



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 7179/2022

- | | |
|-----|----------------------------------|
| (1) | REPORTABLE: YES |
| (2) | OF INTEREST TO OTHER JUDGES: YES |
| (3) | REVISED. NO |

5 DECEMBER 2022

DATE

SM MARITZ AJ

SIGNATURE

In the matter between:

MEDITERRANEAN SHIPPING COMPANY (PTY) LTD

[REG NO: 1978/001255/07]

Applicant

and

TRANSNET FREIGHT RAIL, AN OPERATING DIVISION OF TRANSNET

SOC LTD

[REG NO: 1990/00900/30]

First Respondent

THE CHAIR PERSON OF THE TRANSNET FREIGHT RAIL

REVIEW AUTHORITY

Second Respondent

MAERSK LOGISTICS AND SERVICES SA (PTY) LTD

[REG NO: 2003/024204/07]

Third Respondent

JUDGMENT

MARITZ AJ

A. INTRODUCTION & RELIEF SOUGHT¹

[1] The Applicant, Mediterranean Shipping Company (Pty) Ltd ("**MSC** or Applicant"), seeks an interdict *pendente lite*, pending the final determination of the internal review/appeal process, interdicting and restraining the First Respondent, Transnet Freight Rail, an operating division of Transnet SOC Ltd ("**Transnet** or First Respondent or **TFR**") as follows:

- 1.1 that this application be heard as one of urgency in terms of Uniform Rule 6(12) and that the ordinary periods and forms of service prescribed by the Uniform Rules are dispensed with;
- 1.2 implementing or further implementing its decision to award Tender No: CP2422 – a commercial proposal for the Leasing of Transnet Freight Rail Sidings/Facilities for a minimum of five (5) years – situated at Transnet Park, Bellville – to the Third Respondent, Maersk Logistics and Services SA (Pty) Ltd ("**Maersk** or Third Respondent"), as sole preferred bidder;
- 1.3 concluding any contract(s) pursuant to the award of Tender No: CP2422 to the Third Respondent;
- 1.4 *alternatively*, giving further effect to any contract(s) that may have been concluded at the date of this Order pursuant to the award of Tender No: CP2422 to the Third Respondent; and
- 1.5 that the First Respondent be ordered to pay the costs of the application, such costs to include those consequent upon the employment of two counsel where so employed, save that in the event of any other Respondent opposing the relief

¹ Notice of Motion

sought, it or they be ordered to pay the costs occasioned by such opposition including those costs consequent upon the employment of two counsel, jointly and severally with the First Respondent.

- [2] In paragraph 4.1 of the Applicant's practice note it is stated that the relief sought in prayer 1 of the Notice of Motion is no longer pursued. On 17 August 2022, Potterill J held that the matter was not urgent and as such there is no need to further address this aspect.

B. RELEVANT BACKGROUND FACTS

The contextual background are as follows:

- [3] On 14 April 2022 the First Respondent issued a request for commercial proposals (invitation to bid) for the tender under Commercial Proposal Number CP 2422, a commercial proposal² for the leasing of the First Respondent's Freight Rail Sidings/Facilities for a minimum period of five (5) years situated at Transnet Park, Bellville ("the tender"), with the closing date for submissions being 3 May 2022 at 10h00.

- [4] In section 3 of the request for commercial proposal the following is stated:

"There are certain properties in the property portfolio of Transnet SOC Limited ("Transnet") which are strategic and productive assets – vehicles for economic development, service delivery and transformation. To ensure effective utilisation of these properties as strategic enablers for rail logistics solutions to compliment an end to end efficient logistics service to the market and after Transnet EXCO's deliberations regarding numerous concerns raised by customers, lessees and other stakeholders, TFR set out to review the process for leasing/letting TFR property and sidings. Some of these properties serve as the rail connectivity between the Port and "Back of Port" Terminals/hubs that represents a geographical area to consolidate consignments for domestic, regional and export transport.

These include but not limited to a process that:

² Commercial Proposal, Annexure "B" to the Applicant's Founding Affidavit

- *Ensures effective management of TFR Properties as Strategic Enablers for Rail Logistics Solutions through diligent positioning of these to compliment an end to end efficient logistics service to the market.*
- *To work with private sector to unlock investment focused on improved efficiency in the supply chain, reducing complexities and the cost of doing business to enable volume growth from road to rail.*
- *Encourage sustainable development and community upliftment.*

Transnet is therefore embarking on an open process for Commercial Proposals for leasing of some of its sidings to allow all sectors to have open access to compete for the lease of sidings."

[5] As per section 3 of the commercial proposal, the bidders were required to submit the following information:

- 5.1 Volume and Operational Plan that covers the matters set out in clause 2.1;
- 5.2 An Investment Plan that covers the matters set out in clause 2.2 as well as to submit a commercial rental offer covering the factors set out in clause 2.3; and
- 5.3 A community development plan as set out in clause 2.4 thereof.

[6] The evaluation methodology is set out in section 3 of the commercial proposal (in paragraph 4). This includes-

- 6.1 Step 1 - Governance and Legal where the returnable and their validity were checked for compliance such as the SBD1 form, Tax clearance documents, B-BBEE certification, Memorandum of Incorporation, etc.
- 6.2 Step 2 to 7 - minimum threshold 70% including the following checks:
 - 6.2.1 volume and operational commitments;
 - 6.2.2 investment;
 - 6.2.3 commercial rental;

- 6.2.4 risk, safety, health environment compliance and business community;
- 6.2.5 transformation and community development.
- 6.2.6 It should be noted that at the end of steps 2 to 7 it is clearly stated in bold as follows: **The minimum threshold for technical/functionally [Step Two to Seven] must be met or exceeded for a Respondent's Proposal to progress to Step 3 for final evaluation.**

6.3 Step 8 – company and credit risk assessment; and

6.4 Step 9 – the award of business and conclusion of contract.

[7] As part of the Investment Plan the commercial proposal called upon bidders to optimally develop the available land of more than 100,000 square metres. The investment categories to be covered in the Investment Plan (appearing on page 16 of the commercial proposal) included-

- 7.1 road infrastructure between the Bellville Container Terminal and Transnet Park to enable efficient transfer of containers from Belcon to the leased facility;
- 7.2 land side upgrades on storage and loading areas; and
- 7.3 building construction/upgrades (e.g., office, ablution facilities, lighting, etc.)

