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[3] **IN THE HIGH COURT OF SOUTH AFRICA**
(WESTERN CAPE HIGH COURT, CAPE TOWN)
[4]

[5] Case No 11785/12

[6] In the application between:

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[8] **GOLDEN ARROW BUS SERVICES (PTY) LTD** Applicant
[9]
[10] and
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[12] **CITY OF CAPE TOWN** First Respondent
[13]
[14] **MEC FOR TRANSPORT AND PUBLIC**
WORKS, WESTERN CAPE GOVERNMENT Second Respondent
[15]
[16] **TRANSPENINSULA INVESTMENTS**
(PTY) LTD Third Respondent
[17]
[18] **KIDROGEN (PTY) LTD** Fourth Respondent
[19]

[20] And in the counter-application between:

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[22] **CITY OF CAPE TOWN** Applicant
[23]
[24] and
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[26] **GOLDEN ARROW BUS SERVICES (PTY) LTD** First Respondent
[27]
[28] **AND FOUR OTHER RESPONDENTS**
[29]

[30] **Court:** GRIESEL J

[31] **Heard:** 13 & 14 March 2013

[32] **Delivered:** 26 April 2013

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[34] **JUDGMENT**

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[36] GRIESEL J:

[37] [1] The present application was brought by Golden Arrow Bus Services (Pty) Ltd ('the applicant') against the City of Cape Town ('the City') (as first respondent); the MEC for Transport and Public Works,

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Western Cape Government (as second respondent); Transpeninsula Investments (Pty) Ltd (as third respondent); and Kidrogen (Pty) Ltd (as fourth respondent).

[38] [2] The application arises against the background of on-going efforts on the part of the City to establish an integrated public transport network ('IPTN') in its metropolitan area and the negotiations aimed at achieving this goal. It proposes doing so in four broad phases from 2012 to 2032. The new *MyCiti* bus service, which has already been partially implemented, forms part of this integrated network.[1]

[39] [3] As the facts of this case demonstrate, the process of establishing an IPTN is an extremely complex one, involving numerous issues and role-players and it is governed by a myriad of legislative requirements. Chief among these are the provisions of the National Land Transport Act, 5 of 2009 ('the Act'). This Act, which repealed and replaced the National Land Transport Transition Act, 22 of 2000 ('the Transition Act'), is aimed at furthering 'the process of transformation

1 Full details of the nature of the proposed IPTN system, including the *MyCiti* bus service, are accessible on the City's website and it is accordingly not necessary to burden this judgment with such detail. See: http://www.capetown.gov.za/en/MyCiti/Pages/default.aspx , accessed on 22 April 2013.

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and restructuring the national land transport system' which had been initiated by the Transition Act.[2] The National Land Transport Regulations on Contracting for Public Transport Services ('the regulations'), promulgated in terms of s 8 read with s 46(3) of the Act,[3] are also relevant to the present application.

[40] [4] It is common cause that the applicant has been operating scheduled bus services in Cape Town for over 150 years. Since 1997, its services in the Cape metropolitan area have been regulated by Interim Contract No. IC68/97 ('the interim contract'), concluded between itself and the National Department of Transport on 17 March 1997. Ten years later, on 10 May 2007, the National Department ceded its rights and delegated its obligations in terms of the interim contract to the Province. The interim contract has remained operative under the Act, which expressly makes provision, in s 46 thereof, for interim contracts to continue in force. The applicant has also, from 2011, participated in the initial phase of the *MyCiTi* municipal transport service. Its involvement has been regulated by a 'Further Addendum' to the interim contract,

2 See the long title of the Transition Act and s 2(*a*) thereof.

3 Government Notice R.877 in GG No 32535 of 31 August 2009.

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concluded on 20 April 2011 between the Province, the applicant and the City ('the further addendum').

