

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO.:2024-116238

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

Date: 30 October 2024

E van der Schyff

In the matter between:

PUTCO (PTY) LTD

Applicant

and

HEAD OF DEPARTMENT OF THE GAUTENG
DEPARTMENT OF ROADS AND TRANSPORT

First Respondent

MEMBER OF THE EXECUTIVE COUNCIL OF
GAUTENG FOR ROADS AND TRANSPORT

Second Respondent

MEMBER OF THE EXECUTIVE COUNCIL OF
GAUTENG FOR FINANCE

Third Respondent

MINISTER OF TRANSPORT

Fourth Respondent

JUDGMENT

Van der Schyff J ,

Introduction

- [1] The applicant (PUTCO) approached the urgent court for interim relief, preserving the *status quo* pending the resolution of disputes between the parties that have been referred to arbitration. The application is opposed by the first and second respondents, collectively referred to as DRT.

Context

- [2] The context within which this application is to be considered is succinctly set out in PUTCO's heads of argument. PUTCO provides essential transport services primarily to people living in low-income areas in Gauteng and Mpumalanga and has done so for decades. Approximately 130,000 passengers are transported daily on PUTCO's buses. Commuters traveling to and from work, students, and learners rely on this subsidised public transport mode.
- [3] The transport provided by PUTCO is subsidised by the Gauteng Provincial Department of Roads and Transport (the Department) pursuant to various contracts. As a result, PUTCO's passengers pay a reduced price for their transport.
- [4] Three contracts were concluded between PUTCO and the Department in June 2023. PUTCO avers that the Department subsequently attempted to unilaterally amend the contracts. Several disputes between the parties have since been referred to arbitration, which arbitration is currently pending before the Arbitration Foundation of Southern Africa (AFSA).

Urgency

- [5] PUTCO avers that while the Department previously gave notice of unilateral variations to the contracts, it abandoned the attempts and continued to pay PUTCO every month in terms of the June 2023 contracts. The Department's attempt to amend or vary the June 2023 contracts caused disputes to be declared by PUTCO and underlie the pending arbitration. On 1 October 2024, however, the Department again purported unilaterally to vary or amend the contracts and to withhold payment on that basis.

- [6] PUTCO avers that it will not be able to achieve substantial redress at a hearing in due course because the reductions will cause drastic and irreparable consequences for PUTCO, its employees, and the passengers frequenting its buses. PUTCO explains that the Department's proposed reductions will result in it being short-paid by more than R20.2 million every month. It will have to reduce its fleet by 212 buses and be forced to retrench approximately 400 employees. Approximately 28 300 passengers daily will be left without transport and be forced to rely on taxi transport.

- [7] DRT avers that the 'degree of urgency' is questionable. DRT submits that the relief PUTCO seeks will not become irrelevant if not immediately granted. Because DRT is mitigating a situation that might negatively affect both parties, a reduction in kilometers not only assists the respondents in their compliance with the PFMA but also has the potential to assist the applicant in mitigating unnecessary expenditures with their business.

- [8] DRT claims that PUTCO ought to have commenced with urgent proceedings after receiving a letter dated 22 April 2024; alternatively, a letter dated 26 August 2024, wherein it was informed of DRT's budgetary constraints and its implications for the contracts concluded between the parties. As a result, the urgency, if it exists, is self-created.

- [9] DRT defines the category of urgency involved as commercial urgency and submits that although there may be potential financial prejudice, there must be a marked degree of urgency or at least special circumstances to justify 'commercial urgency.'
- [10] With regard to the factual context of this application, specifically the impact of an amendment of the *status quo* on scores of passengers, and finding that the trigger event underpinning this application is the latest communication sent to PUTCO dated 1 October 2024, I find that the application meets the requirements to be dealt with on an urgent basis.

Opposed applications for interim relief¹

- [11] It is trite that in an application for interim relief, an applicant is not required to establish its right to relief on a balance of probabilities. It is sufficient to show that such a right is *prima facie* established, though open to some doubt.
- [12] In the *locus classicus*, *Webster v Mitchell*,² the court explained what this means:

'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 a 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 could not succeed in obtaining 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 protected in the meanwhile...' [My emphasis]

¹ BR Southwood *Essential Judicial Reasoning* 2015 LexisNexis 32.