[8] Paragraph 4.4 of the commercial proposal provides that immediately after approval to award the contract has been received, the successful or preferred bidder(s) will be informed of the acceptance of his/their bid either by way of a Letter of Award or Letter of Intent where after Transnet will negotiate the final terms and conditions of the contract with the successful bidder(s).

[9] Thereafter, the final contract will be concluded with the successful bidder(s). Otherwise a final contract will be concluded and entered into with the successful bidder after acceptance of a Letter of Award.³

[10] The bidders bound themselves to the following conditions in Transnet's-

³ Paragraph 13 of First and Second Respondent's Answering Affidavit & par 4.4 of commercial proposal

- 10.1 Standard Lease Agreement (which may be subject to amendment at Transnet's discretion, if applicable);
- 10.2 General Bid Conditions⁴; and
- 10.3 Any other standard or special conditions embodied in the commercial proposal.

[11] Furthermore,-

11.1 should Transnet decide that a formal contract should be signed and so inform them in a Letter of Intent, the proposal [and, if any, its covering letter and any subsequent exchange of correspondent] together with Transnet's Letter of Intent, shall constitute a binding contract between Transnet and the bidders until the formal contract is signed.

11.2 In the absence of a formal written contract, non-compliance with any of the material terms of this request for commercial proposal, including those mentioned above, will constitute a material term of the breach of the terms of this request for commercial proposal, and provide Transnet with costs for cancellation.

[12] The above terms and conditions were accepted by all bidders, including the Applicant.⁵

[13] At the closing date and time, a total number of two bids had been received. Due to challenges with the e-tender portal system, three bidders indicated that they were unable to upload their bid responses on time. A request was made to the Transnet Freight Rail Chief Procurement Officer for these bids to be accepted. These bids were accepted after approval was granted on 9 May 2022. The total number of bids to be evaluated became five.⁶

[14] On 4 July 2022 Transnet informed Maersk that its bid was successful, and that a formal contract would be signed with it. The Letter of Award/Intent together with proposals submitted by Maersk constitute a binding contract between Transnet and Maersk until the formal contract is signed. There is therefore a valid and binding agreement between Transnet and Maersk which consists of the bid proposal, general conditions and any other standard or general conditions mentioned and/or embodied in the commercial proposal,

⁴ General Bid Conditions, Annexure "C" to Applicant's Founding Affidavit

⁵ First and Second Respondents' Answering Affidavit, par 16

⁶ First and Second Respondents' Answering Affidavit, par 17

including the proposal made by Maersk as well as Transnet's Letter of Award/Intent and the proposal submitted by Maersk. It is the submission of the First and Second Respondents that there is currently a contract between Transnet and Maersk although the contract should still be finalised.⁷

[15] Relevant facts pertaining to the submission of the Applicant's bid and the internal review process-

[16] Pursuant to the request for commercial proposal MSC submitted that it sought to compile the necessary information and documents to submit a competitive bid. It submitted that it found the time period within which it was expected to submit its bid insufficient, and on 29 April 2022⁸ MSC requested a two-week extension of the closing date for the submission of its bid. MSC submitted that it was done in circumstances where the tender only allowed for eight (8) work days for prospective bidders to submit their bids. When no response was forthcoming from Transnet, MSC nevertheless compiled its bid submissions. It was submitted by MSC that with such a brief period granted to prospective bidders it was of the view that the bid process was administratively unfair and recorded its displeasure by redacting that portion of the tender that seeks to warrant that the tender process had been conducted in a fair and transparent manner.

[17] MSC sought to submit its bid via the online portal prior to 10:00 on 3 May 2022 only for the portal to reject MSC's bid submission due to a technical error.

[18] At 10h32 on 3 May 2022⁹, the Applicant was notified that its request for an extension was rejected. Transnet stated the reasons for the rejection which included *inter alia* that the request was only received late on Friday, 29 April 2022 and as Transnet does not operate on weekends the request was only seen on Monday, 3 May 2022 and that that bidders have the responsibility to check for updates to the advert and make extension requests on time to as not to render the process unfair.

⁷ First and Second Respondents' Answering Affidavit, para 18, 19 & 20

⁸ MSC's request for a two-week extension, Annexure "D" to the Applicant's Founding Affidavit

⁹ Annexure "E" to the Applicant's Founding Affidavit

[19] MSC's displeasure with the tender process was conveyed in a subsequent email, which email also contained its bid, sent to Transnet at 11:40 on 3 May 2022.¹⁰ The following were conveyed in this email to Transnet:

- 19.1 stating that the request for an extension had been unreasonable declined;
- 19.2 that the published period of eight (8) work days was unreasonably short and substantially unfair;
- 19.3 informed the First Respondent that its online portal was not functioning properly and because of this it was unable to submit its bid timeously; and
- 19.4 attached thereto a copy of its bid submission.

[20] On 6 May 2022¹¹ Applicant's attorneys addressed a letter to the First Respondent-

- 20.1 stating the Applicant intends to challenge the First Respondent's decision to reject the Applicant's bid on the basis that its submission was late;
- 20.2 requesting the procurement policy applicable to the commercial proposal; and
- 20.3 requesting the First Respondent to advise what internal appeal process (if any) is applicable to the tender.

[21] Pursuant thereto and on 10 May 2022¹² the First Respondent informed the Applicant's attorneys that the late submission of its bid due to the technical issues experienced with its online portal will be accepted.

[22] On 29 June 2022¹³, the Applicant's attorneys addressed a letter to the First Respondent's Chief Procurement Officer-

- 22.1 seeking confirmation of the award of the bid to the Third Respondent;
- 22.2 requesting written reasons for the granting of the award to the Third Respondent, if so made;
- 22.3 requesting a copy of the policy applicable to the tender and to be advised of the internal remedy available to the Applicant; and

¹⁰ Annexure "F" to Applicant's Founding Affidavit

¹¹ Annexure "G" to the Applicant's Founding Affidavit

¹² Annexure "H" to the Applicant's Founding Affidavit

¹³ Annexure "K" to the Applicant's Founding Affidavit

22.4 informing the First Respondent of its intention to challenge the award of the tender, if so made, to the Third Respondent.

