



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

REPORTABLE

CASE NUMBER: 13787/2024

In the matter between

RAUBEX BUILDING (PTY) LTD

APPLICANT

and

BITOU MUNICIPALITY

FIRST RESPONDENT

CARNIVORE CAPITAL (PTY) LTD

SECOND RESPONDENT

JUDGMENT

Date of hearing: 5 November 2024

Date of judgment: 19 November 2024

BHOOPCHAND AJ:

1. Where lies the sense of a relay team demanding the gold medal for it crossed the finish line fastest but dropped the baton at the first change?

2. In October 2023, the First Respondent (“the Municipality”) issued a public tender for the development of housing units under the First Home Finance and Subsidy Assistance Programme, previously known as the Finance-linked Individual Subsidy Programme (FLISP). The tender was awarded to the Second Respondent (“Carnivore”) on 15 April 2024. The Applicant was an unsuccessful bidder and sought judicial review and ancillary relief relating to the decision of the Municipality. In Part A of the application, the Applicant prayed for an urgent interim interdict to prevent the Respondents from taking any further steps to implement the tender. The Applicant also sought costs against the Municipality and Carnivore, the latter if it opposed the application.
3. Francis J. heard Part A of this application on 2 July 2024. Due to a lack of urgency, the matter was struck from the roll with costs. Carnivore invited the Applicant to withdraw the application pursuant to comments allegedly made by the Honourable Justice on the prospects of success with the review, but the Applicant declined. Carnivore accordingly set Part A of the application down for hearing, and the Applicant indicated it intended to proceed with the application for an interim interdict.
4. On commencement of the hearing, Applicant’s Counsel intimated that he was instructed to seek a postponement of the matter. Counsel instructed by Carnivore confirmed that the matter was set down to proceed on Part A of the application, and so it did. The Court was assigned to hear Part A of the application and was not inclined to grant a postponement raised at a late stage of the proceedings. Applicant’s Counsel did not pursue the application for a postponement with any fervour. To the extent that the Court is required to do so, the application for a postponement was declined. Applicant’s Counsel then proceeded to present the application for an interim interdict.
5. Erf 4367, Plettenberg Bay, was rezoned in August 2020 to allow the construction of middle-income housing units accommodated in multiple-level flats on prime property. The recognised procedure for the award of a tender occurred. On 10

November 2023, prospective tenderers attended a compulsory bid clarification meeting. The closing date for submitting bids, i.e., 15 December, was extended to 31 January 2024 following the issue of two further addenda to the bid documents. The first addendum dealt with the amendment of the preference points awarded to tenderers. The bulk of the preference points were awarded for price and the remainder for compliance with specific goals detailed in the bid invitation. The specific goals in this tender included contracting with historically disadvantaged persons and promoting enterprises in the surrounding areas. The specific goals were measurable and quantifiable and would be monitored for adherence. As the value of the tender was above R50 million, the preference point system applicable to the tender changed from 80/20 to 90/10 for price and the achievement of specific goals, respectively. The first addendum also dealt with a change in the closing date.

6. The second addendum to the tender documents changed the closing date for bids to 31 January 2024 and amended the functionality category, which concerned the density factor and unit cost calculation. The minimum size of the units was reduced from 50m² to 35², and the capped value of sales of each unit below R1million, from 150 to 120. The points conferred as part of the functionality assessment relating to the number of units and the unit cost calculation changed. A functionality assessment concerns each bid and includes, among others, proof of similar undertakings, proof of the supplier's location, and the financial capability of the service provider.
7. The tender specifications, included in a four-page document, are pivotal to the determination of this application. The flagship sectional title development project was intended to serve the Gap housing income market. In 2023, the income limit applicable to the Gap category was between R3501 and R22 000 per month. The specifications included provisions for 1 to 3 bedrooms, communal open spaces, access control and access to the N2. The Bitou zoning scheme bylaw of 28 July 2023 and the Municipality conditions of rezoning approval of 17 June 2020 applied. The development was limited to 3 floors with a maximum height of 10.67 metres.

