

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

Case No. 2009/3994

ELECTRO-MOTIVE SIBANYE JOINT VENTURE

Applicant

and

TRANSNET LIMITED

First Respondent

GE TRANSPORTATION SOUTH AFRICA

Second Respondent

SIEMENS SOUTHERN AFRICA

Third Respondent

JUDGMENT

MEYER, J

[1] The applicant seeks an interim interdict pending the finalisation of an application for final relief that it intends to launch.

[2] The applicant's *locus standi* is in issue. It is cited as 'a joint venture partnership' between Sibanye Trade & Services (Pty) Limited ('STS') and Electro-Motive Diesel and Locomotive Company (Pty) Ltd ('EMD-SA'), which came into being pursuant to a written 'joint venture agreement' concluded between them on 20 March 2007 ("the joint venture"). EMD-SA is a wholly owned subsidiary of Electro-Motive Diesel Inc., which is a company incorporated in the United States of America ("EMD"), and it is common cause that EMD "is currently one of the two largest and leading builders of railway locomotives in the world in terms of overall sales."

[3] The question is whether the joint venture agreement constituted a partnership between STS and EMD-SA. The joint venture agreement is not vague or indefinite in its terms. It stipulates that there is no partnership between them and that the joint venture shall have no separate legal personality. Contracting parties are, as a rule, bound by their agreements. If the agreement states that there is no partnership, a party to the agreement cannot claim that there is one in fact. See: Hart v Pickles 1909 TH 244 at p 247; Le Voy v Birch's Executors 1913 AD 102. Third persons, on the other hand, are not necessarily bound by the description which contracting parties give to their agreement. At their instance a court will declare the transaction a partnership if it is one in fact. See: Joubert v Tarry & Co 1915 TPD 277; cf Zandberg v Van Zyl 1910 AD 302, at p 309; Pezutto v Dreyer & Others 1992 (3) SA 379 (A).

[4] The first respondent ("Transnet") takes no issue with the description which EMD-SA and STS have given to their joint venture agreement. Even though a joint venture

may in law and in a particular factual situation be in the nature of a partnership as was contended for by Adv M Hellens SC on behalf of the applicant, EMD-SA and STS have expressly disavowed that kind of relationship between themselves and effect must be given to their expressed intention.

[5] The parties to the joint venture agreement should accordingly have brought this application. The joint venture itself does not have legal personality capable of suing and being sued in its own name. The application falls to be dismissed on this ground.

[6] Adv P Kennedy SC, who appeared with Adv K Tsatsawane for Transnet, requested that I also deal with the merits of the application irrespective of my finding on the issue of *locus standi*. I consider it appropriate to accede to this request.

[7] On 18 September 2006, Transnet issued tender number EWS677. This tender is referred to in the papers as “the first tender”. It was for the manufacture, supply, delivery and commissioning of a combination of 212 new 3000 horsepower (“3000HP”) and 4000 horsepower (“4000HP”) diesel-electric locomotives, with an option to use either DC or AC traction motors, for Transnet’s general freight business. The value of the first tender was approximately R 6 billion. It closed on 7 November 2006. It is in issue whether the submission of a tender on 31 October 2006 was a response by STS or by the joint venture to the first tender. Transnet awarded “preferred bidder status” to the joint venture during August 2007. This was announced on 21 August 2007 at a meeting attended by a delegation of senior executives from Transnet, members of the board of managers of the

joint venture, and a representative of EMD. It was also confirmed in a letter dated 28 August 2007.

[8] The joint venture avers that Transnet's CEO at the time, Ms Maria Ramos, requested execution to commence immediately before the conclusion of a contract due to Transnet's urgent need for the locomotives. I accept this version. Transnet's letter dated 28 August 2007 sets out a "tight" negotiation programme and Transnet's Group Chief Operating Officer, Mr Louis van Niekerk, confirms "that Transnet advised that they would reimburse EMD for all reasonable costs in the event that no contract was concluded..." Senior executives of Transnet, including Ramos and Van Niekerk, visited EMD's facilities in the USA and negotiations regarding the terms of the written contract to be concluded between Transnet and the joint venture followed.

