was unsuccessful; that the second respondent had been awarded the tender contract; that the applicant's services agreement would finally come to an end on the 31st October 2011 and that the applicant was requested to remain on standby to assist the second respondent to settle.

[13] The applicant averred that despite requesting reasons on the very next day, 27 September 2011, for the administrative decision, no reasons were given. The applicant's queries were ignored. On 14 October 2011 the first respondent publicly made it known via Tender Bulletin that the second respondent was the successful bidder of the tender contract BID-DOH(FS) 30-2010/2011: Healthcare Risk Management. The contract is valid for 3 years from 12 September 2011 to 11 September 2014

(vide annexure s.u.p. 2). The pricing of the second respondents were published in the Tender Bulletin.

[14] According to the applicant the second respondent used the wrong pricing statistics (annexure "d") and wrongly tendered to render the services by simply bidding similar prices for all the different five regions. The applicant's contention was that the second respondent's bid was not a viable economic proposition. Because it was unrealistic, the services were bound to collapse. The collapse would pose serious health hazards. It was not in the public interest to let such a dangerous situation develop.

[15] The applicant was aggrieved. It reckoned that the second respondent's significant under-costing for the waste services gave the second respondent an unfair advantage which ultimately enhanced its prospects to win the tender, and did win. The cheaper and attractive pricing rates were deceptively induced by the first respondent's misinformation. The applicant warned that the second respondent would not be able to operate economically and that a likely collapse of waste services in the province, with

catastrophic adverse impact on health and environment, was looming large on the horizon.

[16] The aforegoing concludes the applicant's corporate profile and the historical background of the circumstances which precipitated the urgent launch of this two-pronged application on 14 October 2011 for hearing on 26 October 2011.

[17] I now turn to the corporate profile of the second respondent. The second respondent is a corporate enterprise. It specialises in healthcare risk waste management services throughout this country. It delivers such services in all the nine provinces. Besides public institutions such as hospital, clinics, morgues, laundries and psychiatric complexes, it also renders such services to private institutions, for instance private hospitals, clinics, healthcare laboratories and medical practitioners.

[18] The second respondent has been rendering the waste management services since 2005. It averred that because it has a vast experience of collecting comparatively greater

volumes of medical waste and over substantially greater geographical areas than its competitor collects, the tender contract awarded to it would not present to it any logistical or financial difficulties to practically implement and execute the tender contract.

[19] According to the second respondent, the medical waste tonnage it was nationally collecting from various collection sites was nearly three-fold as much as the tonnage of medical waste the second respondent was required to collect under the 2011 bid awarded to the second respondent by the Free State Government.

[20] The second respondent contended that the grave concerns of the applicant about the capabilities of the second respondent to tender the required medical waste management services were unfounded. It averred that, based on its vast operational experience, the pricing rates of its bid were not ridiculously and uneconomically low for the second respondent to profitably render the services to the outlying regions outside Motheo District. This, in the brief, concludes the second respondent's corporate profile.

[21] The decision of a provincial tender board to award a tender contract is an administrative action performed by public functionaries of a provincial government – **CASH PAYMASTER SERVICES (PTY) LTD v THE EASTERN CAPE PROVINCE AND OTHERS** 1999 (1) SA 324 (Ck).

[22] In the first place, it was incumbent upon the applicant to prove a *prima facie* right. This is the first requisite of an interim interdict. (See **SETLOGELO v SETLOGELO** 1914 AD 221).

[23] Mr Voormolen contended, on behalf of the applicant, that the applicant has made out a case for the relief sought. He submitted that the applicant had (or has) a *prima facie* right to be given reasons for the public decision whereby the tender contract in connection with the medical waste services was awarded to the second respondent. Once the required reasons have been given, the applicant would also have a right to take the decision on judicial review. He relied on certain constitutional and legislative provisions.

[24] On behalf of the second respondent, Mr Snellenburg contended that the applicant had failed to make out a *prima facie* case for the interim relief sought. He too relied on certain constitutional and legislative provisions. He submitted that, although the applicant had a right to be given reasons by the first respondent for the administrative action, the applicant had no *prima facie* right to have the implementation of the tender contract between the respondents suspended.

