REPUBLIC OF SOUTH AFRICA

IN THE TAX COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 2023-024680

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

DATE 22/01/2024 SIGNATURE

In the matter between:

LIBERTY GROUP LIMITED	**First Applicant**
PARETO LIMITED	**Second Applicant**
FIRSTRAND BANK LIMITED	**Third Applicant**

and

CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY	**First Respondent**
JOHANNESBURG DEVELOPMENT AGENCY SOC LIMITED	**Second Respondent**
JOHANNESBURG ROADS AGENCY SOC LIMITED	**Third Respondent**
STEFANUTTI STOCKS (PTY) LTD	**Fourth Respondent**

A RE SHOMENG HOLDINGS (PTY) LTD **Fifth Respondent**

ORDER

Part A of the application is dismissed with costs, such costs to include the cost of two counsel where employed.

JUDGMENT

FISHER J

Introduction

[1] The applicants have brought this application in two parts.

[2] In Part A they seek an interim interdict restraining the first to third respondents (collectively referred to hereinafter as "the respondents" or the CoJ) from performing or allowing any contractor, on their behalf, to perform, any construction work in respect of the *Rea Vaya*, Bus Rapid Transit ("BRT") terminal on Rivonia Road, between Sandton Drive and 5th Street, Sandton.

[3] Part B is an application to review and set aside the decision to place the terminal on this spot.

[4] I am seized with the determination of Part A only, which I do against a factual background which is, for the most part, common cause.

Factual background

[5] The BRT system is a transport network designed to deliver comfortable, low-cost, efficient urban mobility to public transport users.

[6] The BRT programme forms part of a broader public transport strategy which was approved by Parliament in 2007. Its purpose is to connect different parts of the city which were previously difficult and costly to navigate.

Historical transport planning has resulted in the majority of people residing on the outskirts of the Johannesburg and Sandton central business districts with the attendant disadvantages from a socio-economic perspective. The initial decision made by the CoJ to implement the plan and construct the BRC took place in 2013 and there was formal publication of this decision.

[7] The BRT programme has entailed the planning and construction of various BRT terminals or "stations" which link the outskirts to the inner-city areas.

[8] It currently sees expansion towards Sandton, Rosebank, Midrand and Alexandra. This is the leg of the programme which has relevance to this application.

[9] The terminal in issue is currently under construction opposite the Rivonia Rd entrance to Sandton City Shopping Centre.

[10] The applicants who are variously involved in the design, ownership and management of the Sandton City precinct are dissatisfied with the choice of this site and, as I have said, plan to review the decision in due course under Part B.

[11] Since 2019 there has been substantial engagement with the various stakeholders in the precinct, including the applicants, relating to the placement of a terminal in the Sandton precinct.

[12] Initially the location of the terminal was to be between West and fifth streets on Rivonia Road. The applicants were satisfied with this arrangement.

[13] As the project developed, however, the respondents took the decision to relocate the station. The respondents say that this change came about as a direct result of the public consultation process.

[14] It is this relocation of the terminal which has created the dispute. The applicants accept the *Rea Vaya* system is for the benefit of the shopping and office precinct and

the public generally; the objection is to having the terminal opposite an entrance to Sandton City.

[15] The applicants allege that their use and enjoyment of the precinct will be negatively affected by the placement. The aesthetics appear to be a problem for them as well.

[16] It is true that the respondents initially considered that physical encroachment onto a portion of the applicants' property would be necessary. This would have involved expropriation. There was an objection to this approach by the applicants and the respondents thus returned to the drawing board.

[17] The current design and configuration does not seek to encroach on the precinct and is confined only to municipal property. The applicants, however, state that they still harbour fears of this possible encroachment.

[18] The applicants complain that the current plan will terminate an existing right turn into Pybus Road from Rivonia Road. They complain also that the demarcation of dedicated bus lanes along Rivonia Road which will impact on traffic flow.

[19] The applicants accuse the applicants of inconsistency and a cavalier approach to the project. A further central complaint is that there has been inadequate public consultation in relation to the changed location of the terminal.

[20] January 2023 applicants, through their attorneys Webber Wentzel sought documents proving that the respondents had complied with certain legislation in relation to the process dating back to the initial resolution. This was clearly preparatory to the review.

[21] The applicant's sought, through their attorneys, that there be an undertaking that the construction of the terminal would not continue pending the determination of the dispute.

[22] The respondents will not provide this undertaking. They are continuing with the plan.

The issues

[23] The applicants argue that they have prospects of success in the review and that they are entitled to an interdict to stop the construction of the terminal from proceeding any further in the interim.

[24] The respondents argue that no case has been made out for interdictory relief. The say that this is especially so because the application impacts on conduct that flows from statutory powers and functions referred to in section 156 of the Constitution.

Applicable legal principles

[25] The legal inquiry in an application for an interim interdict is well settled. The applicant must establish prima facie right; a well-grounded fear of irreparable harm; that the balance of convenience is served by the interdict and that there is no other appropriate remedy. These are known as the *Setlogelo* requirements or the *Setlogelo Test*.[1]

[26] In *National Treasury and Others v Opposition to Urban Tolling Alliance and Others*[2] *2012 (6) Sa 223 (CC)*) (OUTA) the Constitutional Court put a gloss on these requirements in circumstances where the interdict sought was against organs of state and in restraint their statutory power.