The Municipality explained that its application to depart from these limitations was unsuccessful, meaning that the designs provided by bidders had to comply with these limitations.

8. The Applicant costed each unit it proposed to build at R891 632.73, which was the lowest bid on price. However, the Applicant's design proposed four floors and exceeded the height restriction of 10.67 metres. The founding affidavit minimises this glaring blemish in the Applicant's bid. Five bidders, including the Applicant and Carnivore, tendered for the contract to develop the site. Each bid was subjected to a technical appraisal, a bid evaluation, and finally, an adjudication per the Municipality's Supply Chain Management policy. Marcel Minne, the Spatial Planner employed at the Municipality, provided an unauthorised explanatory affidavit addressing the tender process and the adjudication of the bids submitted.

9. The Applicant requested the Bid Adjudication Committee's report and the reasons for its unsuccessful bid on 18 April 2024 from the Municipality's Supply Chain Management practitioner, Mr Larry Damonds ("Damonds"). Damonds responded on 23 April 2024 whilst he was on leave. The brief response included references to the functionality, combined bid scores, and the Town Planning Approval and Bitou Zoning Scheme bylaw, which allowed for three floors and a height of 10.67 metres. The response states that the Applicant submitted a proposal for four floors that exceeded the height of 10.67 metres. The Applicant obtained a functionality score of 91.75, and Carnivore scored 93.75. Both bids were passed.¹ The combined score table reflected that the Applicant received 83.55 points for the financial offer, 5 for BBBEE, 2 for locality, and a total of 89.55. Carnivore received 89.94 points under the financial offer, 4 for BBBEE, 5 for locality, and a total score of 98.94. The Applicant was ranked third out of five bidders, and Carnivore, the successful bidder, was ranked number one.

¹ The pass/fail column in the table reflected "pass" for the Applicant and Carnivore

10. The Applicant requested functionality scoring for all tenderers, as it assumed that only two bidders passed the functionality criteria. A further response clarified that three bidders passed the functionality scoring. This information would have been apparent from the table of combined scores included in Damonds' email, which ranked the Applicant third out of five bidders. The Applicant contended that it had only realised “now that the Municipality calculated the preference points on a 90/10 ratio”. The reference to “now” is unclear, as it could refer to when the response was received from Damonds or during the drafting of the founding affidavit. The allegation is untenable as the first addendum to the tender addressed this aspect. The Applicant and Carnivore agreed that the preference point ratio did not impact the outcome. The Applicant contended that it would have scored the highest points.

11. Further email correspondence from the Applicant sought clarification on whether it was unsuccessful because its design did not comply with the bylaws or scored the highest points. The response from Damonds on 3 May 2024 repeated that he was on leave but tried to check emails to enable a response. Damonds answered that the Applicant was unsuccessful on both design and points, but ultimately, the highest-scoring bidder would have still been recommended for the tender.

12. On 9 May 2024, the Applicant appealed under section 62 of the Municipal Systems Act 32 of 2002. The Applicant referred to its price of R891 632.73 per unit compared to that of Carnivore, which was R959 875, and the email exchanges seeking reasons and clarification from Damonds. The notice of appeal does not refer to the Applicant's design. The Applicant used the formula $P_s = 90(1 - P_t - P_{min})$, where P_s referred to the points scored for the tender price, P_t , the tender under consideration, and P_{min} , the lowest acceptable tender, to motivate its contentions in the appeal notice. The scoring for Carnivore used the tender price of the second-ranked bidder, Wincrest Developments (Pty) Ltd (“Wincrest”), of R960 511.36 as P_{min} . The Applicant contended that the Municipality should have used its tender price as it was the lowest. Using its tender price, the Applicant calculated the scoring at 83.11 for Carnivore, 83.04 for Wincrest, and 90 for itself.