[25] On the 26 September 2011 the first respondent orally informed the applicant that its bid was unsuccessful. The first respondent gave no reasons for its decision to award the bid to the second respondent. The very next day, on the 27 September 2011, to be precise, the applicant formally delivered its written request for such reasons to the first respondent. On the 14 October 2011 the applicant launched this application. By then the applicant had still not heard from the first respondent. Twelve days later the matter was argued.

[26] The first respondent, as an organ of the state, was obliged

to give the applicant reasons for its decision. The applicant was entitled to be given reasons for the administrative action but that was not where it ended. There is more to the matter than meets the eye. The first respondent was entitled to be given time to consider the applicant's request. The applicant's request was subject to an important legislative provision. The first respondent was entitled to a period of 90 days from 27 September 2011 within which to give the applicant reasons for its decision – sec 5 Promotion of Administrative Justice Act 3/2000.

[27] A clinical look at the facts revealed that the application was prematurely launched. The applicant rushed to court twelve days after the commencement of the ninety day statutory period as envisaged in section 5. It followed, therefore, that the legal process was initiated 78 days too early. By so doing the applicant infringed the rights of the first respondent.

[28] In my judgment the applicant had no *prima facie* right to be given reasons at the time the application was launched. To conclude otherwise would mean that an organ of state was

obliged to give reasons on demand. Such a finding would certainly be incompatible with section 5. Accordingly, the applicant had failed to establish the first requisite of an interim interdict. The applicant had no *prima facie* right to have the implementation of the tender suspended.

[29] In the second place it was incumbent upon the applicant to prove injury or harm to its right. Here what is required is actual harm or reasonable apprehension of harm to one's right. The applicant's right was derived from a tender contract concluded in 2007. The lifespan of the contract was three years. In the ordinary course of events, the contract would have expired on 31 October 2010. However, the contract was effectively extended by one more year by mutual agreement between the first respondent and the applicant.

[30] The first respondent duly notified the applicant on 26 September 2011 that the tender contract by virtue of which the applicant was rendering the services would finally expire on 31 October 2011. There would be no further extensions. The current proceedings were urgently

initiated on the 14 October 2011, less than three weeks before the expected end of the extended three-year contractual ties. As far back as 2007 the applicant knew that its relationship with the first respondent would come to an end at a certain point in time. When the first respondent put out a public notice calling for tenders in 2010 the applicant was reminded that its days were numbered. The clock was ticking against its right to render the services.

[31] The first respondent did not infringe the applicant's right by calling for tenders in 2010 or by giving the applicant final notice. The applicant knew very well and expected that by 1 November 2011 this contract would have expired and has since expired. Both parties knew that as from that date the applicant would be rightless *viz-á-viz* the first respondent. What reasonable apprehension of harm could the applicant have had in those circumstances? When there is no right there can be no harm. It is a matter of simple logic. What the applicant contended to be its reasonable apprehension of harm was nothing but apprehension in the air. In my view, the applicant has failed to prove the second requisite for an interim relief.

[32] In the third place it was incumbent upon the applicant to show that it had no alternative remedy. Because of its intrinsically intrusive nature, an interdict is not readily granted where it is shown that an applicant has an alternative ordinary remedy that can similarly provide an effective and satisfactory protection for the right under threat.

[33] The applicant sought an interim relief at this juncture but the ultimate relief it really wanted was to have the administrative action set aside on review, and the award taken away from the first respondent by the court and awarded by the court to the applicant. Mr Voormolen contended that a refusal by the first respondent to give reasons for its decision infringed the right of the applicant. There is no doubt an unlawful refusal would frustrate the applicant's contemplated review application and undermine the applicant's ultimate purpose.

[34] Let me assume that the first respondent wrongly refused to give reasons as the applicant contended. The springboard

for the launch of the interdict was the alleged refusal to give reasons. That was a point of departure in the current debacle. The ordinary and alternative remedy available to the applicant in the circumstances was quite simply to urgently apply to this court before anything else: firstly, to have the ninety day period as stipulated in section 5 reduced and secondly, to have the first respondent compelled to expeditiously give reasons for its decision within a shorter period. Needless to say that the applicant did not follow the condonation avenue. Instead, the applicant hurried to court by way of an interdict, bitterly complained that the first respondent refused to give reasons and urged me to prevent the second respondent from rendering the services as the new service provider in terms of the 2011 tender award.

