

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case No: **2024/058854**

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED, [REDACTED]

Date: 6 August 2024

Signature: [REDACTED]

In the matter between:

MAANO CHEMICALS (PTY) LTD

Applicant

and

RAND WATER SOC LTD

Respondent

JUDGMENT

GOEDHART AJ:

Introduction

[1] This is an application in two parts to interdict the award of a tender ("Part A") pending its review in due course ("Part B").

- [2] The respondent, Rand Water SOC Ltd (Rand Water), is an organ of State. Exercising statutory powers under the Preferential Procurement Policy Framework Act ("PPPFA"), it seeks to procure by public tender an unspecified volume of chlorine and sodium hypochlorite for the disinfection of its potable water supply across four provinces.
- [3] The applicant, Maano Chemicals (Pty) Ltd, is Rand Water's current supplier of these disinfection chemicals. It is one of 16 bidders in the ongoing tender process, which appears from the papers to be at the near-close of the evaluation stage.
- [4] The application served before me in the urgent court on 18 June 2024. Having heard the parties, I reserved judgment in the matter.
- [5] The volume of the application was not appropriately calibrated to the realities of the urgent court. The case bundle in this matter amounted to over 530 pages. The founding affidavit and annexures alone reached 300 pages, including an annexure inadvertently omitted and then introduced by supplementary affidavit.
- [6] In this judgment, I deal first with the point of non-joinder taken by the respondent. I then turn to the urgency of the application; and finally to the constitutionally-mandated legal requirements for granting an interim interdict against the exercise of a statutory power by an organ of state.

NON-JOINDER OF OTHER BIDDERS

[7] The applicant makes out its case on joinder in its founding papers, which it restates in reply.¹ Its deponent states that the number and identity of the other responsive bidders is unknown at present and that due notice will be provided to these parties when the identity of the responsive bidders is disclosed as part of the record dispatched under Rule 53 of the Uniform Rules of Court.

[8] The respondent takes a single preliminary point: the non-joinder of the other 15 bidders in the tender process.

[9] The respondent's deponent states as follows:

*"I am advised that it is imperative that the other bidders be joined [in the] process to prevent other bidders from approaching court on similar relief as the applicant when the relief sought would be res judicata or moot."*²

[10] This same point is amplified later in the answering affidavit, where the deponent avers that the other 15 bidders who have submitted bids have a direct and

¹ Founding Affidavit paragraphs 18, 23-24; Replying Affidavit paragraph 28.

² Answering Affidavit paragraph 44.

substantial interest in these proceedings because “*the interdict will affect other bidders as well*”.³

[11] Thus, the applicant has not joined any bidders to Part A of this application and intends to join all responsive bidders in due course, prior to the determination of Part B. The respondent’s position is that all bidders must be joined of necessity, failing which the application is Part A is defective for non-joinder.

[12] The relevant facts established on oath are that the respondent’s Bid Evaluation Committee (BEC) first tests each bid for responsiveness — that is “*compliance with formal requirements*” (i.e. the “responsive bids”) and then scoring for functionality. This process generates a shortlist of bidders, which is followed by testing of chemical samples and due diligence at the premises of shortlisted bidders. The BEC then passes its recommendation to award the tender to a successful bidder to the Bid Adjudication Committee (BAC) for consideration and adjudication, and then the BAC makes a recommendation to be made to the Group Chief Executive, with whom the final decision rests.⁴ On the respondent’s version, the tender process is at the near-close of the evaluation

³ Answering Affidavit paragraphs 42-46.

⁴ Answering Affidavit paragraphs 31-33.

stage, and only shortlisted bids are now under consideration. The report of the chair of the BEC to the BAC is all that remains of the evaluation stage.⁵

[13] I am cognisant that the respondent's bid evaluation and adjudication process allows for the BAC to remit the matter to the BEC, and thus the number or identity of shortlisted bidders might conceivably change as the tender process advances to completion.

[14] The applicant's deponent presses the long and uncertain duration of the evaluation process, and repeated extension of the bid validity period,⁶ but cannot gainsay the accuracy of this characterisation of the stages of the tender process or the fact that the shortlisted bids are still under evaluation.⁷

[15] Assessed holistically, this factual foundation cannot satisfy the test for non-joinder, as I set out below.