The Applicant submitted that its bid scored the highest and that the Municipality had erred in awarding the tender to Carnivore. The Applicant claimed that it should have received the tender and threatened interdictory action pending the outcome of the appeal if the tender was implemented.

13. The Municipality's official response under the hand of the Acting Municipal Manager occurred on 13 May 2024. The Acting Municipal Manager misconstrued the Applicant's notice of appeal as an enquiry as to why the Applicant did not succeed. He does not acknowledge an appeal but proceeds to clarify the issues raised by the Applicant on the processes followed and why the Applicant's bid was not accepted as the highest-scoring bidder. The Acting Municipal Manager emphasised that his correspondence sought to clarify the concerns raised in the Applicant's letter. He then proceeded to outline the process involved in evaluating the bids. He listed the five bidders and referred to the compliance and technical evaluation of the bids under the Supply Chain Management policy and tender rules.
14. The Acting Municipal Manager then dealt with the evaluation by the Bid Evaluation Committee. He referred to the bid specifications relating to the number of floors permissible and the height restriction. The response then repeated the table of combined tender evaluation points first provided by Damonds, which ranked the Applicant third among five bidders before repeating the floor and height restrictions. The latter was referred to as risk checks on responsive tenders. The response states that Wincrest and the Applicant submitted plans for four floors, which were **unacceptable** based on the advertised tender conditions. The Acting Municipal Manager then provided the final combined tender evaluation points. Carnivore was the only bidder reflected in the table. It scored 90 points for price, 9 points for preference and 99 points in total, earning the number one ranking. The response stated that Carnivore had been recommended as the highest-scoring responsive bidder.

15. The Applicant contends that the Municipality acknowledged that the preference points scores had indeed been incorrectly calculated and confirmed that the Applicant outscored both Carnivore and Wincrest. The applicant alleged that the Municipality then purported to withdraw the preference points that it had allocated. The Applicant downplays that its bid was rejected as the submitted design did not conform to the specification by characterising it as another trick up the Municipality's sleeve. The latter allegation was gratuitous as no evidence was forwarded to suggest improper conduct.
16. The Applicant reminded the Municipality that its letter was not addressed as an enquiry but as an appeal and asked that the appeal be noted and specified documents provided. Damonds responded by email on 3 June 2024. He pointed out that the appeal period commenced on 18 April 2024 and ended 21 days later on 9 May 2024. Damonds informed the Applicant that their letter of 16 May 2024 consisted of a further request which fell outside the appeal period and would not be considered. The Municipality was incorrect as the notice of appeal had conformed to the time allowed for the appeal. It was submitted on the last day of the appeal period.
17. On 4 June 2024, the Applicant urged the Municipality to review its decision or undertake to halt implementation of the development until the Applicant applied to review the Municipality's decision. Damonds correctly requested the Applicant to direct all further enquiries to the Municipal Manager, as it should have done from the beginning. The Municipality did not respond to the letter.

THE APPLICANT'S CASE

18. The Applicant contended that the award was fatally flawed and repeated the reasoning already canvassed thus far. The Applicant recited the legislation and principles underlying the award of tenders and the review thereof. It asserted that the tender awarded to Carnivore was unlawful and invalid and fell to be set aside.

The Applicant listed seven grounds of review prescribed in section 6 of the Promotion of Administrative Justice Act 34 of 2000 (“PAJA”) without elaboration. The review forms part B of the application.