[23] On 5 July 2022¹⁴ the First Respondent sent a Letter of Regret to the Applicant notifying it that its bid was unsuccessful and that the tender had been awarded to the Third Respondent. The Applicant was further provided with the reasons why its bid was not successful as follows:

“The primary reason your bid was unsuccessful on this occasion is due to your bid failing to meet the requirements of the following:

23.1 *Technical threshold for volume of 20 points with your score of 11,2 points;*
and

23.2 *Technical threshold for Investment of 50 points with your score of 19,6 points.”*

[24] On 8 July 2022¹⁵ the First Respondent sent a letter via email to the Applicant advising that-

24.1 the First Respondent issued the Letter of Award to the preferred bidder on 4 July 2022;

24.2 the First Respondent also issued the Letters of Regret to the respective bidders, including the Applicant, on 5 July 2022;

24.3 written reasons for granting of the award to the preferred bidder are contained in the Award Letter issued to such company;

24.4 the Regret Letter sent to the Applicant also comprises written reasons for the First Respondent not awarding the tender to the Applicant; and

24.5 the Applicant should follow the correct PAIA request process in order to obtain a copy of the Transnet policy for Commercial proposals as well as for the advice sought regarding the internal appeal processes that Transnet followed in this regard. A copy of the Transnet PAIA and POPIA Information Manual was attached to the letter.

[25] On 12 July 2022¹⁶ the Applicant's attorneys addressed a letter to the First Respondent-

¹⁴ Annexure “I” to the Applicant's Founding Affidavit

¹⁵ Annexure “L” to the Applicant's Founding Affidavit

¹⁶ Annexure “M” to the Applicant's Founding Affidavit

- 25.1 taking issue with the First Respondent's advice to make use of its PAIA request process;
- 25.2 repeating its request for a copy of the procurement policy applicable to the tender and seeking advice as to the internal remedy available to the Applicant; and
- 25.3 seeking an undertaking by no later than close of business on 13 July 2022 that the contract with the Third Respondent will not be concluded, alternatively if concluded, will not be implemented until such time as the internal review/appeal proceedings are instituted and finalised.

[26] On 14 July 2022¹⁷ the First Respondent's Acting Head of Governance and Compliance (Mr Maringa) sent an email to the Applicant stating that-

- 26.1 he will be responsible for investigating the matter and providing feedback.
- 26.2 in accordance with the National Treasury Instruction Note 3 of 2021/22 all procurement complaints and allegations must be investigated within 60 business days from the date the he received a complaint, and the First Respondent has delegated such responsibilities to his department;
- 26.3 an independent team will be appointed to re-evaluate the whole tender in line with the Applicant's complaint/allegations; and
- 26.4 if anything is further needed from the Applicant, the First Respondent will contact the Applicant's attorneys.

[27] On 14 July 2022¹⁸ an email was sent by the First Respondent's Mr Bright Malele (independent review team) to the Applicant's attorneys requesting to be provided with clarity regards the following-

- 27.1 Do you request the team to review the procurement process followed?
- 27.2 List the issues that you would want the team to investigate regarding the procurement process followed for this tender; and
- 27.3 informing the Applicant that a prompt response will be appreciated for the team to commence with the reviews.

¹⁷ Annexure "N" to the Applicant's Founding Affidavit

¹⁸ Annexure "AA3" to the First & Second Respondents' Answering Affidavit

[28] On 14 July 2022¹⁹ the Applicant's attorneys addressed a letter to the First Respondent's Acting Head of Governance and Compliance (Mr Maringa)-

28.1 repeating its request for a copy of the First Respondent's procurement policy applicable to the tender;

28.2 requesting a written undertaking by close of business on 18 July 2022 that the tender/contract with the Third Respondent will not be implemented until such time as the investigation is finalised;

28.3 requesting a copy of the Bid Evaluation Report at the time the decision was made to award the winning bid to the Third Respondent; and

28.4 sought confirmation of the time period, after the delivery of the Bid Evaluation Report, within which the Applicant's submissions ought to be made.

[29] On 15 July 2022²⁰, the Applicant's attorneys were once again advised via email correspondence to make use of the First Respondent's PAIA process procedure to obtain the documents/information requested.

[30] On 18 July 2022,²¹ the First Respondent's Review Authority informed the Applicant's attorneys that the contracting process will not be stayed as per its request of 14 July 2022.

[31] On 2 August 2022²², the First and Second Respondents' attorneys address a letter to the Applicant's attorneys stating that-

31.1 the internal review could not progress in the absence of the information sought in the e-mail of the First Respondent's Mr Malele on 14 July 2022; and

31.2 because this information has not been provided, it was stated that "*no such [internal review] proceedings are underway*"; and

31.3 the First and Second Respondents' letter was written "*with prejudice*" and forewarned of a punitive costs order.

¹⁹ Annexure "O" to the Applicant's Founding Affidavit

²⁰ Annexure "RA2" to the Applicant's Replying Affidavit

²¹ Annexure "P" to the Applicant's Founding Affidavit

²² Annexure "LF2" to the Third Respondent's Answering Affidavit

[32] On 4 August 2022²³, the Applicant's attorneys responded to the aforesaid letter recording that it was "*premature for our client to provide a list of issues without having had sight of the Bid Evaluation Report*" and denied having abandoned the internal review process.

[33] On 8 August 2022²⁴, the Applicant submitted its PAIA request for the Bid Evaluation Report and the procurement policy applicable to the tender.

C. ISSUES FOR DETERMINATION

The following issues are in dispute:

[34] Whether there is a fundamental defect in the Applicant's application;

[35] Whether the requirements of an interim interdict have been met;

[36] Whether the Applicant has initiated, alternatively has abandoned, further alternatively has refused to continue with the investigation proceedings provided for in paragraph 10 of the PFMA SCM Instruction Note No.3 of 2021/22;

[37] Whether a contract has been concluded between the First and Third Respondent;

[38] Whether the investigation proceedings constitute an internal remedy as envisaged in Section 7(2) of the Promotion of Administration Justice Act 3 of 2000 ("PAJA"); and

[39] Whether, if the Applicant makes out a case for interdictory relief, the Court should nonetheless exercise its discretion to refuse the relief.