[35] Had the applicant followed that remedial course, who knows what could have happened. There were possibilities. One of them was that the first respondent might have speedily given sound and satisfactory reasons acceptable to the applicant which would then have rendered the launch of this interdict unnecessary. In the

light of all this, it could not be said that the applicant was remediless. There was, in my judgment, an alternative remedy available.

[36] If the applicant had a right, even though it was open to some doubt, which was actually injured or under some reasonable threat or harm, there was a satisfactory and ordinary remedy. Such remedy would have afforded the applicant adequate and effective protection. However, the applicant's lawful request for reasons did not ripen into a legal right. The untimely launch of the interdict application fatally interrupted the maturity process of the request. As a result of such an abortive step the applicant had no right but a mere entitlement at the time the matter came up for adjudication.

[37] On the facts the contention that the first respondent refused to give reasons was untenable. The period as envisaged in section 5 was supposed to run until the 27th January 2012. Before the end of that date the first respondent could not be correctly of any administrative remissness on neglect whatsoever. On the contrary the applicants disingenuous

was in attempting to circumvent section 5, as it did. I am persuaded by the submission of Mr Snellenburg that the applicant has failed to show that it had no alternative remedy.

[38] In the fourth place, the applicant had to show that the balance of convenience favoured the grant of the interdict and not its refusal. On behalf of the applicant Mr. Voormolen contended that there would be no interruption of services; that the retrenchment of the workforce would be averted; that the rendering of the medical waste services would be continued by a reliable service provider with three years experience until the review application had been decided and that it would be in the public interests of the inhabitants of the province to retain the applicant, a well-equipped service provider with a proven track record and operational capacity, on site in order to ensure safe and riskless collection of hazardous medical waste.

[39] On behalf of the second respondent, Mr. Snellenburg, disagreed. He submitted that the scenario on the other side of the fence was in no way different in several respects. He

stressed that the critical factor was that second respondent was a successful bidder; that it had already made substantial capital layout to provide the services; that it had acquired equipments for the operations; that it had concluded ancillary agreements concerning vehicles, as well as lease of premises; that it had recruited an engaged workforce; that it was capable to execute the tender contract without endangering the provincial healthcare system, the inhabitants and the environment; that it was geared up for big business and that because it has been successfully operating in all the nine provinces for nine years, the applicant was highly experienced in the safe collection, transportation and destruction of hazardous medical waste.

[40] The applicant was supposed to have prepared itself to vacate the operational site. The various agreements relating to the employees, the lessors, equipments, the vehicles and sundry suppliers were obviously concluded by the applicant fully knowing that the tender contract would last until 31 October 2010. The applicant also knew that there was no guarantee that it would again win the provincial tender contract after the expiry date. All that information should

have enabled the applicant to plan and arrange its operations and business affairs accordingly. Here the buzzword of the scenario was downscaling.

[41] The situation as regards the second respondent was completely different. Here various new agreements were recently concluded between 12 September 2011 and 31 October 2011. At the time (14 October 2011) the interdict application was launched, the second respondent was probably in an advanced state of readiness and preparedness to start rendering the medical waste management services in terms of the tender contract. It is clear and obvious therefore, that the second respondent would face a seriously predicament if the interdict application should succeed. What the second respondent has done since the bid was awarded, cannot suddenly be undone without paying a heavy price.

[42] The fact of the matter is that at the end of the enquiry the second respondent had the right to provide the services as from 1 November 2011. In sharp contract to the scenario, the applicant would have no such a right. The balancing act

of the two competing interests showed, in my view, that the scale of convenience was heavily tipped in favour of the second respondent. Once again, the applicant failed on that front. The fourth requisite for the grant of an interdict was, in my view, not established. Even if the first three requisites had been established, the application for an interdict would fail on this ground alone.

[43] To succeed an application for an interdict has to establish all the four requisites of an interdict. Failure to establish one of the requirements is sufficient for a respondent to successfully resist the grant of an interdict. In this instance, the applicant has lost the battle on all four fronts. In the circumstances an interdict was not an appropriate relief. I am, therefore, inclined to dismiss the application.

[44] When a court deals with an interim interdict, as in the instant matter, the ultimate purpose of such interim relief must be constantly kept in mind. The ultimate purpose of the current interdict application is to have the administrative decision of the first respondent's provincial tender board reversed and the tender contract awarded to the applicant by the review

court. (part b, notice of motion.)