[16] Counsel for the respondent did not direct me to any binding or persuasive authority for the specific proposition that joinder of all bidders submitting bids (or all responsive bidders, or all shortlisted bidders) in an ongoing tender process is necessary as a matter of law. The respondent's heads of argument

⁵ Answering Affidavit paragraphs 61-64.

⁶ Founding Affidavit paragraph 26.

⁷ Replying Affidavit paragraph 23.2.

traverse the issue of non-joinder, but are silent on the application of the case-law to the specific facts of this matter.

[17] The respondent's list of authorities instead refers to eight judgments, predominantly from the Supreme Court of Appeal and Constitutional Court, arising in a range of factual contexts very different from the present matter — but from which, helpfully, the general principles of the law on joinder may be distilled.

[18] Applying the well-established test for non-joinder⁸ the crisp preliminary point before me in adjudicating Part A of this application is whether any shortlisted bidder in the ongoing tender process has a direct and substantial interest in the interdicting of the award of that tender pending its review; and whether granting the interdict may prejudice any such bidder.

[19] Two recent judgments in this Division traverse the specific issue of joinder of other bidders in an ongoing tender process in an application for an interim interdict.

[20] In **Bothongo Agriculture GP (Pty) Ltd v Johannesburg Water SOC**,⁹ Gilbert AJ considered that the non-joinder of four shortlisted bids under adjudication

⁸ **Absa Bank Ltd. v Naude NO and Others** 2016 (6) SA 540 (SCA), [2015] ZASCA 97 (SCA), paragraph 10.

⁹ [2023] ZAGPJHC 246 (20 March 2023).

was not necessarily fatal to the application, finding that it was “*not beyond doubt that the other bidders would suffer legally-cognisable prejudice*”. In that matter, the applicant sought joinder *mero motu* from the court, without real opposition from the respondent. Gilbert AJ stated, *obiter dicta*:

“The Re-advertised tender has not reached an advanced stage, and so should the interim interdict be granted, the effect thereof on the bidders for that tender is limited. The respondent is not forthcoming in its answering affidavit as to the stage that has been reached in the re-advertised tender, saying no more than there are four short-listed bidders that had complied with the bidding requirements and that the adjudication process is underway. During argument, upon enquiry by the court, the respondent through its counsel, after taking instructions, for the first time disclosed that the respondent would not complete the adjudication process and make an award by 19 June 2022. As there has been no adjudication, the prejudice that the shortlisted bidders will suffer if the interim interdict is granted and the adjudication cannot be completed is outweighed by the prejudice that the applicant will suffer if the re-advertised tender goes ahead and, after adjudication, is awarded to the successful bidder. It might even be that the shortlisted bidders will suffer no legally cognisable prejudice if the interim relief is granted as there has not been an adjudication of the bids, although I do not make any finding on this.”¹⁰

¹⁰ Ibid paragraph 73.8.

[21] In **Fidelity Security Services (Pty) Ltd v Airports Company South Africa SOC Ltd and Others**,¹¹ a re-enrolled urgent interim interdict application served before Van Nieuwenhuizen AJ. There was some uncertainty whether the initial application had been struck from the urgent roll for non-joinder of the other bidders or rather that the applicant had been ordered to join the other bidders. Its attorneys notified a list of potential bidders of the proceedings, none of whom expressed the intention of joining the proceedings. Van Nieuwenhuizen AJ found:

*“Given that only interim relief is sought pending a return day there can hardly be any harm to the notified parties if interim relief is granted. In my view a rule nisi would take adequate care of any non-joinder problem. If it later turns out that Mahalelo J indeed granted an order for the joinder of all bidders, same can be complied with in due course.”*¹²

[22] This practical approach resonates with the *dictum* of the Constitutional Court in **Matjhabeng Local Municipality v Eskom Holdings Limited and Others**¹³, where that Court held, in a wholly different factual context:

“[t]here may well be a situation where joinder is unnecessary, for example where a rule nisi is issued, calling upon those concerned to appear and defend a charge

¹¹ [2024] ZAGPJHC 561 (30 May 2024).

¹² Ibid paragraph 31.