D. JUDGMENT

[40] As stated above the Applicant seeks interdictory relief as set out in its Notice of Motion.

[41] Before considering whether the Applicant has satisfied the requirements for an interim interdict it is necessary to deal with the other arguments advanced by the Respondents, namely that the Applicant's application is fundamentally defective, that the Applicant did not initiate the investigation procedure provided for in paragraph 10 of the PFMA SCM Instruction No.3 of 2021/22 *alternatively* the Applicant has abandoned the proceedings further *alternatively* has refused to continue with the investigation proceedings; whether a contract has been concluded between the First and Third Respondent and whether the

²³ Annexure "LF4" to the Third Respondent's Answering Affidavit

²⁴ Annexure "RA3" to the Applicant's Replying Affidavit

investigation proceedings constitute an internal remedy as envisaged in Section 7(2) of the Promotion of Administration Justice Act 3 of 2000 (“PAJA”).

[42] Conclusion of contract and fundamental defect in the application

[42.1] It is the case of the Third Respondent that the application is fundamentally defective because the Applicant will not be able to obtain the relief it ultimately seeks namely the setting aside of the award to the Third Respondent in the internal review process and therefore the application is ill-founded.

[42.2] It is common cause that the First Respondent has awarded the tender to the Third Respondent. On 8 July 2022²⁵ the First Respondent sent a letter via email to the Applicant advising that the First Respondent issued the Letter of Award to the preferred bidder, namely the Third Respondent, on 4 July 2022. Letters of Regret were issued to the respective bidders, including the Applicant, on 5 July 2022. The First Respondent further advised that written reasons for the granting of the award to the preferred bidder, namely the Third Respondent, were contained in the Award Letter. The Award Letter constituted an offer to the Third Respondent. There is nothing on the papers indicating that the Third Respondent did not accept the offer. The fact that the Third Respondent is opposing this application is a further indication that it has accepted the offer. Therefore I accept that the Third Respondent has accepted the offer.

[42.3] Furthermore, paragraph 4.4 of the commercial proposal provides that immediately after approval to award the contract has been received, the successful or preferred bidder(s) will be informed of the acceptance of his/their bid either by way of a Letter of Award or Letter of Intent where after Transnet will negotiate the final terms and conditions of the contract with the successful bidder(s). Thereafter, the final contract will be concluded with the successful bidder(s). Otherwise a final contract will be concluded and entered into with the successful bidder after acceptance of a Letter of Award.²⁶

[42.4] The First and Second Respondents in its answering affidavit²⁷ stated that “*there is a valid and binding agreement between Transnet and Maersk which consists of the bid proposal, general*

²⁵ Annexure “L” to the Applicant’s Founding Affidavit

²⁶ Paragraph 13 of First and Second Respondent’s Answering Affidavit & par 4.4 of commercial proposal

²⁷ Paragraphs 18 to 20 & 57 of the First and Second Respondents’ Answering Affidavit

conditions and any other standard or general conditions mentioned and/or embodied in the RFP (Request for Proposal), including the proposal made by Maersk as well as Transnet's letter of intent (award) and the proposal submitted by Maersk." It went on that "I have already stated that there is currently a contract between Transnet and what is not in place is a final contract as envisaged. There is in fact a contract between Transnet and Maersk. There is nothing precluding Transnet and Maersk from acting upon the current contract. There is nothing preventing Transnet and Maersk from negotiating the terms and conditions of the final contract."

- [42.5] As Watermeyer ACJ remarked in *Reid Bros (South Africa) Ltd v Fischer Bearings Co Ltd* 1943 AD 232 at 241, "...a binding contract is as a rule constituted by the acceptance of an offer". As stated above there is nothing in the papers indicating that the Third Respondent did not accept the offer. It is further clear from what I have stated above that the First Respondent regards the contract concluded between itself and the Third Respondent as valid and binding. I find that the parties have intended by their agreement to conclude a valid and binding contract, while agreeing, either expressly or by implication, to leave the outstanding matters to future negotiation with a view to a comprehensive/final contract. For reasons stated above I find that there is a binding and valid contract between the First and Third Respondent, which has legal consequences.
- [42.6] I now turn to consider whether the application is fundamentally defective. The Applicant ultimately seeks the setting aside of the award/contract to the Third Respondent during the internal review process. The Applicant relies on paragraphs 10.1(c) and 10.1(e) of the National Treasury Instruction SCM Note 3 of 2021/22 ("the NT Note"), which according to the Applicant confers wide powers on the First alternatively the Second Respondent to set aside the awarding of the tender to the Third Respondent if procedural irregularities in the tender process are found during the internal review process.
- [42.7] It is the case of the First and Second Respondents that the Applicant can obtain adequate redress in due course during the internal review process. It is stated that "*it matters not if the irregularity is committed by an official of Transnet or an outside party connected with a bidder...the independent team are significant and they in fact constitute adequate relief if the investigation concludes in the applicant's favour.*"²⁸

²⁸ Paragraphs 55 to 56 of the First and Second Respondents' Answering Affidavit

[42.8] It is necessary to quote paragraph 10 of the NT Note which provides in relevant part as follows:

“10. INVESTIGATE COMPLAINTS AND ALLEGATIONS

10.1 The AO/AA-

- (a) *must investigate a complaint/allegation of abuse in the SCM system, resolve and provide a response to the person who submitted the complaint/allegation by no later than 60 days after receipt of the complaint/allegation;*
- (b) *may extend the period mentioned in paragraph (a), up to 30 days and provide to the person who submitted the complaint/allegation written reasons for the extension and a status update at the time of the extension;*
- (c) ***must, if the investigation concludes that there has been an irregularity or that the irregularity is as a result of an alleged misconduct by an official, refer the matter for further investigation and processing;***
- (d) *must, where the investigation indicates any irregularity by a person, act against the person in terms of the relevant prescripts and may in addition to the penalties/remedies provided for in the relevant prescripts, also implement remedial actions which may include but are not limited to-*
 - (i) *rejecting the bid;*
 - (ii) *cancelling the contract;*
 - (iii) *restricting the person from conducting business with the State;*
 - (iv) *claiming damages (if any); and*
- (e) ***must inform the relevant treasury and AGSA of the outcome of the investigation and the proposed actions, within 30 days of completing the investigation.*** [Own emphasis]

[42.9] Counsel for the Third Respondent, Adv Budlender SC, contended that when the First Respondent awarded a tender to the Third Respondent a contract came into existence. For reasons stated above I agree herewith. He further submitted that Transnet may not unilaterally reverse its decision and cancel the award. The contract remains in force, unless and until it is reviewed and set aside by a court. In support of his contentions he relies on *MEC for the Executive Council for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute 2014 (5) BCLR 547 (CC) [2014 (3) SA 481 (CC) at para 64-65, 102-106]*.