THE RESPONDENT’S ANSWER

19. Carnivore contested the Applicant’s allegation that it lost the bid for one reason alone, namely that Carnivore outscored it. Carnivore rejected the contention as demonstrably false as the bid was decided on the bidders' responsiveness to the specifications. The cardinal flaw in the Applicant’s bid was that it failed to comply with the tender specifications. It was non-responsive and fell to be rejected before the functionality or scoring even arose. Although the Municipality repeatedly raised the Applicant’s non-responsiveness in the correspondence between itself and the Applicant, it is not mentioned in the founding affidavit. The Applicant’s failure to comply with the minimum requirements of the tender should be the end of this matter.
20. Carnivore contends that on the Applicant’s own submission, it has failed to exhaust the internal remedy available to it in terms of section 62 of the Local Government Municipal Systems Act 32 of 2000 (“the Systems Act”). The Applicant maintained that the Municipality’s response to the appeal did not constitute an appeal decision. The Applicant’s case was that the internal appeal had not been determined. Carnivore reasoned that the review application is premature as the Applicant has failed to exhaust the internal remedy. The Applicant should have sought an order compelling the Municipal Manager to dispose of its appeal. This Court should not circumvent the internal appeal process by granting an order in review proceedings. Carnivore asserted that the incomplete appeal process was also fatal to this application.
21. Carnivore then characterised the proposed review as incompetent for two reasons. The Applicant had failed to exhaust its internal remedies as required in

section 7(2) of the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”) as well as Section 51 of the Supply Chain Management Policy (“SCM”). Furthermore, the Applicant had merely identified the subsections of section 6 of PAJA that it relied upon without elaboration, meaning that its grounds for review were speculative. The Applicant expected Carnivore to trawl through its allegations to ascertain the case it proposed to present in the review application. Carnivore could not respond properly to the grounds of review the Applicant relied upon.

22. Carnivore contended that the Applicant’s bid was cheaper because it did not conform to height restrictions. It would have been able to produce more units for the project than any other compliant bidder. In doing so, it could bid to produce more units at a lower marginal cost. The Applicant could lower its per unit price and remain profitable.

APPLICANT’S REPLY

23. In its reply, the Applicant accuses Carnivore of opposing the application on false and contrived grounds to kick up as much dust as possible. It accuses Carnivore of making allegations that are misleading. The Applicant pursued this theme, alleging a patent lack of merit in Carnivore’s answer. Carnivore ignored the applicable test for interim applications and the applicability of uniform rule 53 for uncovering further information relating to the tender award. Carnivore allegedly and opportunistically traversed the merits of the Part B review application. The Applicant persisted with its contention that the sole reason for losing to Carnivore was calculating Carnivore’s score. The Applicant denied that its bid was non-responsive, asserting that non-compliance or unresponsiveness did not feature in the Municipality’s reasons for denying it the tender.
24. The Applicant made an about-turn on the appeal that it initially contended the Municipality had misconstrued. It alleged that the Municipality’s communicated position was dispositive of the appeal. The Applicant had exhausted its internal

remedy. Regrettably, the Applicant, supervised by legal representatives, brazenly changed its position in reply as if its initial contentions would have escaped Carnivore and the Court's attention. The Applicant changed its position because Carnivore noted the consequence of not exhausting an internal remedy. Carnivore had correctly contended that there were three possibilities relating to the issue of the Applicant's appeal. The mischaracterisation of the appeal notice, the appeal was out of time, and the Municipal Manager did decide the appeal. The Court observes that Carnivore is equally guilty of peddling untenable submissions. The Municipal Manager did misconstrue the Applicant's appeal letter. The appeal was submitted on time. Damonds email confirmed that the closing date was 9 May 2024.

INTERIM RELIEF

25. This application is primarily concerned with whether the Applicant should succeed with its application for an interim interdict pending the final determination of the review application. The Court declined to read two further bundles of documents obtained through the Rule 53 procedure. Those documents are best reserved for the review Court. This Court has restricted itself to the evidence in the affidavits that are properly before it.²
26. The requirements for the grant of an interim interdict are set out in *Setlogelo* and refined in *Webster*. The requirements to obtain an interim interdict that involves the State and organs of the State are more onerous, a pattern that began in 1955 and received further attention in 2012. The well-known test enunciated in *Setlogelo* remains with refinements on the requirements and more stringent rules for granting them. The test requires an applicant seeking an interim interdict to establish (a) a *prima facie* right even if it is open to some doubt; (b) a reasonable apprehension of irreparable and imminent harm to the right if an interdict is not granted; (c) that the balance of

² National Treasury and Others v Opposition to Urban Tolling Alliance Others 2012 (6) SA 223 (CC) at 31

convenience must favour the grant of the interdict and (d) there is no other remedy.³ A Court will not easily grant an interdict restraining the exercise of statutory powers unless there are allegations of *mala fides*, exceptional circumstances, and a strong case for granting the interdict.⁴ 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. If a right asserted is sourced from the Constitution, enquiring whether that right exists would be redundant. 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 the state against which the interim order is sought.