² *Webster v Mitchell* 1948 (1) SA 1186 (W) 1189-1190.

- [13] PUTCO has a contractual right to be paid on the terms agreed upon in the June 2023 contracts, including at the rate per kilometer and to operate the number of scheduled kilometers agreed upon. The highwater mark of DRT's opposition is twofold – on the one hand, DRT claims that it is entitled, in terms of clause 10.1.5 of the agreements to amend or vary the contracts, on the other hand it claims that continued implementation of the contracts and their terms would lead to unauthorised and irregular expenditure.
- [14] The interpretation of clause 10.1.5 and the question of whether the Department was required to, and did, engage in 'meaningful' consultation with PUTCO and the passengers using its services on the affected routes, are some of the issues referred to arbitration. PUTCO doesn't need to establish a clear right in these proceedings. The fact that their right may be open to some doubt as it pivots on an interpretation of clause 10.1.5 of the contracts is not fatal to their application for interim relief. Specifically, since the question of whether DRT complied with the consultation requirement looms large.
- [15] DRT avers that the conclusion of the negotiated contracts without the allocation of the relevant budget was inconsistent with section 38 of the Public Finance Management Act 1 of 1999 and, therefore, *prima facie*, unlawful. For the current application, it suffices to state that no self-review proceedings have been instituted to date. DRT's submission that PUTCO's challenge to the amendments or variations may eventually lead to a situation where DRT would not be able to perform at all, or where the contracts are set aside in totality, is not a legal bar to PUTCO relying on the terms of the existing negotiated contracts.
- [16] For purposes of considering an application for interim relief, PUTCO *prima facie* established its right in terms of the contracts.
- [17] The well-grounded apprehension of irreparable harm if the interim relief is not granted but PUTCO ultimately succeeds in the arbitration proceedings is evident. A unique facet of this application is the impact and irreparable harm that the curtailment of PUTCO's services, even temporarily, will have on the commuters

utilising its services, and the number of PUTCO employees who risk losing their employment.

- [18] In applications for interim relief, the balance of convenience is the consideration of whether the harm the applicant will suffer if the interim relief is refused is greater than the harm the respondent will suffer if the interim relief is granted. The balance of convenience enquiry must be applied cognisant of the normative scheme and democratic principles that underpin the Constitution.³ The Constitutional Court explained in *National Treasury* that:

‘... when a court weighs up where the balance of convenience rests, it may not fail to consider the probable impact of the restraining order on the constitutional and statutory powers and duties of the state functionary or organ of state against which the interim order is sought.

The balance of convenience must now carefully probe whether and to which extent the restraining order will probably intrude into the exclusive terrain of another branch of government. The enquiry must, alongside other relevant harm, have regard to what may be called separation of powers harm. A court must keep in mind that a temporary restraint against the exercise of statutory power well ahead of the final adjudication of a claimant’s case may be granted only in the clearest of cases and after careful consideration of separation of powers harm.’

- [19] This matter does not concern a restraint against the exercise of statutory power. It concerns the interpretation of a negotiated contract and the delineation of liability in terms of the contracts. The issue of separation of powers does not arise, as the court is not stepping into the shoes of another branch of government. As stated, the disputes, among others, revolve around the correct interpretation of clause 10.1.5 of

³ *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC) at paras [46]-[47].

the June 2023 agreements and whether the Department met the consultation requirement provided for in the clause.

- [20] The Department claims that it cannot wait for the finalisation of the arbitration proceedings before implementing the proposed amendments or variation, as it operates within a limited budget. The Department's solution lies in expediting the arbitration proceedings. If the harm that the temporary suspension of PUTCO's services holds for the commuters on the affected routes, the impact it will have on the job security of many employees, and might have on the viability of the company, particularly if the arbitration is dragged out indefinitely, is considered, the balance of convenience favours PUTCO.
- [21] There is no other satisfactory remedy than interim relief preserving the *status quo* pending the resolution of disputes between the parties that have been referred to arbitration. DRT contends that PUTCO should have approached the arbitrator for interim relief. In the factual context and having regard thereto that the agreement explicitly allows a party to approach a court for urgent interim relief and that the first arbitration session has not yet commenced, PUTCO cannot be criticised for approaching the court for interim relief.
- [22] The interim relief stands to be granted.