[42.10] Adv Budlender SC further submitted that, with reference to the NT Note, that paragraph 10.1(d) applies only where the investigation “*reveals any irregularity by a person*”. A “*person*” is defined in paragraph 2 as a bidder, a supplier, or a person having one of the defined interests in a bidder or supplier. The remedies in paragraph 10.1(d) are therefore directed at dealing with irregularities committed by such a “*person*”. In this matter, there is no allegation of an irregularity by a bidder or a supplier or a connected person. It follows that subparagraph 10.1(d) is not applicable. I agree herewith.

[42.11] As stated above MSC confines itself to paragraphs 10.1(c) and 10.1(e) of the NT Note.

[42.12] It was further submitted on behalf of the Third Respondent that paragraph 10.1(c) applies where it is found that there has been an irregularity by an official. The consequences are that the matter must be referred “*for further investigation and processing.*” Paragraph 10.1(c) does not create the remedy of cancellation of the contract. If Transnet is of the view that the contract ought to be cancelled because of an irregularity by an official, its remedy is to apply to court for an order setting aside the award of the contract. Paragraph 10.1(e) merely imposes an obligation to report the outcome of the investigation and action. It creates no remedy at all. It was submitted that the fact that subparagraph (d) provides for the remedy of cancellation, and subparagraph (c) does not do so, is the clearest indication that the remedy of cancellation does not exist in the latter case, namely irregularity by an official. The *maxim inclusion unius, exclusion alterius* applies. It was submitted that the “*internal review*”, whatever its outcome, would therefore not confer on Transnet the power to set aside the contract. If it is alleged that there has been an irregularity in the tender process/procedure, and a bidder e.g., MSC wishes the irregularity to be cancelled, its

remedy is to apply to court for such an order (judicial review). In my view the reasoning of the Third Respondent's Counsel is correct.

[42.13] Transnet's argument that the Second Respondent can without recourse to legal proceedings, disregard administrative actions by their officials if they consider them mistaken in terms of the NT Note is flawed. The decision by Transnet to award the tender to the Third Respondent is an administrative action.

[42.14] In the matter of *Oudekraal Estates (Pty) Ltd v City of Cape Town* [2004] 3 All SA 1 (2004) (6) SA 222) (SCA) the essential basis of the case was that invalid administrative action may not simply be ignored, but may be valid and effectual, and may constitute to have legal consequences, until set aside by proper process. The Court expressed it thus:

"For those reasons it is clear, in our view, that the Administrator's permission was unlawful and invalid at the outset...But the question that arises is what consequences follow from the conclusion that the Administrator acted unlawfully. Is the permission that was granted by the Administrator simply to be disregarded as if it has never existed? In other words, was the Cape Metropolitan Council entitled to disregard the Administrator's approval and all its consequences merely because it believed that they were invalid provided that its belief was correct? In our view, it was not. Until the Administrator's approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked. The proper functioning of a modern State would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside."

[42.15] Counsel for the Applicant, Adv Pammenter SC, submitted in his heads of argument that in terms of paragraph 10.1(a) of the NT Note Transnet's Administrative Authority is obliged to investigate a complaint/allegation of abuse of the SCM system, resolve it and provide a response to the person who submitted the complaint/allegation by no later than 60 days after receipt of the complaint/allegation. According to the Applicant there is no restriction on the type of complaint envisaged in this paragraph nor is there any restriction on the type

of resolution, that the accounting authority may apply. In this regard I have to consider whether the Applicant has initiated the internal review process alternatively has actively pursued it. I will address it hereinunder.

[42.16] Counsel for the Applicant further submitted that if after conducting the investigation, the accounting authority ascertained that there was indeed an irregular award of the tender, it would be obliged, itself to bring a “self-review”. In support of this submission the Applicant relied on the case of the *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd 2018 (2) SA 23 (CC) [2018 (2) BCLR 240 (CC)]* (“*Sita vs Gijima case*”). In my view reliance on this case will not assist the Applicant in that Transnet can unilaterally review its decision to award the contract to Maersk and set it aside when irregularities are found in the tender process during the internal review without recourse to a judicial review. In the *Sita vs Gijima case* the Constitutional Court only determined the question whether an organ of state such as Transnet when seeking to review and set aside its own decision may invoke PAJA or is the appropriate route a legality review. The Constitutional Court ruled that an organ of state cannot review their administrative decisions based on PAJA, but may review such decisions under the principle of legality. It follows that the review and setting aside of Transnet’s decision to award the contract/tender to Maersk, even in the case of a so-called “self-review”, should ultimately be done in a judicial review. Furthermore, the Supreme Court of Appeal in *Altech Radio Holdings (Pty) Ltd and Others v City of Tshwane Metropolitan Municipality 2021 (3) SA 25 (SCA)* dealt with factors which should be considered if a “self-review” is done which include *inter alia* delays in bringing a self-review application and prejudice that would be suffered by interested parties involved. In this matter the contract/tender was awarded to Maersk and therefore Maersk will inevitably be entitled to reasons if any such self-review is done by Transnet, which will result in a judicial review. It follows that the Applicant will not obtain the ultimate relief it sought namely to set aside the decision of Transnet to award the contract to Maersk in the internal review process even if procedural irregularities are found and Transnet does a “self-review” as that can ultimately only be obtained in a judicial review.