27. The balance of convenience enquiry must now carefully probe whether and to what extent the restraining order will probably intrude into the exclusive terrain of another branch of Government. The enquiry must, alongside other relevant harm, properly regard the doctrine of separation of powers. A court must remember that a temporary restraint against exercising statutory power well ahead of the final adjudication of a claimant's case may be granted only in the clearest of cases. It is neither prudent nor necessary to define "clearest of cases". However, one important consideration would be whether the harm the claimant apprehends amounts to a breach of one or more fundamental rights warranted by the Bill of Rights.⁵

PRIMA FACIE RIGHT

28. Apart from the right to review and set aside the Municipality's decision not to award it the tender, the Applicant had to demonstrate a *prima facie* right threatened by an impending or imminent irreparable harm. The Applicant

³ Setlogelo at 28

⁴ Gool v Minister of Justice and Another 1955 (2) SA 682 (CPD). See also Molteno Brothers and Others v South African Railways and Others 1936 AD 321 at 329 and 331

⁵ Outa at paras 41-47

contended that any further progression of the contract awarded to Carnivore had to be stopped.⁶

29. The Applicant failed to demonstrate any right other than the right to a review. Although the Applicant seeks an interim interdict, it does not address the requirements in an easily discernible and sequential manner. It does not address the *prima facie* right it has at all. Carnivore was more accommodating of the omission and the haphazard and cursory manner in which the Applicant dealt with the requirements for an interim interdict in the founding affidavit.
30. Carnivore generously identified the right to just administrative action as the exclusive right relied upon by the Applicant. Carnivore asserted that the Applicant possessed no right after submitting a non-responsive bid because it did not comply with the specifications. The Applicant had no right to contract with the Municipality, nor did it contend it had.

IRREPARABLE HARM

31. The Applicant provided an overview of the contract's design, the initial construction phase, and its costs if the work was allowed to proceed. Substantial costs estimated at approximately R13 million were attributed to moving heavy equipment onto the site. The Applicant contended that the Municipality and the taxpayer could save these if the works were halted. The Applicant relied on the dictum that the longer the contract proceeded, the harder it would be to set aside the unlawful award. In appropriate circumstances, a Court will decline, in the exercise of its discretion, to set aside an invalid administrative act.⁷ An invalid award of a tender is permitted to stand in circumstances where the prejudice to the Respondent, the public interest in the finality of administrative decisions and the exercise of administrative functions, the latter including considerations of

⁶ Outa at para 50

⁷ Oudekraal Estates (Pty) Ltd v City of Cape Town 2004 (6) SA 222 SCA para 36 at 246D

pragmatism and practicality, and a case that is affected by the efflux of time and intervening events.⁸ In relying on *Sapela*, the Applicant contended that it is an established stratagem for a successful bidder to insulate the award of a tender against it being set aside. Refusing interim relief would significantly reduce the possibility of obtaining any meaningful remedy on review. The Applicant could not conceive of any harm Carnivore would suffer if interim relief were granted.

32. Carnivore contended that the construction phase had not commenced, and the Applicant had not specified any harm it would suffer. The Applicant focussed on the significant cost element for the taxpayer should progress be abruptly halted. Carnivore asserted that this is not the kind of harm required to be shown to secure interdictory relief. The harm to the community will be far greater if affordable housing is not implemented without delay.