¹³ 2018 (1) AS 1 CC, [2017] ZACC 35, 2017 (11) BCLR 1408 (CC).

or indictment against them. Undeniably, in appropriate circumstances, a rule nisi may be adequate even when there is a non-joinder in contempt of court proceedings.”¹⁴

[23] I find that there is no joinder of the shortlisted bidders necessary in Part A of these proceedings. The applicant cannot be faulted for its ignorance of the identity of the shortlisted bidders, and thus, its inability to formally cite them at this early stage of the proceedings. The applicant has demonstrated a *bona fide* intention to notify and join all other responsive bidders as soon as this information is disclosed in the proper way under Rule 53.

[24] Although it was open to the applicant to do more — for instance, by inviting the Court *mero motu* to join the shortlisted bidders to this application; by crafting suitable draft order incorporating a *rule nisi* for the Court to consider; or by demonstrating that its attorneys had previously demanded a list of bidders from the respondent — there is no cognisable legal basis for a party in the position of the applicant to be required to have done more to avert a finding of non-joinder.

[25] This finding rests on the specific facts of this application. The applicant has crafted its case for an interim interdict, in substantial part, on its status as the respondent’s current supplier, and an alleged contractual right of sole supply of

¹⁴ Ibid paragraph 94.

disinfectant chemicals to the respondent at a number of the sites within the scope of the tender.¹⁵ By its nature, this contractual right is unique to the applicant and cannot affect any other bidder.

[26] The applicant also relies on broader constitutional rights under section 217 of the Constitution. The protection of these rights may well affect other bidders, but I cannot conclude on the facts before me that any other bidder necessarily has a direct and substantial interest in the subject-matter of Part A of this application. As I set out later in this judgment, this is because the substratum of the alleged imminent harm to the applicant's section 217 rights appears, *prima facie*, to flow from the idiosyncratic manner in which the applicant has interpreted and completed the bid documentation, not to an objective deficiency in the tender process.

THE RELATIVE URGENCY OF THE APPLICATION

[27] The test for urgency is clear on the face of Rule 6(12)(b). It stands on two legs. First, the applicant is required to "*set forth explicitly the circumstances which...render the matter urgent*". Second, the applicant must provide the reasons why it claims that it "*could not be afforded substantial redress at a hearing in due course.*"

¹⁵ Founding Affidavit paragraph 43.

[28] Rule 6(12)(b) is not applied in the abstract. It is inevitable in urgent applications to traverse the merits at least to some extent because the inquiry on urgency is contextually-bound and fact-specific.¹⁶

[29] In this matter, the final bout of pre-litigation correspondence between the parties was initiated on 12 April 2024 and concluded on 22 May 2024. The notice of motion was filed on 28 May 2024. The respondent's deponent sets out in detail averments that the application is not urgent, or that the urgency was self-created.¹⁷

[30] The applicant's deponent denies that the rights on which it relies for relief are commercial in nature,¹⁸ but in truth, its case on urgency most closely resembles one of commercial urgency.

[31] It is also true that the applicant's case for urgency is not a model of clarity or completeness:

31.1. The averments on urgency in the founding papers are terse, and the urgency trigger is described as the failure of the respondent to give certain undertakings. The papers show that the applicant's attorneys, in

¹⁶ See **Sithole and Another v Media24 (Pty) Ltd and Others** [2023] ZAGPJHC 884 (8 August 2023), paragraph 43.

¹⁷ Answering Affidavit paragraphs 27-40.

¹⁸ Founding Affidavit paragraphs 49-51.

their letter of 12 April 2024, requested the respondent to issue a tender addendum and to confirm in writing that estimated volumes would be used in the evaluation of the bids.¹⁹ The founding affidavit then confuses matters by suggesting that the urgency of the matter subsists in the applicant's belief that a new contract may be concluded with a new supplier, which "*may occur any day*"²⁰ and which would then involve a lengthy process to set aside.

31.2. In reply, the emphasis of the applicant's case for urgency shifts. The applicant's deponent accepts that the applicant would have reconsidered its position on urgency if the respondent had been willing to specify the date by which the tender would be awarded.²¹ The implication is that if the respondent committed to a tender award date, this would have obviated the need for an immediate urgent application because the timing of the application could have been calibrated to the timing of the award of the tender.

31.3. In its heads of argument, the emphasis shifts once again, to the "*tainting*" of the tender process — that is, the legal implications under the PPPFA of the respondent's decision to inquire whether the

¹⁹ Founding Affidavit paragraphs 28-33 read with Annexure "FA3".