[9] Transnet's internal auditors, Ernst & Young, in the interim conducted an investigation into certain alleged irregularities in the first tender process as a result of a complaint received on 9 November 2007 by the Public Service Commission's national anti-corruption hotline. It is common cause that Mr Christopher Wells, who is the Chief Financial Officer of Transnet and the deponent to its answering affidavit, invited Mr Gustav Adams, who is a director of STS, a member of the joint venture's board of managers, and the deponent to the joint venture's affidavits, to a meeting during March or April 2008. Adams was advised that Transnet had "a problem" with the contract and that a number of issues needed to be discussed concerning the first tender. The meeting was attended by Messrs Koekemoer and Oates from Ernst & Young, a Mr van Rensburg, who

is an attorney from Hofmeyrs, and Adams. They advised Adams that they were investigating alleged “irregularities” in the first tender process and he was informed of an anonymous complaint of a “corrupt relationship” between himself and Mr Percival Mosweu, who was the Chairman of the Adjudication Steering Committee, which committee had to make a recommendation in respect of the tenders to the Spoornet Acquisition Council. Adams was asked various questions aimed at ascertaining the nature of his relationship with Mosweu and of the business association between Adams, Mosweu and their respective wives within the context of Mosweu’s position at Transnet and of Adams’s interest, through STS, of obtaining contracts from Transnet.

[10] It is common cause that Ramos and Wells met with representatives of EMD and the joint venture, namely Mr John Hamilton (EMD’s CEO and President), Mr Albert Enste (EMD’s Vice President, Marketing and a member of the joint venture’s board of managers) and Mr Tom Rissman (EMD’s Vice President and General Counsel and a member of the joint venture’s board of managers), on 8 July 2008 at EMD’s facility at Ledge, Illinois, USA. Adams is the only other member of the joint venture’s board of managers. Adams, in the joint venture’s founding affidavit, states this: “At this meeting Ramos advised that the respondent will not be signing the contract and that an anonymous complaint had been received of wrongdoing in the procurement process.” Transnet “discovered” that Adams “had an irregular or improper relationship with Mosweu.” Adams also states that “[t]he two reasons advanced by the respondent for the discontinuation of the first tender were, firstly, alleged flaws in the tender process and, secondly, that the respondent’s locomotive requirements had changed.” It is also stated

that “Ramos advised at the meeting that the respondent “needs to close off this process and put a new process in place.” It is in dispute whether Hamilton “made it clear that the JV did not accept the stance adopted by Transnet” and whether he said “that the withdrawal of the tender was not accepted...”. Transnet’s version is that the joint venture acquiesced in the cancellation of the first tender. It is common cause that the investigations into the alleged irregularities resulted in a contract not being concluded between Transnet and the joint venture.

[11] Following the meeting, negotiations were undertaken between Transnet and EMD regarding the purchase of locomotives from EMD without the involvement of STS. EMD had quoted a price of R2.494 billion for the supply of 96 “like-new” (refurbished) locomotives, but the price was considered excessive by Transnet’s Capital Investment Committee at its meeting on 17 September 2008. EMD was notified that Transnet “was considering instead the possibility of a confined tender for 100 locomotives for delivery in 2009”.

[12] During November 2008, Transnet issued tender number GSM08/10/0142. This tender is referred to in the papers as “the second tender”. It is for the procurement of 100 new or “like new” (refurbished) 3000HP diesel-electric locomotives with AC traction motors. Three original equipment manufacturers (“OEM’s”) were invited to tender. They are EMD, the second respondent, and third respondents. The second tender should have closed on 17 November 2009, but its closing date was finally extended to 17 March 2009 as a result of these proceedings.

[13] The order that is presently sought is aimed at interdicting Transnet from closing the second tender pending the finalisation of a review application that the joint venture intends to launch.

[14] A Court's approach in a matter for an interim interdict pending the finalisation of an action or application for final relief and the requirements that need to be established by an applicant for the interim interdict, was thus formulated in Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton, and Another 1973 (3) SA 685 (A), at p 691C-G:

‘The granting of an interim interdict pending an action is an extraordinary remedy within the discretion of the Court. Where the right which it is sought to protect is not clear, the Court's approach in the matter of an interim interdict was lucidly laid down by Innes JA in *Setlogelo v Setlogelo* 1914 AD 221 at 227. In general the requisites are-

- (a) a right which, “though *prima facie* established, is open to some doubt”;
- (b) a well grounded apprehension of irreparable injury;
- (c) the absence of ordinary remedy.