BALANCE OF CONVENIENCE

33. The balance of convenience requirement has become pivotal in granting restrictions on statutory power. A State must function without interfering in executing its duties and obligations. A court must be satisfied that the balance of convenience favours granting a temporary interdict. It must first weigh the harm to be endured by an applicant if interim relief is not granted as against the harm a respondent will bear if the interdict is granted. Thus, a court must carefully assess all relevant factors to decide where the balance of convenience rests. Both parties contended that the balance of convenience weighed in their favour.
34. Determining where the balance of convenience lies encompasses the limitations placed on a Court to honour the separation of powers.⁹ Courts should not usurp the constitutional or statutory allocation of specific powers to particular branches

⁸ Chairperson: Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others (511/2004) [2005] ZASCA 90; 2008 (2) SA 638 (SCA) ; [2005] 4 All SA 487 (SCA) (26 September 2005) (*Sapela*)

⁹ Outa at para 63,

of government in making decisions of their preference. That would frustrate the balance of power implied in the principle of separation of powers. The primary responsibility of a court is not to make decisions reserved for or within the domain of other branches of government, but endeavour to ensure that they exercise their authority within the bounds of the Constitution. This is pertinent where an impugned decision is policy-laden and polycentric.¹⁰ A polycentric decision involves multiple centres in decision-making. A policy-laden decision is grounded in political influence on conceptualising and implementing broad values. A litigant's invitation to restrain statutory power must be cautiously considered and only accepted when a proper, unassailable, and clear case is articulated. This does not mean the Municipality is impervious to judicial review because of the separation of powers. The exercise of all public power is subject to constitutional control.¹¹

35. After traversing the distinction between an infringed fundamental right and one that follows an administrative decision, the Applicant eventually asserted its right to fair administrative action. The remaining allegations made by the Applicant do not advance its case for restraining the Municipality. The latter response resonates with its tendency to make bald assertions without substance under these headings. Carnivore fared better in answering the Applicant's non-existent allegations to support this requirement for interdictory relief. Carnivore asserted that the Municipality had exercised its statutory power to promote access to housing. The Municipality is under a constitutional obligation to realise the right to access to adequate housing, and it has elected to meet the obligation by issuing the tender. The Applicant issued a non-responsive bid. It could never have fulfilled the obligations in the tender and assisted the State in realising its constitutional obligations. Carnivore submitted that it was lawfully appointed and is well placed to carry out the project. It cannot be that the balance of convenience would favour

¹⁰ Doctors for Life International v Speaker of the National Assembly and Others [2006] ZACC 11; 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC), International Trade Administration Commission v SCAW South Africa (Pty) Limited [2010] ZACC 6; 2012 (4) SA 618 (CC); 2010 (5) BCLR 457 (CC) (ITAC) at paras 47-55

¹¹ Outa at para 65

impeding the right of access to affordable housing so that the Applicant can litigate a wrongheaded and fatally flawed review application at its leisure and pleasure.

36. The Applicant repeated the dictum that the stronger the prospects of its case on review, the more the scales of convenience tilt in its favour. It then proceeded to baldly assert that it has strong prospects of success in setting aside the decision. Carnivore answered this assertion by rating the Applicant's prospects of success on review as negligible.
37. Finally, when assessing where the balance lies, the Court has to address whether it is constitutionally appropriate to grant the interdict and not whether an interim interdict against the Municipality is competent. The Court has to consider the impact of a restraint order on the best application, operation and dissemination of public resources.¹² The Applicant's contention that the preliminary and exorbitant construction costs would be a loss for the Municipality and the taxpayer is merely one side of the coin. On the flip side are the costs of delaying the project and the inflationary increases that would intervene and place the aspirations of first-time buyers qualifying to purchase housing units in the complex beyond their reach. The cost to the Municipality and taxpayer and the consequent implementation of a constitutional imperative are unquantifiable. The Applicant makes no credible accusations of *mala fides*, fraud or corruption apart from snide remarks about the Municipality having tricks up their sleeves.¹³

NO ALTERNATIVE REMEDY

38. The Applicant alleges that as the Municipality will not undertake to halt progress on the contract, it has no other satisfactory remedy than a temporary interdict. Carnivore exploited the Applicant's proposal to submit to truncated periods to

¹² Out at para 66, ITAC at para 69

¹³ Outa at para 71,

expedite the review process through case management by asserting that it inherently suggested a readily available and effective alternate remedy. Carnivore suggested that the Applicant pursue the review process without seeking interim relief.