²⁰ Founding Affidavit paragraph 59.

²¹ Replying Affidavit paragraph 23.3.

applicant's bid prices would change after five extensions to the bid validity period.

[32] I am satisfied that, despite the concerns set out above, the applicant ought to succeed on the first leg of the urgency test.

[33] This is because, on a conspectus of the papers as a whole, the applicant has placed sufficient facts before the court to show that:

33.1. As the current supplier of disinfection chemicals at a substantial number of the respondent's sites that are also within the scope of the tender,²² the applicant has a contractual obligation to supply these chemicals to the respondent.

33.2. The applicant's obligation to continue to supply disinfection chemicals to the respondent has been extended on a month-to-month basis as from February 2024, until a new supplier (which may be the applicant or other party) is appointed at the conclusion of the ongoing tender process.²³

33.3. As an incumbent supplier of disinfection chemicals at certain sites, the inference to be drawn is that the applicant is peculiarly aware of the

²² Founding Affidavit paragraph 43.

²³ Replying Affidavit paragraph 25.1, read with Annexure "FA10", clause 2.1.

volume requirements at those sites and has particular concerns about the absence of required volumes in the request for proposals and its own reliance of assumptions about estimated volumes, crystallising into what its attorneys describe as the “*tonnages problem*” and the open door to a “*fraudulent tenderer*”.²⁴

33.4. The applicant submitted its bid before the closing date on 28 November 2022. The bid validity period for the tender, which was initially set at 180 days, has since been extended five times and is close to reaching two years; the bids remain under evaluation; and the respondent has not committed to conclude the evaluation phase or the adjudication phase, or to reach a final decision within a specific time period, within a reasonable period, or at all. Had it done so, the applicant avers, there would have been no urgent application.

[34] Thus, although the applicant does not say so in so many words, the inference is that it fears what the Supreme Court of Appeal characterises, in a different factual context, as an “*open-ended tender process*” in which certainty is no longer the “*touchstone*”.²⁵

²⁴ Annexure FA3, paragraphs 5-6.

²⁵ **Ekurhuleni Metro Municipality v Takubiza Trading & Projects CC and Others** 2023 (1) SA 44 (SCA), [2022] ZASCA 82, paragraph 15, citing **Tahilram v Trustees, Lukhamber Trust and Another** 2022 (2) SA 436 (SCA), [2021] ZASCA 173, paragraph 24.

[35] Comparable facts involving an incumbent supplier of services to the State, and giving rise to commercial urgency were also approved by the High Court of Namibia in **AFS Group Namibia (Pty) Ltd v Chairperson of the Tender Board of Namibia and Others**.²⁶

[36] On this basis, I find that the first leg of the urgency test is satisfied.

[37] Turning to the second leg of the urgency test, the applicant's deponent characterises its case for absence of substantial redress in due course as a damages claim, "*unlikely to succeed*", for "*the loss of the business it would have done and the profits it would have earned if the interim relief [under Part A] was granted.*"²⁷ The respondent avers that this statement is insufficient to meet the second leg of the test for urgency.²⁸

[38] In **Esorfranki Pipelines (Pty) Ltd v Mopani District Municipality**,²⁹ the Constitutional Court clarified the specific legal framework available for redress to unsuccessful bidders in a tender process that falls short of the requirements of section 217 of the Constitution. Following this judgment, it is clear that if the applicant were to be unsuccessful in a tender process tainted by intentional misconduct by the respondent as an organ of State, the applicant would be

²⁶ [2011] NAHC 184 (1 July 2011).

²⁷ Founding Affidavit paragraphs 53-54.

²⁸ Answering Affidavit paragraph 29.

²⁹ 2023 (2) SA 31 (CC), [2022] ZACC 41, 2023 (2) BCLR 149 (CC).

entitled to claim damages for economic loss under section 8(1)(c)(ii)(bb) of the Promotion of Administrative Justice Act. No such claim would be available under PAJA in what the Court terms the “*negligent but honest bungling of a tender*”³⁰ by an organ of state in the position of the respondent. The Court also found that the principle of subsidiarity forecloses a parallel claim at common law.