In exercising its discretion the Court weighs, *inter alia*, the prejudice to the applicant, if the interdict is withheld, against the prejudice to the respondent if it is granted. This is sometimes called the balance of convenience.

The foregoing considerations are not individually decisive, but are interrelated; for example, the stronger the applicant's prospects of success the less his need to rely on prejudice to himself. Conversely, the more the element of “some doubt”, the greater the need for the other factors to favour him. The Court considers the affidavits as a whole, and the interrelation of the foregoing considerations, according to the facts and the probabilities...”

[15] The approach in deciding whether the applicant for an interim interdict pending final relief has established a *prima facie* right, especially where there are disputes of fact, is as follows according to Webster v Mitchell 1948 (1) SA 1186 (W), at p 1189:

“The proper manner of approach I consider is to take the facts as set out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute, and to consider whether, having regard to the inherent probabilities, the applicant could on those facts obtain final relief at the trial. The facts set up in contradiction by the respondent should then be considered. If serious doubt is thrown on the case of the applicant he cannot succeed in obtaining the temporary relief, for his right, *prima facie* established, may only be open to “some doubt”. But if there is mere contradiction, or unconvincing explanation, the matter should be left to trial and the right be protected in the meanwhile, subject of course to the respective prejudice in the grant or refusal of interim relief.”

The criterion for the first branch of the enquiry was considered too favourable towards an applicant for an interim interdict in Gool v Minister of Justice and Another 1955 (2) SA 682 (C), at p 688E, and accordingly qualified to

“should (not could) the applicant on those facts obtain final relief at the trial.”

[16] It is undisputed that Transnet is an organ of State and subject to the provisions of the Constitution relating to such bodies. See Goodman Bros (Pty) Ltd v Transnet Ltd 1998 (4) SA 989 (WLD), at pp 994G – 996C, *per* Blieden J. Transnet’s act of cancelling the joint venture’s preferred bidder status and the first tender process is an administrative one. It falls within “the true meaning of an administrative act”, which, according to the Goodman case, “means any act relating to the management of the affairs” of the relevant body.

[17] Transnet is also a major public entity listed in schedule 2 to the Public Finance Management Act 1 of 1999 (“PFMA”). In terms of s 217 of the Constitution of the Republic of South Africa Act 108 of 1996, and also s 51(1)(a)(iii) of the PMA, it is

required to conduct its procurement activities in accordance with a process which is fair, equitable, transparent, competitive and cost effective.

[18] The joint venture contends that it should have been given an opportunity to make representations before Transnet took any decision relating to the cancellation of the first tender.

[19] Adv Hellens SC submitted that there are inconsistencies and vagueness in Transnet's answering affidavit *inter alia* relating to when the decision was taken to cancel the first tender process and the preferred bidder status of the joint venture and when it was conveyed. Much emphasis, both in the joint venture's replying affidavit and in argument on its behalf, was also placed on an invitation in a letter from Transnet's attorneys, dated 15 January 2008, extended to the joint venture to make written representations as to why Transnet should not terminate the appointment of the joint venture as the preferred bidder and start the first tender process afresh. Such invitation was withdrawn in a subsequent letter dated 2 February 2009. It is explained in Transnet's answering affidavit that such invitation was extended in error. This explanation is consistent with an earlier communication from Transnet's General Manager, Group Finance, Mr Anoj Singh, dated 17 December 2008, in which he advised Rissman of EMD that the first tender was cancelled in its entirety.