EVALUATION

39. There is a point when a Court has to draw the line and say enough and no more. The Applicant submitted a non-responsive bid; not an unsuccessful one as it contends. No amount of technical meandering will correct that. The Applicant attempted to convince the Court that it was unaware of the change in the preference point scoring when an additional addenda addressed that issue. The Applicant failed on a critical aspect of the bid in two respects: it provided for an additional floor and exceeded the height restrictions. Now, the Applicant seeks to derail a flagship development that will promote the transformation of the residential profile in one of the most unequal areas of our coastline. Taking off a floor from a design is not as simple as lopping off a tier on a multi-tiered cake, as the Applicant contends somewhere in its papers. The Applicant cannot make out a case in the founding affidavit that its appeal was misconstrued and then change that case in reply to state that the appeal had been disposed of because the Respondent raised it as a powerful defence to its application.
40. There is an unauthorised affidavit under the hand of Marcel Minne, a spatial planner employed by the Municipality. Both parties responded to the content of the affidavit. For this judgment, the Court declines to have regard to an unauthorised affidavit and the responses to it. The Court had to contend with a case premised upon the replies provided by an official of the Municipality who was on leave and who stressed that qualification when he replied to the Applicant's requests for answers about the Municipality's decision. It is inexplicable how a resourced and seasoned company like the Applicant can conduct its affairs in this manner. Not only did it fail to inform itself of the addenda containing critical and

material information relating to the bid, but it also built a case on the responses of an official on leave. When it eventually elicited an official and comprehensive response to its appeal, misconstrued as an inquiry, it failed to accept an outcome that should have been apparent to it and its personnel who prepared the design and bid documents from the outset.

41. The Respondent identified three premises upon which the Applicant has founded its case. The first is that the Applicant submitted a compliant bid. This Court has already expressed itself on the unsustainability of that premise. The second premise is that the Applicant's bid was the highest scoring if the correct scoring was used. This premise is as flawed as a relay team claiming they crossed the finish line fastest and should be awarded the gold medal even though they dropped the baton on the first change. The third premise is that the Municipality did not reject its bid. The response letter of 13 May 2024 is clear. The Applicant failed dismally to comply with the specifications. The Applicant then chose to downplay, if not entirely avoid, the most compelling reason for its failure to secure the bid.
42. The Court is cognisant of the relief sought in this application and the caveat that a review remains in the offing. The Applicant has failed to make out a case for an interim interdict. It has not identified a *prima facie* right beyond that of a prospective hope to prove the Municipality's decision unlawful and invalid. The harm it identifies if the relief is not granted is one-sided and abstract. It initially relies on harm to the municipality and the taxpayer. It advanced the contention that the longer the contract proceeds, the less likely a Court will incline toward invalidating an unlawful award. The Applicant concluded that a refusal of interdictory relief and the viability of a damages claim amounted to prejudice that qualified as irreparable harm. The flaw in this reasoning is that the Applicant premises this requirement entirely on a successful outcome of its review application. It does identify any harm that is current or imminent. The premise, out of necessity, requires the Court to pronounce on the Applicant's prospects of success in the review application based on the admissible evidence presented in

this application. That prospect is poor or negligible because the Applicant failed to comply with the design limitations.

43. The Applicant's failure to cogently support its contention that the balance of convenience favours it has been addressed. The Court has considered the effects of delaying a flagship project that addresses the inequality in the ownership of resources in the area, the transformation of the coastline that is largely the preserve of the wealthy, the inflationary increases that will occur, the aspirations of first-time owners to secure a coveted home, and the prejudice to Carnivore in executing its contract. The balance of convenience is firmly against the Applicant.
44. The Applicant provided a credible alternate relief when it adverted its intention to expedite the review process. The Applicant's case for an interim interdict is neither strong, proper, nor clear. In the premises, the Court declines the prayer to grant an interim interdict.