[42.17] For reasons stated above I am of the view that if it is the Applicant’s allegation that there has been an irregularity in the tender process, and a bidder e.g., MSC wishes the award and the contract between Transnet and Maersk to be cancelled, its remedy is to apply to court for such an order. MSC does not in my view attack the validity of the awarding of the contract

to Maersk. It merely attacks the tender process. The proposed interdict would therefore be purposeless. There is no purpose in granting an interim interdict pending the outcome of an internal review which cannot change the situation or set aside the award or the contract. MSC's reliance on the fact that it seems that Transnet may hold the view that after the internal review, it could cancel the contract unilaterally is incorrect. The NT note does not confer that power on Transnet under circumstances such as these. In my view this should be the end of this application and the application should be dismissed.

[43] Did MSC initiate an internal review alternatively has it pursued the internal review ?

[43.1] I have already dealt with the chronology pertaining to the initiating alternatively pursuing of Transnet's internal review process by the Applicant in paragraphs 15 to 33 above, which are repeated herein. The relevant part thereof is as follows:

[43.2] The Applicant was informed that its bid was unsuccessful as far back as 5 July 2022 and provided with reasons why its bid was unsuccessful, was informed of the internal review/appeal process and was informed of the First Respondent's PAIA process procedure to obtain the documents/information requested. On 14 July 2022 the Applicant was requested to state as to whether it requests the team to review the procurement process followed, to list the issues that it would want the team to investigate regarding the procurement process followed for this tender; and was informed that a prompt response will be appreciated for the team to commence with the review. Furthermore, on 2 August 2022²⁹, the First and Second Respondents' attorneys address a letter to the Applicant's attorneys stating that the internal review could not progress in the absence of the information sought in the e-mail of the First Respondent's Mr Malele on 14 July 2022 and because this information requested in its email, dated 14 July 2022 has not been provided, it was stated that "*no such [internal review] proceedings are underway*".

[43.3] The only response of the Applicant was on 4 August 2022 as follows: it is "*premature for our client to provide a list of issues without having had sight of the Bid Evaluation Report*" and denied having abandoned the internal review process. The Applicant only submitted its PAIA request for the Bid Evaluation Report and the procurement policy applicable to the tender on 8 August 2022. The importance of the above is clear – MSC did not make any

²⁹ Annexure "LF2" to the Third Respondent's Answering Affidavit

submissions and would only make same if and when its demands for the Bid Evaluation Report were met.

[43.4] It was clearly stated on 14 July 2022 by the First alternatively the Second Respondent that no such proceedings (internal review proceedings) was on its way due to no complaint submitted and/or submissions made by the Applicant that the Second Respondent could investigate. The Applicant further in its papers as well as during the hearing of this application addressed the Court on its prospects of success in the internal review proceedings with reference to the alleged irregularities in the tender process. This is a clear indication that the Applicant had sufficient information at its disposal to at least submit a provisional complaint and/or made provisional submissions in order to initiate and/or pursue the internal review proceedings. Nothing prevent the Applicant from supplementing and/or augmenting its provisional complaint and/or submission once the required documents come to hand. This was not done and at date of the hearing of this application there was no evidence before this Court that any complaint and/or submissions were made by the Applicant in order to initiate and/or pursue the internal review proceedings and as such I find that no such internal review proceedings are on it way and/or pending. Even if the Applicant has initiated the internal review process it has not actively pursued therewith.

[43.5] The consequences of this stance by the Applicant that it would only make submissions once its demands for further documentation were met is firstly that MSC cannot seek an interim interdict pending the outcome of an internal review it has not initiated, or is not pursuing. Secondly, MSC cannot be allowed to cause a stalemate by seeking an interdict, pending the outcome of proceedings it will only initiate when it is completely satisfied that it has every scrap of paper that it chooses to seek. This would give MSC *carte blanche* to determine when to pursue the internal remedy proceedings, and in the meantime completely stall the project, to the detriment of Transnet, Maersk, and the persons who will benefit from it (via direct employment, and in the fruit farming industry). Thirdly, MSC's intransigence in refusing to proceed with its internal review, yet insisting on an interim interdict pending the outcome of that process warrants in my view a costs order on a punitive scale.

[43.6] For these reasons the Applicant's application should be dismissed as the granting of the proposed interdict will be purposeless.

[43.7] Irrespective of the fact that I have already found that the application should be dismissed for the reasons stated above I will briefly consider whether the Applicant has established the requirements for the interdictory relief sought hereinunder.

[44] Interdictory relief sought

[44.1] It is trite law that an applicant for an interim interdict must establish:

- (a) a *prima facie* right, though open to some doubt;
- (b) a reasonable apprehension of irreparable and imminent harm to the right;
- (c) the balance of convenience; and
- (d) that it has no other satisfactory remedy.

[44.2] Prima facie right

[44.3] In considering whether the Applicant has a *prima facie* right I have to briefly consider the Applicant's prospects of success in the internal review process. Sight should not be lost that firstly this is not a review court and secondly that I have already found that the Applicant has not initiate the internal review process alternatively has not pursue same.

[44.4] The Applicant's complains that the tender process was "*administratively unfair*" because the time allocated was insufficient.³⁰ It then made a comparison with some past unrelated tenders of Transnet.³¹ The Applicant then submits that the tender "*fell short of what is required in terms of the relevant framework*".³² In support of this submission the Applicant referred to *Airports Company South Africa SOC Ltd v Imperial Group Ltd and Others [2020] 2 All SA I (SCA); 2020 (4) SA 17 (SCA)* ("ACSA judgment") as well as to the Preferential Procurement Policy Framework Act, 5 of 2000 ("PPPFA") and the Preferential Procurement Policy Framework Regulations ("the PPP Regulations"). In my view the ACSA judgment is not applicable to this matter, which is distinguishable on both the facts and the law and the PPP Regulations have been found to be invalid, although, that order has been suspended until early 2023.