[20] On the joint venture's version, as stated in its founding affidavit, the conclusion seems inescapable that Transnet's decision to cancel the first tender process, and

accordingly the preferred bidder status of the joint venture, was taken and conveyed at the meeting on 8 July 2008. According to the version advanced by Adams as to what transpired at the meeting, Transnet indicated that it would “not be signing the contract” and that the first tender was being “discontinued” or “withdrawn”. Adams’ version in this regard is consistent with various statements made by Wells on behalf of Transnet. He states that Transnet took steps to terminate the appointment of the joint venture as preferred bidder during July 2008, and, as a result of the termination of the first tender process, a new procurement strategy had to be developed in August 2008. He also states that the reasons for that decision were communicated to the joint venture on 8 July 2008. That the first tender and the joint venture’s preferred bidder status were cancelled at the 8 July 2008 meeting, is also consistent with the subsequent events. Following that meeting, EMD stopped executing in terms of the first tender process and negotiations were entered into between EMD and Transnet aimed at Transnet purchasing locomotives directly from EMD without the involvement of STS.

[21] Accepting that the requirement to give an opportunity to make representations is flexible and depends on the circumstances of each case as was submitted by Adv Kennedy SC, I am unable to find on the papers that Transnet in all the circumstances acted in a fair manner by giving the joint venture sufficient information and a reasonable and effective opportunity to make representations before the decision to cancel the first tender was taken. At best for Transnet, Adams, at the meeting with him during March or April 2008, and the other two members of the joint venture’s board of managers at the meeting on 8 July 2008, were notified of the substance of Transnet’s concerns arising

from the relationship between Adams and Mosweu, and were afforded an opportunity to address Transnet on the matter. But there were other alleged irregularities on which Transnet also relies for its decision to cancel the first tender process. It is not suggested that the members of the joint venture's board of members were informed of those alleged irregularities before the decision to cancel the first tender process was taken. Insofar as an opportunity to make representations was given after the decision was taken, such invitation was considered erroneously given and withdrawn, and the joint venture was accordingly also not given the opportunity to procure a modification of Transnet's decision to cancel the first tender process and the joint venture's preferred bidder status.

[22] The application which the joint venture intends to bring is aimed at reviewing and setting aside Transnet's decision to cancel the first tender and the preferred bidder status of the joint venture in terms of the provisions of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"). S 7(1) of PAJA provides that any proceedings for judicial review must be instituted without unreasonable delay and not later than 180 days after the date on which the applicant for review was informed of the administrative actions and the reasons for it. Transnet contends that the joint venture has been aware of the decision to cancel the first tender for more than 180 days and has not in its affidavits made out a case on the basis upon which its late filing of the review application can be condoned.

[23] In the as yet unreported judgment of The New Reclamation Group (Pty) Ltd v Eskom Holdings Ltd & Kwanda Ferro-Alloy African Resources (Pty) Ltd (WLD Case

No. 07/27391, delivered on 14 May 2008), Blieden J referred to the following principles relating to the exercise of a court's discretion in matters of judicial review:

“[47] As submitted by Kwanda's counsel, it is a well-established principle of judicial review that a court exercises a discretion whether to set aside an invalid administrative act. According to the Supreme Court of Appeal:

“It is that discretion that accords judicial review its essential and pivotal role in administrative law, for it constitutes the indispensable moderating tool for avoiding or minimizing injustice when legality and certainty collide.”

Oudekraal Estates (Pty) Ltd of Cape Town 2004 (6) SA 222 (SCA) at par 3

[48] As has already been stated, in terms of PAJA, the yardstick against which this discretion is to be exercised is what is “*just end equitable*”.

[49] Our courts have identified a number of rationales for this discretionary feature of administrative law:

49.1 prejudice caused to the respondent by any delay in bringing the review; *Wolgroeiërs Afslaers (Edms) Bpk vs. Munisipaliteit van Kaapstad* 1978 (1) SA 13 at 41

49.2 the public interest element in the finality of administrative decisions and the exercise of administrative functions: *Associated Institutions Pension Fund and Others v Van Zyl* 2005 (2) SA 302 (SCA) at par 46.

49.3 considerations of pragmatism and practicality. *The Chairperson: Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others* [2005] 4 All SA 487 (SCA) (‘JFE Sapela’) at par 28.

49.4 In the specific context of tenders, our courts have further held that there will be cases where by reason of the effluxion of time (and intervening events) an invalidly awarded tender must be permitted to stand. *JFE Sapela* at par 29.

[50] In the Constitutional Court decision in *Pharmaceutical manufacturers Association: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 614 (CC) at par 51. Chaskalson P held that judicial review of administrative actions was inevitably a constitutional matter.