[45] The contemplated review application was issued, served and filed simultaneously with the interdict application. The irony of the matter was that, on its own version, the applicant did not know the reasons why the tender was awarded to the second respondent. Notwithstanding its lack of knowledge, the applicant surprisingly brought a review application. One comprehensive founding affidavit was made to cover the interdict application as well as the review application. (*Vide* notice of motion, part a and part b respectively.) I, therefore, had a curious situation that at the time the interdict relief was sought the applicant did not know on which grounds to attack the administrative decision on review. Any court would take a dim view of such a situation.

[46] Since there existed no substantive reasons for the attack of the decision of the provincial tender board, the review application itself was premature. Because it was premature, an interim relief sought to underpin it, was legally absurd. The applicant alleged that the tender related disputes take inordinately long time to be finalised. It also alleged that a

further problem was that if it sat back, allowed the second respondent to start rendering the services and only approach the court by way of a review application in the distant future, it could suffer damages that it could not recover should its review application eventually succeed. Those were the applicant's problems if the interim relief was not granted. The argument did not go up. Firstly, it was a sword that cuts both ways. If the interim relief was granted, the second respondent would find itself in pretty much the same predicament if it turned out in the future, on review, that the tender was justly and correctly awarded to it in the first place.

[47] There was no authority, apparently, for the proposition that because the successful bidder, becomes entrenched on account of inordinate delays associated with the review processes, the unsuccessful bidder who was the previous service provider should be preferred to continue rendering the services pending the outcome of the review. The successful bidder becomes entrenched by virtue of an existing contract which has to be accepted and honoured as a valid contract, pending the outcome of the review. There

may well be conceivable unfair advantage but the fact remains that the unsuccessful bidder has no contract at all in terms of which to takeover from the successful bidder the rendering of the services. Here and unfair advantage instantly becomes apparent.

[48] In the **MILLENIUM WASTE MANAGEMENT (PTY) LTD v THE CHAIRPERSON OF THE TENDER BOARD: LIMPOPO PROVINCE** 2007 JDR 1245 (SCA) - now reported at 2008 (2) SA 481 (SCA) the court decided that the successful bidder continue with the operation in order to avoid disruption. The matter was remitted to the provincial tender board to re-evaluate the bids. Obviously, if, after the re-evaluation of the tendering process, provincial tender board found that the bid should have been awarded to the previous service provider or the unsuccessful bidder, then the unsuccessful bidder would simply take over the rendering of the services from the successful bidder who had been providing the services in terms of the tender award that had been revisited and reversed. As can be seen, the applicant was not without ordinary remedies. A review application unheralded by an interim forunner, was but one

of the alternatives.

[49] The chief concern of the applicant was that its tender process lacked transparency. The complaint was that the provincial tender board drastically disregarded the constitutional provision pertaining to procurement – section 217. The cardinal features of the tendering process are that the stake procurement process should be fair, transparent, competitive, costs effective and equitable. The applicant contended that that the tender process relative to the bid, was fundamentally flawed in that: firstly, the tender document was ambiguous and, secondly, the pricing rates for all the districts, save for the Motheo District, were drastically deflated.

[50] The alleged ambiguity of the tender document, the alleged wrong statistical information and the alleged general lack of transparency concerning the current tender process, will probably be appropriately raised, debated and considered during the hearing of the review application. The less said about such matters in this interim application the better. However, I am bound to make certain comments.

[51] The concern of the applicant as regards the inaccurate and low pricing rates was twofold. Firstly, the applicant was concerned that if its competitors with whom it was bidding, would be unduly influenced by the low pricing statistics to tender cheaply and that unless the applicant did likewise, the chances of it winning the tender were greatly diminished. That was very unfair according to the applicant because it had insight information that the actual prices for the previous financial year were a whole lot more than the bidders were told.

[52] To overcome the aforegoing problem, the applicant on its own, submitted two bids – one based on the low, but wrong prices and the other based on the high but accurate prices. That the applicant did in order to compete with the competitors who might submit deflated tenders, on the one hand, as well as those who might submit inflated tenders, on the other hand. By so doing the applicant ensured that the provincial tender board would compare apples with apples. The contention, therefore, that the applicant was prejudiced by comparing the incomparables, was a storm in a tea cup.

The applicant exercised such strategic remedy so that its rival bidders on either side of the tender fence did not gain an unfair advantage.