[27] The Constitutional Court made the point that the existence of mala fides is an important consideration in the inquiry. The Court quoted with approval the decision in Gool[3] as follows:

> "The present is however not an ordinary application for an interdict. In the first place, we are in the present case concerned with an application for an interdict restraining the exercise of statutory powers. In the absence of an allegation of mala fides the Court does not readily grant such an interdict."[4]

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[1] Setlogelo v Setlogelo 1914 AD 221 at 227

[2] *National Treasury And Others v Opposition to Urban Tolling Alliance And Others 2012 (6) Sa 223 (CC)*) (OUTA)

[3] Gool v Minister of Justice 1955 (2) SA 682 (C).

[4] OUTA at para 43.

[28] The Court held further that such an interdict would be granted "only in the clearest of cases."[5]

[29] The Court furthermore, whilst not defining the "clearest of cases" pointed out that an important consideration would be weather the harm apprehended amounted to a breach of one or more of the fundamental rights in the Bill of Rights.[6]

[30] The weighing up inquiry which a court has to engage in when determining whether a case has been made for an interdict takes into account the prospects of success in the review. The stronger the prospects of success the less not for the balance of convenience to favour the applicants; the weaker the prospects of success the greater the need for the balance to favour the applicants.[7]

[31] With these principles in mind, I move to the determination of the merits.

Discussion

[32] A central basis for the review is alleged illegality arising from the fact that there has not been compliance with the notification and public consultation process imposed by sections 66 and 67 of the Local Government Ordinance (the Ordinance) and generally by the Constitution.

[33] The dispute engaged raises ample and compelling authority for the proposition that sections 66 and 67 of the Ordinance are not implicated where there is no road closure.[8]

[34] However, even if it were clear that the applicants have fallen short of requirements contained in the Ordinance and shirked their general duty of facilitating public participation in relation to the impugned decision, this does not, as of right, provide a

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[5] Id at para 26 and 47.

[6] Id at para 47

[7] Olympic Passenger Service Pt Ltd v Ramie an 1957 (2) SA 382 (D) at 383D-G, cited with approval in Eriksen Motors Welkom Ltd v Protea Motors Warrenton 1973 (3) SA 685 (A) at 691F-G. See also Simon NO v Air Operations of Europe AB 1999 (1) SA 217 (SCA) at 231G.

[8] *Bellevue Motors CC v Johannesburg City Council* 1994 (4) SA 339 (W) *Rustenburg Local Municipality v Mwenzi Service Station CC* [2015] 1 All SA 315 (SCA) ([2014] ZASCA 207) *Tembu Convenience Centre CC and Another v City Of Johannesburg And Others 2019 (4) SA 194 (SCA)*

right to found interdictory relief. The following dictum of the Constitutional Court in *Afriforum*[9] bears emphasis:

> "The facilitation or genuineness of any public participation process is of course subject to judicial scrutiny. It however ought to be only in very rare instances that a public participation process that actually took place but is believed to be flawed for want of adequate facilitation or participation would serve as the basis for an interim interdict. The propriety of that process must, as is the case with law making public participation processes that are expressly provided for in the Constitution, be tested through a review process or similar proceedings based on the principle of legality." (Emphasis added)[10]

[35] The applicants seek to distinguish *OUTA* on the basis of scale. They state that because the construction of the whole *Rea Veya* programme is not to be interdicted this differs from the position in *OUTA.*

[36] The respondents argue that the applicability of the *OUTA* principles is not affected by the scale of a project but rather rests on the fact that State power is sought to be curtailed at all.

[37] In *OUTA* the Court put the position relating to the prejudice to the separation of powers thus[11]:

> "A court must carefully consider whether the grant of the temporary restraining order pending a review will cut across or prevent the proper exercise of a power or duty that the law has vested in the authority to be interdicted. Thus courts are obliged to recognise and assess the impact of temporary restraining orders when dealing with those matters pertaining to the best application, operation and dissemination of public resources. What this means is that a court is obliged to ask itself not whether an interim interdict against an authorised state functionary is competent but rather whether it is constitutionally appropriate to grant the interdict."

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[9] Tshwane City v Afriforum and Another 2016(6) SA 279 (CC)

[10] Id at para 66

[11] OUTA at para 66

[38] I do not agree that *OUTA* has no application. The applicants' misguided attempt to distinguish *OUTA* has had the consequence that the principles in that case are not dealt with by the applicants.

Conclusion

[39] This is not a case where it is appropriate to interdict the carrying out of this leg of the programme.

[40] The separation of powers prejudice is not trumped by the applicants perceived inconvenience. They have not made out a case for the exceptional remedy sought. Their remedy is and remains the pending review proceedings.

Costs

[41] There is no reason why the usual costs order should not follow. The parties agree that the costs should be those of two counsel.

Order

[42] I thus make the following order:

Part A of the application is dismissed with costs, such costs to include the cost of two counsel where employed.

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FISHER J

JUDGE OF THE HIGH COURT

JOHANNESBURG

This Judgment was handed down electronically by circulation to the parties/their legal representatives by email and by uploading to the electronic file on Case Lines. The date for hand-down is deemed to be 22 January 2024.

Heard:	16 November 2023
Delivered:	22 January 2024

APPEARANCES:

Applicants counsel:	Christo Bothma SC
And	Nadeem Ali
Applicants Attorneys:	Webber Wentzel
Respondent's Counsel:	Ngwako Maenetje SC
And	Makhotso Lengane
First to Third Respondents Attorneys:	Mchunu Attorneys