[51] As a consequence of the constitutionalisation of judicial review, the discretionary nature of the Courts' power when reviewing administrative action has been given further constitutional entrenchment in section 172(1)(b)(ii) of the Constitution, which empowers a court, when deciding a constitutional matter, to make an order that is just and equitable, including an order suspending the declaration of invalidity of any conduct for any period and on any conditions. *Tantoush v Refugee Appeal Board and others* 2008 (1) SA 232 (T) at par 4.”

[24] Review proceedings have yet not been launched by the joint venture. The joint venture's delay in bringing the review and the other considerations referred to by Blieden J are factors that will be taken into account by the review court in the exercise of its

discretion whether or not to set aside Transnet's decision to cancel the first tender and the preferred bidder status of the joint venture. In the present application for an interim interdict these considerations open the joint venture's *prima facie* right to doubt.

[25] Relevant to the issue whether or not final relief will in due course be granted to the joint venture is also the alleged irregularities on which Transnet relies for its decision to cancel the first tender process and the joint venture's preferred bidder status. Transnet contends that the irregularities that came to light resulted in the tender process not being fair as is required by law, *inter alia* under s 217 of the Constitution of South Africa Act 108 of 1996 and s 51(1)(a)(iii) of the PMA. S 50(1)(b) of the PMA enjoins Transnet's Board to act with fidelity, integrity and in Transnet's best interests in managing its financial affairs, and s 51(1)(b)(ii) enjoins it to take effective and appropriate steps to prevent irregular expenditure.

[26] Transnet relies on the following alleged irregularities in the first tender process:

- STS obtained the tender document long before it was made available to the general public. Other bidders did not get the same opportunity and the luxury of time to prepare their submissions. This was unfair to the other bidders and rendered the process irregular.
- The tender which was submitted in response to the first tender was submitted by only one of the parties to the joint venture, being STS. The joint venture itself did not exist on the date when the first tender was submitted and could not have any rights from a tender process in respect of which it did not submit a tender. See

Steenkamp NO v Provincial Tender Board 2006 (3) SA 151 (SCA), paras 48 and 51.

- Adams had a business relationship with the Chairman of Transnet's Adjudicating Steering Committee, Mosweu. The Chairman did not disclose such relationship and did not withdraw from participating in the evaluation of the tenders.
- There was an error in the evaluation of the joint venture's BBBEE status, which mistake resulted in the joint venture being awarded more points than it should have been awarded and which led to Transnet deciding to award preferred bidder status to the joint venture. Had the points been correctly calculated and allocated, the joint venture would not have been awarded preferred bidder status.

[27] It is common cause that a business relationship or acquaintanceship existed between Adams and Mosweu. They had both been directors and shareholders of a company known as Finishing Touch Trading 239 (Pty) Ltd ("FT"). Upon resigning as a director of this company in December 2006, Adams transferred his shareholding to the remaining directors, including Mosweu. The transfer of the shareholding occurred during the adjudication process and prior to the joint venture's nomination as the preferred bidder. Adams explains:

"A company was purchased, which was a shelf company, for the purpose of participating in a offer made through Dale Hayes who is of considerable golfing fame in this country, in terms of which timeshare or fractional title could be obtained in several glof estates. The thought was that a few business associates of which Mosweu was one, would all become shareholders in a shelf company, which shelf company in turn would acquire the frational title or timeshare in that which was on offer from Dale Hayes. Ultimately, and upon investigation, the project was found to be not viable and in December 2006 I resigned, automatically transferring my shareholding in FT which was the company which was to be used to

house the interests in the fractional title or timeshare to the remaining directors. The shares have no value.”

Adams and the wives of Mosweu and Adams were directors of Sovereign Seeker Investments 110 (Pty) Ltd, which company in turn was a shareholder in Sharp Move Trading 207 (Pty) Ltd, of which Adams was also a shareholder and of which Mosweu’s wife was a director. Adams explains:

“My wife and Mosweu’s wife wanted to go into business together to take up any opportunities that might come along with regard to government or other tenders. To that end they participated in becoming directors and shareholders in these companies. No business was ever done in these companies and Mrs Mosweu ultimately resigned on the 19th June 2007. ... I was a director simply to give a helping hand to the two ladies who thought they might be successful in business together.”