COSTS

45. Carnivore sought costs on a punitive scale, namely attorney and own client costs. It submitted that Part A of Applicant's relief had been subsumed by Part B, which the Applicant acknowledged. The Applicant had been mulcted with a costs order after Part A had been struck from the roll due to a lack of urgency earlier in the year. The Applicant sought to obtain the Respondent's agreement to withdraw Part A and reserve the costs for determination with Part B of the application. Carnivore insisted on the Applicant tendering its wasted costs arising from Part A of the application. Carnivore enrolled the matter to determine Part A simply because the Applicant could not agree on Carnivore's wasted costs. This entailed the Court preparing for Part A and spending further time producing this judgment, which strained scarce judicial resources, especially as another Judge had already read the papers and allegedly pronounced on the Applicant's prospects of success. Carnivore's prayer for a punitive costs order is declined.

46. Rule 67A was inserted into the Uniform Rules of Court on 8 March 2024. It is a relatively new Rule, and the teething problems with its application have surfaced despite a comprehensive treatise on the subject.¹⁴ Rules 67, 69, and 70 apply to the fees that may be chargeable by Advocates and Attorneys. Rule 67A applies to Advocates and Attorneys who appear and do the work usually done by Advocates. An instructing attorney who has the right of appearance does not qualify for fees under Rule 67A if they accompany an Advocate as the instructing attorney. The tendency of some attorneys who accompany Advocates to seek the scaled fees is incorrect.
47. In terms of Rule 69(1), and unless the Court authorises otherwise, the fees to be included in a party and party bill of costs are limited to one Advocate or Attorney with the right of appearance. The permissible fees for a second Advocate or Attorney may not exceed half of what is allowed to the first Advocate on the prescribed scale and as directed by the Court. The factors that a Court must consider in awarding fees on the Rule 69 scale include the complexity of the matter, the value of the claim or importance of the relief sought, and the relief sought. Scale A applies if the Court does not indicate a scale in the order. The fees of Advocates with Trust Accounts differ.
48. The default position for Advocates and Attorneys with a right of appearance appearing in Court is scale A. The award of fees on a higher scale has to be properly motivated by the parties in their written or oral arguments, and the Court may have to direct specific questions at them to make a final determination on Counsel's fees.
49. Lead Counsel in this matter asked that both Counsel representing Carnivore be awarded fees on the C scale. If the rule is to be properly interpreted, then a Court may not award Counsel's fees for two Counsel on the same higher scale. Apart from the Court's questions directed to Counsel, there were no submissions on the

¹⁴ Mashavha v Enaex Africa (Pty) Ltd [2024] ZAGPJHC

matter's complexity, the claim's value, or the importance of the relief sought. This is an application for an interim interdict based upon a decision relating to tender award. There is nothing complicated or exceptional about it. The Court is prepared to award Senior Counsel's fees on the C scale, but the second Counsel's fees are in line with an ordinary costs order, regarding the prescribed rule that limits the second Counsel's fees to half that of the first Counsel.

50. In conclusion, the Court answers the question posed at the beginning of this judgment as follows:

Where lies the sense of a relay team demanding the gold medal for it crossed the finish line fastest but dropped the baton at the first change? In hopeless hope, against the opprobrium of opportunistic zeal, untampered by the dictates of reality, and in expectation of the impossible.

ORDER

51. The application for an interim interdict is dismissed with costs including the costs of two Counsel. Senior Counsel's fees are to be agreed or taxed on the C scale.



Ajay Bhoopchand
Acting Judge of the High Court
Western Cape Division
Cape Town

Judgment was handed down and delivered to the parties by e-mail on 19 November
2024

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