[39] There is no basis at all in the papers before me to suggest any intentional wrongdoing on the part of the respondent. Quite the contrary. On the affidavits, all the applicant might hope to demonstrate at a hearing in due course is “*negligent but honest bungling*”, if that. Even in the applicant’s attorneys’ own correspondence, the “*exclusion of volumes in calculating the bid price*” is described as a “*potential blunder*”.³¹

[40] Absent intentional wrongdoing, the implication is that, following the judgment in **Esorfranki Pipelines**, the applicant would be non-suited in a claim for damages for economic loss in due course, which is the only cognisable head of damages available to the applicant in this matter.

[41] On this basis, the applicant must succeed on the second leg of the urgency test because it has no prospect of substantial relief at a hearing in due course.

³⁰ Ibid para 40.

³¹ “Annexure 1” to Annexure “FA3”.

[42] Accordingly, I find that this matter merits the attention of the urgent court and ought to be enrolled as such under Rule 6(12). I turn to the merits of the relief sought in Part A.

THE LEGAL REQUIREMENTS FOR THE RELIEF SOUGHT

[43] As the applicant correctly submits, the sole fact that the tender process is ongoing does not, in itself, rule out interim interdictory relief. Counsel for the applicant referred me to three cases in this Division, the Eastern Cape Division and Western Cape Division which demonstrate the competence of this relief and, as I point out above, there are other persuasive authorities as well.

[44] What is required in these cases is a fact-specific assessment of the well-established requirements in ***Setlogelo v Setlogelo***;³² refined in ***Webster v Mitchell***;³³ and recalibrated to the standards of the Constitution in ***National Treasury and Others v Opposition to Urban Tolling Alliance and Others*** (“OUTA”).³⁴

³² 1914 AD 221.

³³ 1948 (1) SA 1186.

³⁴ 2012 (6) SA 223 (CC), [2012] ZACC 18, 2012 (11) BCLR 1148.

[45] Writing for the majority in **OUTA**, Moseneke DCJ held:

“Beyond the common law, separation of powers is an even more vital tenet of our constitutional democracy. This means that the Constitution requires courts to ensure that all branches of Government act within the law. However, courts in turn must refrain from entering the exclusive terrain of the Executive and the Legislative branches of Government unless the intrusion is mandated by the Constitution itself.

*It seems to me that it is unnecessary to fashion a new test for the grant of an interim interdict. The **Setlogelo** test, as adapted by case law, continues to be a handy and ready guide to the bench and practitioners alike in the grant of interdicts in busy Magistrates Courts and High Courts. However, now the test must be applied cognisant of the normative scheme and democratic principles that underpin our Constitution. This means that when a court considers whether to grant an interim interdict it must do so in a way that promotes the objects, spirit and purport of the Constitution.*

Two ready examples come to mind. If the right asserted in a claim for an interim interdict is sourced from the Constitution it would be redundant to enquire whether that right exists. Similarly, 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 enquiry must now carefully probe whether and to which extent the restraining order will probably intrude into the exclusive terrain of another branch of Government. The enquiry must, alongside other relevant harm, have proper regard to what may be called separation of powers harm. A court must keep in mind that a temporary restraint against the exercise of statutory power well ahead of the final adjudication of a claimant's case may be granted only in the clearest of cases and after a careful consideration of separation of powers harm. It is neither prudent nor necessary to define "clearest of cases". However, one important consideration would be whether the harm apprehended by the claimant amounts to a breach of one or more fundamental rights warranted by the Bill of Rights.”³⁵ [emphasis added]

[46] In **Economic Freedom Fighters v Gordhan and Others; Public Protector and Another v Gordhan and Others**³⁶ the Constitutional Court unanimously restates the law on interim interdicts after OUTA:

“We were cautioned by this Court in OUTA that, where Legislative or Executive power will be transgressed and thwarted by an interim interdict, an interim interdict should only be granted in the clearest of cases and after careful consideration of the possible harm to the separation of powers principle. Essentially, a court must carefully scrutinise whether granting an interdict will disrupt Executive or Legislative functions, thus implicating the separation and distribution of power as envisaged by law. In that instance, an interim interdict

³⁵ Ibid paragraphs 44-47.