[28] Transnet’s procurement is *inter alia* governed by the provisions of the Public Finance Management Act 1 of 1999. The regulations made under this Act provide that a supply chain management official, such as Mosweu, or other role player must recognise and disclose any conflict of interest that may arise. These regulations *inter alia* provide as follows:

“If an official or other role player, or any close family member, partner or associate of such official or other role player, has any private or business interest in any contract to be awarded, that official or other role player must ~

- (a) disclose that interest; and
- (b) withdraw from participating in any manner whatsoever in the process relating to the contract.”

[29] Mosweu did not disclose that a person with whom he had a “business acquaintanceship” had an interest in the first tender and Mosweu did not withdraw from participating in the first tender process. At the meetings of the Adjudicating Steering Committee everybody, including Mosweu, present were minuted to have “declared that

they had no interest in or any relationship with any of the tenderers / suppliers / agents involved with the tenders being tabled ...” This is not disputed. Adams in reply states that Transnet has failed to set out any indication of a decisive or significant role played by Mosweu in the process of evaluating the tenders. He, however, in his capacity of Chairman of the Adjudicating Steering Committee, held a key position.

[30] Adv Kennedy SC submitted that the existence of the undisputed “business acquaintanceship” that Mosweu had with Adams gives rise to a reasonable apprehension of bias by Mosweu in favour of the joint venture and this alone has tainted the entire first tender process. See Bam-Mugwanyanya v Minister of Finance and Provincial Expenditure, Eastern Cape 2001 (4) SA 120 (Ck), par 34. This failure, in my view, also opens the joint venture’s *prima facie* right to doubt.

[31] Transnet avers that the tenders received in the first tender process were to be evaluated against three criteria, namely their technical, financial, and socio-economic components. These three criteria were allocated evaluation weightings of 50, 40 and 10 respectively. The socio-economic component included Broad-Based Black Economic Empowerment (“BBBEE”), legal requirements and the national industrial participation policy, which were allocated weightings of 45, 45 and 10 respectively. A mistake occurred in the evaluation of the joint venture’s BBBEE status in that the score for that was only calculated with reference to the BBBEE status of STS only and not with reference to the BBBEE status of both STS and EMD-SA. It is common cause that EMD constitutes 70% of the joint venture. The joint venture achieved a 100% score (5 points)

in respect of the BBBEE criterion. Transnet maintains that the joint venture ought to have achieved 1.8 points instead, which would have resulted in the second respondent achieving higher overall scores than the joint venture. Transnet accordingly concluded that the adjudication of the tenders in the first tender process was flawed, unfair to the other tenderers and particularly the second respondent, and that the first tender had to be discontinued.

[32] Adams on behalf of the joint venture in reply says the following on this issue:

“I am not convinced at all that the manner in which the matter was scored was incorrect. The bid was put in on behalf of STS declaring that it intended to form a SPV to accommodate the bid. STS, when adjudged from its BBBEE status would score one hundred percent because it has that status. The fact that a SPV would at a later stage accommodate the JV in terms of which there would be a split, as it turned out 70/30, was not a factor to be taken into account at the time that the points were awarded.”

Applying the criterion on which Transnet relies, Adams, in the joint venture’s replying affidavit, concedes that the second respondent would have achieved a higher overall score in respect of the 4000HP locomotives, but not in respect of the 3000HP locomotives.

[33] The fact remains that the preferred bidder status was awarded to the joint venture and not to STS. The joint venture has accordingly, in my view, failed in its replying affidavit to show the basis upon which it could rationally be found that the matter was scored correctly.

[34] The findings made so far in respect of the requirement of a *prima facie* right make it unnecessary to consider all the other facts set up in contradiction or submissions advanced on behalf of Transnet. The applicant has, in my judgment, established a *prima facie* right, but it is, at the very least, open to “some doubt”. There is not “mere contradiction or unconvincing explanation” on the part of Transnet.

[35] The joint venture in these proceedings seeks the preservation of Transnet’s requirement for new or refurbished locomotives as it existed at the time of the cancellation of the first tender and the joint venture’s status as the preferred bidder. I accept that it has satisfied the requirement that it has no other satisfactory remedy.