³⁰ Applicant's Founding Affidavit, para 71 and 72

³¹ Applicant's Founding Affidavit, para 73

³² Applicant's Founding Affidavit, para 76

[44.5] The Applicant then further complains that the tender does not state whether the 80/20 preference point system as envisaged in Regulation 6, or the 90/10 preference points system as envisaged in Regulation 7, applies to the tender. Furthermore, that the tender does not specify what the evaluation criteria for measuring functionality is. The tender nor Transnet's General Bid Conditions does not explain what formula will be used to determine these scores and that the tender process fell foul of Section 217 of the Constitution as the tender process was not in accordance with a system that is fair, equitable, transparent, competitive and cost-effective and ought to be set aside.³³

[44.6] With reference to the Request for Commercial Proposal (tender) it is clear that it does set out the evaluation criteria as well as the minimum threshold, measures, description, scores and scoring tables. These measures include, volume and operational commitments, investment, commercial rental, risk, safety, health, transformation and community development. As stated above the Applicant was informed and provided with reasons why its bid was unsuccessful. In my view there is no substance to the allegation that the tender had no evaluation criteria.

[44.7] The Applicant's complaint in respect of the alleged truncated time periods which according to it applied in Tender No. CP2422 is without substance. Firstly, the Applicant had ample opportunity to apply for an extension (between 14 and 28 April 2022), it only applied on 29 April 2022 and the Applicant's extension request was for reasons stated above only picked-up by Transnet on 3 May 2022. The Applicant was nevertheless allowed to submit its submissions by 10 May 2022, an additional 7 days. Secondly, the Applicant agreed to be bound by the conditions of the tender. Therefore, I find that there is no substance to the complaint that insufficient time was afforded. If there was a valid complaint in this regard, that complaint was cured by the extension of time and the Applicant's acceptance of the extension.

[44.8] Without usurping the functions of the internal review/judicial review I find that on the two grounds advanced by the Applicant to challenge the award, namely (i) the alleged insufficiency of time as well as (ii) the alleged non-compliance with the Regulations, the Applicant has simply not made out a *prima facie* case, but this should ultimately be determine by a review court.

³³ Applicant's Founding Affidavit, para 82 to 88

[44.9] Counsel for the Third Respondent, Adv Budlender SC, submitted with reference to *National Treasury and Others v Opposition to Urban Tolling and Alliance and Others 2012 (6) SA 223 (CC) ("OUTA")* at para 50 that the Constitutional Court has explained that an applicant must demonstrate a *prima facie* right that is threatened by an impending or imminent irreparable harm, other than a right to have the impugned decision reviewed and have it set aside. The right to review the impugned decision does not require any preservation *pendente lite*. He further pointed out that in the OUTA case it was held that it is not for the interdictory court to determine the validity of the contemplated ground of review and that a court hearing the application for interdictory relief should be careful not to usurp the review court's determination of the merits. What is required, is the establishment of a right, "[q]uite apart from the right to review" the decision, which is "threatened by an impending or imminent irreparable harm". It was submitted that this applies equally to an internal review. I find nothing to deviate from this submission.

[44.10] MSC's *prima facie* right is premised on one ground, namely that it seeks to "protect its right to utilise the internal review/appeal procedure".³⁴ This is insufficient to establish a *prima facie* right.

[44.11] The Applicant further has the following fundamental difficulties namely that I have already found that there is no internal remedy which can provide the relief which MSC seeks, namely to cancel the contract and setting aside the award without recourse to a judicial review. Furthermore, as stated above MSC has not pursued the internal review on which it seeks to rely.

[44.12] I have further in addition to the above considered the following factors which include *inter alia* the fact that there were 5 bidders who were subjected to the same time periods to submit their tender submissions, the fact that the Applicant applied for an extension of time to submit its tender submissions, which was initially rejected but subsequently granted, the fact that all the bidders received the same request for proposal documents and none of the other bidders complaint of any irregularity in respect thereof, the fact that the Applicant to date of this application has not actively pursued the internal review process because if so pursued it could have been finalised by now, the fact that the Applicant was provided with reasons why its bid was unsuccessful namely that it did not meet the technical requirements and the fact that no allegation is made against Maersk in respect of any irregularity

³⁴ Applicant's Founding Affidavit, para 101.1

pertaining to the tender process. For these reasons, I find that the Applicant has not established a *prima facie* right.

[44.13] A reasonable apprehension of irreparable and imminent harm to the right

[44.14] It is trite law that an applicant must establish that there is a “*reasonable apprehension of irreparable and imminent harm eventuating should the order not be granted. The harm must be anticipated or ongoing.*”³⁵ The test is an objective one.

[44.15] This requirement is inextricably linked to the balance of convenience, because in exercising its discretion, the court weighs *inter alia* the prejudice or harm to the applicant if the interim interdict is withheld, against the prejudice or harm to the respondent if it is granted.³⁶

[44.16] In *Tshwane v Afriforum and Another 2016 (6) SA 279 (CC) at para 59* Mogoeng CJ noted as follows:

“[59] *Irreparable implies that the effects or consequences cannot be reversed or undone. Irreparable therefore highlights the irreversibility or permanency of the injury or harm. That would mean that a favourable outcome by the court reviewing allegedly objectionable conduct cannot be an order that would effectively undo the harm that would ensure should the order not be granted.*”

[44.17] MSC asserts that it will suffer irreparable harm if it does not obtain an interim interdict pending the final determination of its internal review. However, the internal review will itself be unable to prevent the alleged harm and furthermore, there is currently no internal review on going for reasons stated above. The interim interdict is therefore purposeless.

[44.18] The alleged harm is in any event not irreparable, because MSC was entitled to seek an expedited judicial review. It could already have done this.

[44.19] Furthermore, a review court if pursued/internal process is activated, will in due course pronounce on the decision to extend the cut-off date by 7 days and to award the tender to

³⁵ *Tshwane v Afriforum and Another 2016 (6) SA 279 (CC) at para 55 and 59*

³⁶ *Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton & Another 1973 (3) SA 685 (A) at 691D-E*

Maersk. These processes have yet to commence and, on the authority of the Constitutional Court in OUTA, do not require preservation *pendente lite*.

[44.20] For reasons stated above I find that the Applicant has not established the requirement that it would suffer irreparable harm if the interim interdict is not granted.