³⁶ 2020 (6) SA 325 (CC), [2020] ZACC 10, 2020 (8) BCLR 916 (CC).

would only be granted in exceptional cases in which a strong case for that relief has been made out.” [emphasis added; footnotes omitted]³⁷

[47] Where, as in this case, interdictory relief is sought *pendente lite* in the anticipated review of a tender process, the principles in OUTA also confirm that this court must be especially careful not to delve too deeply into the merits of the review, as the decision of a future review court ought not to be anticipated.³⁸

[48] For its part, the respondent makes a full-throated complaint of “*separation of powers harm*” in terms of the OUTA judgment. For instance, its deponent characterises the impact of the relief sought as an attempt by the applicant to:

48.1. “dress itself with the powers vested on Rand Water, the powers to design the specifications of the bid documents and to evaluate the tender”;³⁹

48.2. “to procure advanced judicial supervision of executive powers and duties...”,⁴⁰ and

³⁷ Ibid paragraph 48.

³⁸ **OUTA** footnote 34 above, paragraph 31.

³⁹ Answering Affidavit paragraph 19.4.

⁴⁰ Answering Affidavit paragraph 20.

48.3. “to prohibit Rand Water from exercising its constitutional right in terms of section 217 of the Constitution to award this tender.”⁴¹

[49] Counsel for the respondent pressed the point that this is not one of the “*clearest of cases*” or “*exceptional cases*” that warrant judicial intrusion into the sphere of executive action.

[50] In response, counsel for the applicant refers to the recent decision of the Western Cape Division in ***H & I Civil & Building (Pty) Ltd and Another v City of Cape Town and Others*** (“H & I”) as being “*on all fours*” with the present matter.⁴² I cannot agree with this submission. In ***H & I***, the applicants complained of material changes to the B-BBEE scorecard during an ongoing tender process which, the applicants submitted, were inconsistent with prevailing legislation and thus *prima facie* unlawful. Cloete J characterised this as the “*crux of the main dispute*”.⁴³

[51] By contrast, the “*crux of the main dispute*” in the present matter appears to turn on an apprehended fear of infringement of two rights: first, a contractual right of the appellant to maintain its “*right to supply*” of disinfection chemicals at certain of the sites within the scope of the tender; and second, the applicant’s

⁴¹ Answering Affidavit paragraph 67.

⁴² [2024] ZAWCHC 15 (30 January 2024).

⁴³ Ibid paragraph 30.

constitutional right to participate in a fair, equitable, transparent, competitive and cost-effective procurement system, under section 217 of the Constitution.

[52] The applicant's position is that the manner in which the respondent inquired about the possible escalation of bid prices (the "*bid price inquiry problem*"), together with the "*tonnages problem*" mentioned earlier in this judgment make the tender *prima facie* irrational and non-compliant with section 217 of the Constitution.

[53] It remains opaque how the awarding of the tender — either to the applicant or to another bidder — could cause harm to the applicant's current contractual right to supply disinfection chemicals at certain of the respondent's sites. I do not think it could. The applicant has neither a right to nor legitimate expectation of renewal of its current supply contract once the tender is awarded.

[54] As for the "*bid price inquiry problem*" raised by the applicant, the respondent gives a substantial answer. Its deponent avers that bids will be evaluated at the price originally submitted, but that in the event of delay — which, on the papers, has been substantial — the respondent would consider awarding an escalation. The deponent adds that the purpose of the price inquiry was to make adequate provision for the tender in the respondent's budget process.⁴⁴ Without delving

⁴⁴ Answering Affidavit paragraphs 95.3 and 96.1.

more deeply than appropriate in these proceedings, there is no cognisable basis to dispute the respondent's version.

[55] The "*tonnages problem*" arises from the applicant's apprehension that the respondent has not undertaken to evaluate the bids on the basis of estimated volumes, but that it has ostensibly mischaracterised or misunderstood its own tender as "*rates-based*", in other words, based on rates or pricing per ton.⁴⁵ The applicant's deponent puts the problem this way: "*In order to be fair to all bidders, price per ton for product and price per ton for delivery must be linked to the estimated volume of the individual product and its packaging size to understand the true cost of tender price over the term of the contract.*"⁴⁶

[56] On the applicant's own version, which the respondent does not dispute, its bid included estimated volumes as underlying assumptions for its calculations, which the respondent accepts as valid calculations.⁴⁷ This fact, alone, suggests that the absence of requirement to specify volumes in the tender is not *prima facie* irrational, precisely because the applicant, as a prospective bidder, was able to respond to the bid and did not require clarification, passing up two opportunities to do so.⁴⁸ The applicant has not been denied the opportunity to

⁴⁵ Answering Affidavit paragraph 17.