[53] Had the applicant won the tender, nothing would have been heard in that camp about the alleged irregularities. Mr. Snellenburg contended that the applicant was sitting pretty well at the time raking in approximately a profit of R160 000,00 per month and that the applicant, through the interim relief urgently sought, wanted to squat on the tender contract awarded to the second respondent. There was much to be said for those comments. The applicant had no sound reasons for challenging the 2011 tender awarded to the second respondent. As matter stood when the matter was argued the applicant's prospects of success on review were very bleak.

[54] Secondly, the applicant gravest concern was that experience had shown or taught that it was unwise for a provincial tender board to award the tender contract to cheap bidders. That was so because, so contended the applicant, quite often cheap bidders dismally fail to deliver the goods as a

result of undercosting. When the rendering of services collapse and the medical waste are not properly and frequently collected and removed throughout the Free State Province to be auto-claved or incinerated in Bloemfontein, infectious deceases may spread causing a highly dangerous situation to develop.

[55] The primary task of the provincial tender board is, has always been and will always be to ensure that the government gets the best price for procuring goods or services and the best value for the price it pays. These are the prime objectives of public procurement policy which chiefly informs the core functions of a provincial tender board. If this is no longer the case, then the provincial tender board no longer have reason to call for tenders or even to exist – **SOUTH AFRICAN POST OFFICE LTD v CHAIRPERSON, WESTERN CAPE PROVINCIAL TENDER BOARD, AND OTHERS** 2001 (2) SA 675 (CPD) at 875 where Cleaver, J pointed out that a provincial tender board has a responsibility to conduct its affairs and to arrive at its decision in an ambiguous and economically responsible, and I may add, competitive manner.

[56] It was the applicant's case that on 26 September 2011 the first respondent asked the applicant to be on standby, in other words, to be on alert for four months as from 1 November 2011 in order to step in, take over the medical waste management service and rescue the province should the second respondent fail to perform. Now, if such a contingency plan was indeed in place, then there was no reasonable or danger that the medical waste management services in this province, would collapse. Mr. Snellenburg argued that it should not really be the applicant's concern if the second respondent was prepared to execute the contract for less than the applicant. He argued further that the second respondent had previously executed and was still currently executing far bigger contracts elsewhere in the country.

[57] According to the second respondent, it was wishful thinking for the applicant to fear that the previous contractor's downfall debacle would ever recur during the second respondent's contract period. The second respondent averred, and the applicant did not deny it, that it was the

applicant's *modus operandi* to run to court every time it lost out and its competitor won the bid. Mr. Snellenburg criticised the applicant's conduct and called upon the applicant to refrain from behaving as if it were a saviour on the white horse for this province. The second respondent, counsel contended, was ready and capable to render the services without the aid of any other service provider, but had no problem if the applicant wanted to be on standby, but forewarned the applicant that it would wait in vain if it hoped that it would ever be called upon to rescue the services from collapsing.

[58] I am of the firm view that the applicant failed to make out a case for the grant of the interim relief sought. The interdict application cannot but fail. I decline to arrest the implimentation process. The interdict application was fatally premature and defective.

[59] Mr. Voormolen conceded that if the application failed, there was no reason why the costs should not be borne and paid by the applicant. Although the first respondent had adopted a neutral stance right from the outset, Mr. Danzfuss asked

that the costs incurred by the first respondent be paid by the loser whoever the lose might be. The concession made by Mr. Voormolen on the question of costs applied to both respondents. It follows, therefore, that the applicant should also bear the brunt of the first respondent's costs.

[60] These then are the reasons for the order I made *ex tempore* after hearing legal argument. For the sake of completeness the relevant part of the order is repeated. It reads:

"1. The application for the interdict is dismissed.

2. The tender awarded by the 1st respondent to the 2nd respondent stands.

3. The applicant is directed to pay the costs of the respondents.

M.H. RAMPAI, AJP

On behalf of applicant: Adv. V. Voormolen
Instructed by:
Matsepes Inc
BLOEMFONTEIN
and
Shepstone & Wylie Attorneys
Umhlanga Rocks

On behalf of first respondent:	Adv. F.W. Danzfuss SC Instructed by: The State Attorney BLOEMFONTEIN
On behalf of second respondent:	Adv. N. Snellenburg Instructed by: Phatshoane Henney Inc BLOEMFONTEIN

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