[44.21] Balance of Convenience

[44.22] MSC relies on the internal review to argue that the balance of convenience favours it.³⁷

[44.23] Counsel for the Third Respondent submitted that the balance of convenience favours the Third Respondent and that the Third Respondent will suffer irreparable harm if the interdict is granted for the following reasons:

44.23.1 The uncontested evidence shown that there is a pressing need for the project, which is time-constrained to coincide with the harvesting times of the South African fruit farmers and the so-called 'reefer' season, and that delay will cause substantial harm.

44.23.2 The total estimated spend for the project is in the region of R700 million.

44.23.3 To operationalise the project, the construction costs over the next 12 months will be approximately R58 million. This work will bring about short-to-medium term job creation in the form of various forms of construction-related employment.

44.23.4 If an interdict is granted, and remains in place for 12 months, the project losses on a conservative basis would be approximately R185 million. If the delay is longer, or worse still, the project is abandoned, the loss would be significantly higher.

44.23.5 If the project is not operationalised, this would result in a significant loss of revenue for the fiscus.

³⁷ Applicant's Founding Affidavit, para 101.3

- 44.23.6 The project's timeline has been carefully calibrated. To meet the schedule, contractors have been engaged and consulted. The project will create immediate employment for a large number of persons. The project must be allowed to continue now, to ensure that it coincides with the fruit harvesting schedule and the '*reefer season*' for export.
- 44.23.7 The estimated loss of employment if interim relief is granted would be 331 jobs. The estimated monetary losses would be R185 million. This in addition to the significant social development benefits which will be delayed or lost.

[44.24] After considering these factors I find that the balance of convenience does not favour MSC, a non-compliant bidder who now seeks interim relief pending an internal review which cannot provide the remedy which it seeks and which it has not actively pursued. There is nothing in the papers indicating the Maersk's bid and the awarding of the contract to it was not done following an open and competitive process. The balance of convenience is further tilted against MSC because the proposed interdict leaves it in the hands of MSC to decide when its internal review will finally be determined. The final determination of the internal review will arrive only when MSC has decided not to continue its search for documents which might provide a basis for its internal review, and has pursued that review, the internal review has been completed and any judicial review (and/or appeal) of the outcome of that internal review have been completed. Furthermore, there is no evidence that MSC has offered to indemnify Maersk if its internal review is unsuccessful. No tender was made at all.

[44.25] In addition to the above Counsel for the First and Second Respondents, Adv Makola SC, submitted that the balance of convenience favours Transnet and that it would suffer more harm if the interim interdict is granted than the Applicant would if it is not granted, and that Transnet's prejudice is based on the following:

- 44.25.1 Suspension of the project plan on leasing out sidings/facilities across the various corridors of business for five years;
- 44.25.2 Suspension of this would have a domino effect and would stop the provision of the required services and transportation of freight by rail over the lease period;

- 44.25.3 It would freeze the intended investment by Maersk of approximately R759 million;
- 44.25.4 It would also freeze the construction of a cold storage facility, warehouse, container depot, handling equipment as well as security facilities and systems would place in abeyance the payment of rentals for as long as the interim interdict is extent;
- 44.25.5 It would also freeze the creation of job opportunities for the local community. It is anticipated that approximately 179 jobs would be created. It would have trickle-down benefits;
- 44.25.6 R6 million intended to be committed towards a community development programme would also be frozen; and
- 44.25.7 The investments would also be frozen i.e., the construction of road infrastructure between Bellville Container Terminal and Transnet Park to enable transfer of containers from Belcon to the leasing facilities, land site upgrades on storage and loading areas, building construction/upgrades i.e., offices, ablution facilities, lighting etc., security upgrades including fencing, walling, guard houses as well as investments in rail infrastructure, rail lines and OHTE outside the facility, rolling stock (wagons and shunting), security and related technology for approximately 12 km of rail track.

[44.26] MSC does not set out what loss it will suffer if the interim relief is not granted. It merely reference the right to participate in the internal review process.

[44.27] After considering the above submissions by the Respondents I find that the balance of convenience does not favour MSC.

[44.28] No alternative remedy

[44.29] The remedy which MSC is pursuing (the internal review) cannot provide the relief which it seeks. Even if Transnet can do a "self-review" of its own decision if irregularities are found in the tender process during the internal review process the ultimate setting aside of its decision must be done by way of a judicial review based on legality. MSC has an alternative remedy. It is to seek judicial review of the impugned decision, if necessary, on an expedited basis. It has failed to pursue that remedy.

[44.30] In this regard Counsel for the Applicant submitted that section 7(2)(a) of PAJA requires the Applicant to first exhaust any “*internal remedy*”.

[44.31] The Third Respondent in its heads of argument contended that the investigation contemplated in paragraph 10 of the NT Note is not an “*internal remedy*” as envisaged in section 7(2) of PAJA. In this regard he referred the Court to *DDP Valuers (Pty) Ltd v Madibeng Local Municipality [2015] ZASCA 146* (“the DDP Valuers case”).

[44.32] The DDP Valuers case thus established that for the mechanism to be an internal remedy the body dealing with it must have the power to “*confirm, substitute or vary the decision complained of*”. It was submitted that the procedure created by the NT Note is not such a mechanism. The internal review is not a process which can produce the remedy which MSC seeks. Therefore, I find that the investigation contemplated in paragraph 10 of the NT Note is not an “*internal remedy*” as envisaged in section 7(2) of PAJA. In the *Sita vs Gijima case* the Constitutional Court held that PAJA is not applicable to organs of state such as Transnet in the case of a “*self-review*” of its own decision and therefore it should follow that section 7(2) of PAJA is not applicable, but even if this assumption is wrong then I find that the procedure created by the NT Note is not such a mechanism to “*confirm, substitute or vary the decision complained of*” and that MSC has an alternative remedy, namely to seek judicial review.

[44.33] For reasons stated above, I find that the Applicant has not established the requirements for an interim interdict.

E. ORDER

Therefore the following order is made:

1. That the Applicant’s application is dismissed;
2. That the Applicant is ordered to pay the Third Respondent’s costs, including costs occasioned by the employment of two counsel, on the attorney and client scale.

3. That the Applicant is ordered to pay the First and Second Respondents' costs, including costs occasioned by the employment of two counsel, on the attorney and client scale.

SIGNED ON THIS 5TH DAY OF DECEMBER 2022.

BY ORDER

SM MARITZ AJ

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