[36] The joint venture must further establish, as an objective fact, an actual or well grounded apprehension of irreparable loss if the interdict is not granted. See Ruskin NO v Appleson 1951 (3) SA 800 (W), at p 813B-C.

[37] Adams says the following on this issue in paragraph 105 of the joint venture’s founding affidavit:

“If an award is made under the second tender be that to the applicant, EMD or anyone else, the respondent may then raise the argument that it has fulfilled its traction requirements, for the time being, under the first tender by means of the second tender: in so doing the respondent would have created its own reality and avoided its obligations to the applicant under the first tender.”

[38] An award under the second tender will, on the undisputed facts, not fulfill Transnet’s traction needs. Transnet says that it intends to procure a total of 460 diesel

locomotives to replace elements of its existing fleet. Its stated intention is supported by its actions. On 1 May 2007, an agreement in respect of the acquisition of 50 locomotives was concluded between Transnet and the joint venture. These units will, according to Admas, be delivered before the end of 2009. On 21 August 2007, Transnet awarded preferred bidder status to the joint venture for 212 locomotives. This tender was cancelled. However, that Transnet required in excess of 400 locomotives was emphasised at the meeting on 8 July 2008. Ramos advised the meeting that Transnet “still intended to procure up to 400 locomotives and a new tender process would, in due course, be conducted for that purpose.” During November 2008, Transnet issued another tender for the procurement of 100 locomotives. This tender is called for to fulfill Transnet’s urgent and “short-term short-fall” and delivery is required by the end of 2009.”

[39] Whether or not the second tender is in substitution of the first tender is a matter of serious dispute between the parties. I need not consider this issue. It seems inherently probable on the papers that Transnet is in need of more than 400 locomotives and that it intends to acquire at least 212 more locomotives in addition to the 50 “like-new” locomotives forming the subject-matter of its “like-new” agreement with the joint venture and the 100 locomotives forming the subject-matter of the second tender.

[40] In paragraph 148.2 of the answering affidavit, Wells, on behalf of Transnet, states this:

“Transnet states categorically that it will not raise the argument, once an award is made under the Second Tender, that it has fulfilled its traction

requirements under the First Tender. Accordingly, EMSJV will not be met with such a defence and is at liberty to institute legal proceedings against Transnet for whatever rights it believes it has in terms of the First Tender.”

[41] In paragraph 238 of its replying affidavit the joint venture added the possibility of Transnet not being able to afford more locomotives than those provided for in the first tender. Such is, however, mere speculation and not the case that Transnet was required to answer.

[42] The joint venture has, in my judgment, failed to establish that its apprehension of loss should this interim interdict not be granted, is reasonable under all the circumstances.

[43] I now turn to the requirement whether the balance of convenience favours the granting of the interim interdict. In assessing the balance of convenience, a court is required to weigh the prejudice which an applicant will suffer if the interim relief is not granted against the prejudice which a respondent will suffer if the interim interdict is granted. See Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton, And Another 1973 (3) SA 685 (A), at p 691C-G.

[44] The final resolution of the intended proceedings for final relief that the joint venture intends to institute may potentially take a few years to complete. Once the review application is heard the matter may or may not be referred back to Transnet to afford the joint venture a proper hearing. The outcome of such hearing may or may not

result in further review proceedings. Then there is also the potential of appeal proceedings.

[45] Transnet's immediate and urgent need to procure locomotives is common cause. On the joint venture's version, Ramos at the meeting on 27 August 2007 indicated that Transnet's need for the 212 locomotives was urgent and the joint venture was accordingly required to commence work as soon as possible even though the contract had not been finalised. The second tender also seeks urgent satisfaction of Transnet's urgent tractive requirements.