⁴⁶ Replying Affidavit paragraph 17.3.

⁴⁷ Answering Affidavit paragraph 13.

⁴⁸ Answering Affidavit paragraph 7 and paragraph 62.

submit the estimated volumes which it considers intrinsic to its bid. All the respondent says, in effect, is that it does not intend to re-open the tender to require estimated volumes from all other bidders, nor will it give a written commitment to evaluate bids on the basis of estimated volumes. It considers that either action would vitiate the lawfulness of the tender. So too, it understands the concept of a rates-based tender in a particular way. It is exercising statutory powers in doing so.

[57] Seen in this light, the separation of powers harm occasioned by the relief sought in Part A comes clearly into view. An urgent court is not well-placed to intrude into the thinking process of the respondent in defining the nature of its ongoing tender process; its pricing requirements; its financial modelling; or its knowledge of the commercial marketplace for disinfection chemicals; and then, on the basis of its own understanding, to thwart the exercise of an executive power.

[58] For these reasons, I find that the applicant has failed to make out the “*clearest case*” for an interim interdict against the exercise of a statutory power by the respondent.

[59] The application is accordingly dismissed.

COSTS

[60] Under Rule 67A read with Rule 69(7) of the Uniform Rules of Court, the Court itself is now required to assess party-and-party costs on one of three scales — A, B or C. The assessment of the appropriate scale of costs does not depend on the seniority of counsel, but rather on the complexity of the matter and the value of the claim or the importance of the relief. Rule 67A is prospective in effect, so these scales apply only in respect of work performed by legal practitioners in the matter as from 12 April 2024. In this regard, the holding of Wilson J in **Mashavha v Enaex Africa (Pty) Ltd**⁴⁹ is apposite. Wilson J held that Scale A:

*“...is the appropriate scale on which to make an award unless the application of a higher scale has been justified by careful reference to clearly identified features of the case that mark it out as unusually complex, important or valuable. Run-of-the-mill cases, which must be the vast majority of cases in the High Court, should not attract an order on the B or C scales.”*⁵⁰

[61] The respondent, which has substantially succeeded in this matter, seeks costs “on an attorney and client scale on Scale C”. This approach conflates two distinct concepts. As a matter of law, Rule 67A does not apply to costs on the

⁴⁹ (2022/18404) [2024] ZAGPJHC 387 (22 April 2024).

⁵⁰ Ibid paragraph 16.

attorney and client scale; it applies only to “*fees and disbursements as between party-and-party*”.

[62] The respondent’s deponent avers, repeatedly, that this application is tantamount to an abuse of the process of the court and ought to attract an award of punitive costs on an attorney and client scale. I have found that the application was not ultimately well-founded, but it was at arguable on its merits and capably argued. I do not consider a punitive costs award to be justified in these circumstances.

[63] I find that the costs in this matter for work performed as from 12 April 2024 are appropriately assessed on Scale B. The matter is not without complexity, raises important issues and is valuable.

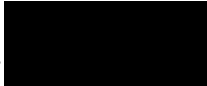
[64] Accordingly, I make the following order:

64.1. The application is enrolled as urgent in terms of Rule 6(12) of the Uniform Rules of Court.

64.2. The application is dismissed.

64.3. The applicant is directed to pay the respondent’s costs, such costs to include the costs of one senior and one junior counsel on the party and party scale to 11 April 2024, and with effect from 12 April 2024 on Scale

B in terms of Rule 67A of the Uniform Rules of Court, such costs to include the costs of senior and junior counsel.


GOEDHART AJ

ACTING JUDGE OF THE HIGH COURT

This judgment was prepared and authored by Acting Judge Goedhart. It is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on Case lines. The date for hand-down is deemed to be 6 August 2024.

DATE HEARD: 18 June 2024

DATE OF JUDGMENT: 6 August 2024

For the Applicant: Adv PF Louw SC and Adv JW Steyn
Instructed by Van de Vyver Inc

For the Respondent: Adv R Mogagabe SC and Adv L Nyangiwe
Instructed by Raborifi Inc