Miscellaneous

- [23] Counsel for DRT, among others, referred the court to the Constitutional Court judgment of *National Education Health and Allied Workers Union v Minister of Public Service and Administration and Others*; *South African Democratic Teachers Union and Others v Department of Public Service and Administration and Others*; *Public Servants Association and Others v Minister of Public Service and Administration and Others*; *National Union of Public Service and Allied Workers Union v Minister of*

Public Service and Administration and Others,⁴ in support of the argument that compliance with the law is mandatory when organs of state conclude contracts.

[24] It goes without saying that the organs of state may exercise no power and perform no function beyond what is conferred upon them by law.⁵ This does not, however, render a negotiated contract *pro non scripto* and without legal effect once it is averred that an official acted outside of the scope of statutory powers in concluding a contract. The contract remains enforceable until set aside by a competent court, and this court was not seized with an application to set aside the contract or pronounce on its validity. On this aspect alone, the application before me is thus distinguishable from the matter dealt with by the Constitutional Court in *National Education Health and Allied Workers Union*.

[25] DRT took issue with the commissioning of the founding affidavit because the date on which the affidavit was commissioned was not inserted. Any issues that could have arisen in this regard have been addressed because the applicant subsequently filed a founding affidavit that was commissioned on 25 October 2024 and an additional affidavit by the erstwhile commissioner of oaths confirming that she commissioned the applicant's founding affidavit on 11 October 2024 and inadvertently omitted to include the date and place at which she commissioned the affidavit.

Costs

[26] PUTCO's counsel submitted that a case is made out for DRT to pay the costs of this application on a punitive scale. It is trite that costs are at the discretion of the presiding judge, and that costs generally follow success. Having considered the applicant's submissions, I am of the view that it is just to order the first and second respondent, jointly and severally, to pay the costs of the application, which costs include the costs of two counsel, on Scale C.

⁴ [2022] ZACC 6; 5 BLLR 407 (CC) (hereafter *National Education Health and Allied Workers Union*).

⁵ *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) at paras [58]-[59].

ORDER

In the result, the following order is granted:

1. The rules, time limits, forms, and procedures provided for in the Uniform Rules of Court are dispensed with in terms of Rule 6(12), to the extent necessary, and the application is heard as a matter of urgency;
2. Pending the final determination of the arbitration proceedings between the parties, which are currently before the Arbitration Foundation of Southern Africa, the first and second respondents are:
 - 2.1. Interdicted from breaching, varying, or amending the June 2023 contracts by taking any steps to:
 - 2.1.1. reduce the number of negotiated scheduled kilometers operated by the applicant or
 - 2.1.2. reduce or 'temporarily reduce' the services operated by the applicant, *inter alia*, as proposed by the Gauteng Department of Roads and Transport in its presentation delivered at the meeting with the applicant on 9 September 2024, or
 - 2.1.3. otherwise, amend or vary the June 2023 contracts to reduce the quantum of the monthly subsidy payable to the applicant.
 - 2.2. Directed to comply with the Gauteng Department of Roads and Transport's obligations under the June 2023 contracts.
3. The first and second respondents are jointly and severally, the one to pay the other to be absolved, liable for the costs of the application, which include the costs of two counsel, on Scale C.


 E van der Schyff
 Judge of the High Court

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines. It will be emailed to the parties/their legal representatives as a courtesy gesture.

For the applicant:	Adv. A Franklin SC
With:	Adv. S. Scott
Instructed by:	
For the first and second respondents:	Adv. M. Mphaga SC
With:	Adv. E.B. Yawa
And:	Adv. P. Jara
Date of the hearing:	29 October 2024
Date of judgment:	30 October 2024