[46] Any delay in the procurement of the locomotives will seriously inconvenience and detrimentally affect Transnet and the country at large. Wells *inter alia* thus describes Transnet's need for locomotives in its answering affidavit:

“144.3 The fact that up to 240 locomotives of Transnet may be withdrawn from active duty, is completely irrelevant. The average age of TFR's locomotive fleet is 28 years, compared with a class-1 railway benchmark of between 14 and 18 years. There is a strong correlation between age and reliability which is compounded by the under-investment in maintenance over the years and the general lack of investment into the TFR fleet. The last batch of locomotives was purchased more than 16 years ago. The problem is that the ageing fleet is characterized by high maintenance costs, low reliability and availability figures, as well as a high number of component failures. The control technology used in TFR locomotives is of an early generation and does not provide the improved train handling, safety controls, protection mechanisms and fault logging features of modern control systems.

144.4 The fact is that Transnet urgently needs to acquire additional locomotives if its business objectives are to be achieved. Unless this materializes, there will be a reduction in its fleet with a corresponding reduction in volume aspirations.

144.5 Transnet's diesel locomotives are significantly older, with an average age of 32 years. The current reliability of diesel

locomotives is at an average of 98 faults per million kilometers, against an industry norm of between 15 and 25 faults per million kilometers. It should be noted that faults are measured per locomotive, but locomotives are operated in consists of up to 6 locomotives. This means that a failure in 1 locomotive has a significant impact on the operations, which is far more pronounced than the statistics for reliability would indicate. With a life expectancy of 30 years, Transnet should theoretically be replacing 3.3% of its locomotives every year.

- 144.6 By increasing capacity and providing more reliable locomotives, this will enable Transnet to provide a more reliable capacity to customers and to improve its service level. Adhering to customer promises is the number 1 requirement of Transnet's customers. The reality is that business opportunities will be graded by improved service levels in that additional demand should result, resulting in higher tariffs being negotiated.
- 144.7 There are also significant benefits to be had to the country as a whole in that the greater usage of rail as opposed to road results in fewer accidents and less damage to our roads. All of this will be significantly impacted on if there is a delay in finalizing the Second tender."

[47] On the other hand, the joint venture remains at liberty to institute its intended proceedings for final relief whether or not this interim interdict is granted. The court reviewing Transnet's administration action is empowered to make an order that is just and equitable in all the circumstances.

[48] It has not been established that any relief that may ultimately be granted to the joint venture would be rendered nugatory if interim relief is not presently granted. The mere possibility, speculative though it is, that Transnet will "not require or ... cannot afford" more locomotives than those forming the subject-matter of the first tender process by the time the joint venture's intended proceedings for final relief are finalised is far outweighed by the definite prejudice which Transnet and the public will suffer if the interim interdict is granted.

[49] The balance of convenience, in my judgment, does not support the interim relief sought.

[50] The notice of motion in this matter was issued on 10 February 2009. The relief was required by way of urgency since the second tender was at that time due to close on 17 February 2009. The matter appeared before the urgent court on 13 February 2009. It was, by consent, postponed to 3 March 2009, time limits for the filing of the answering and replying affidavits were set, and the issue of costs was reserved. This arrangement was made possible, because Transnet agreed to a further extension of the date for the closure of the tender. Adv Hellens SC submitted that the appearance in the urgent court on 13 February 2009 would not have been necessary had Transnet before that date agreed to a further extension of the date for the closure of the second tender. I agree with this submission and consider it appropriate to order Transnet to pay the costs of 13 February 2009.

[51] In the result the following order is made:

1. The application is dismissed.
2. The applicant is ordered to pay the costs of Sibanye Trade & Services (Pty) Ltd and of Electro-Motive Diesel and Locomotive Company (Pty) Ltd for the appearance before this court on 13 February 2009, which costs shall include the costs attendant upon the engagement of the services of senior counsel.

3. Sibanye Trade & Services (Pty) Ltd and Electro-Motive Diesel and Locomotive Company (Pty) Ltd are ordered to pay to the applicant the costs of this application jointly and severally, which costs shall include the costs attendant upon the engagement of the services of two counsel, one of whom a senior counsel, except for the costs referred to in paragraph 2 of this order.
4. Sibanye Trade & Services (Pty) Ltd, Electro-Motive Diesel and Locomotive Company (Pty) Ltd, and the first respondent are hereby given leave to approach this court, upon notice given to all other parties within fifteen days of the date of this order, to recall and to vary the costs orders made in terms of paragraphs 2 and 3 of this order.

P.A. MEYER
JUDGE OF THE HIGH COURT

11 March 2009