[41] [5]The City now wishes to implement Phases 1A and 1B of *MyCiTi*, in accordance with its IPTN. To this end, the City has been negotiating for some time with the three vehicle operator companies earmarked to provide bus services over the routes encompassed by Phases 1A and 1B. One of those companies is the applicant. The other two are the third and fourth respondents in the main application, Transpeninsula and Kidrogen, which are currently parties to interim Vehicle Operator Agreements in respect of the first phase of *MyCiTi*. The expectation is that those negotiations will result in the conclusion of long-term (12-year) negotiated contracts between the City and the relevant companies in terms of s 41 of the Act.

[42] [6] In the course of negotiations involving the City and prospective operators in the IPTN, disputes have arisen between the applicant, on the one hand, and the City, on the other, resulting in a deadlock on certain issues. Relying on the provisions of the Act and the regulations, the applicant seeks to have the disputes in question referred to mediation, followed, if necessary, by arbitration in order to break the
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deadlock.[4] The main issues in dispute relate to (*a*) the question of the applicant's market share percentage in respect of some of the routes; and (*b*) the question of whether (like the minibus taxi operators) the applicant is entitled to compensation for decommissioned vehicles and assets. In the alternative to mediation and arbitration, the applicant seeks an order directing the City to negotiate with it in good faith and reasonably in relation to the disputed issues.[5] The applicant also seeks an order interdicting the City from concluding a s 41 contract with Transpeninsula or Kidrogen in respect of Phases 1A and 1B of *MyCiTi* pending the finalisation of the desired mediation and arbitration, alternatively good faith negotiations.[6]

[43] [7] The application is being opposed by the City, which has in turn launched a conditional counter-application for an order declaring reg 2(5) of the regulations to be *ultra vires* the Act and accordingly

4 Prayers 1 and 1A of the notice of motion as amended.

5 Prayer 2.

6 Prayer 3.

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invalid and unlawful and setting the regulation aside.[7] The National Minister of Transport has consented to being joined as fifth respondent in the counter-application and abides the decision of the court in respect thereof.

[44] Legislative background

[45] [8] The Act contains elaborate provisions allocating various responsibilities to the three spheres of government: in terms of s 11(1)(a)(xi), the national sphere of government is responsible for acting as contracting authority for subsidised service contracts, interim contracts,[8] current tendered contracts and negotiated contracts concluded in terms of the Transition Act.

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7 Originally the counter-application was also directed at reg 7(15), but this attack was abandoned pursuant to an agreement reached between the City and the Minister prior to the hearing.

8 The Transition Act defines 'interim contract' as meaning *inter alia* a contract which is not a tendered contract, the term of which expires after the commencement of the Transition Act, which was concluded before that date between the province and the national Department of Transport on the one hand, and a public transport operator, on the other, and is still binding between them or is binding between the province and the operator. See s 1(1)(xxviii).

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[46] [9] Section 11(1)(b) deals with the role of provinces. Section 11(6) provides that '. . . where a province is performing a function contemplated in subsection (1)(a) on the date of commencement of this Act, it must continue performing that function, unless that function is assigned to a municipality by the Minister in terms of this Act.'

[47] [10] In terms of s 11(1)(c)(xxvi), the *municipal sphere* is responsible, *inter alia*, for 'concluding . . . negotiated contracts contemplated in s 41(1) with operators for services within their areas'. In this regard, s 40 requires a municipality, among other things, to 'take steps as soon as possible . . . to integrate services subject to contracts in their areas, as well as appropriate uncontracted services, into the larger public transport system in terms of relevant integrated transport plans'.

[48] [11] In order to achieve this goal, a municipality (as 'contracting authority') is empowered by s 41(1)(a) 'once only' to enter into 'negotiated contracts' with public transport service operators with a view to, among other things, 'integrating services forming part of integrated public transport networks in terms of their integrated transport plans'. The negotiations contemplated by s 41 'must where appropriate include operators in the area subject to interim contracts, subsidised service [5]
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contracts, commercial service contracts, existing negotiated contracts and operators of unscheduled services and non-contracted services'.[9] However, 'the contracts contemplated in subsection (1) shall not preclude a contracting authority from inviting tenders for services forming part of the relevant network.'[10]

[49] [12] Section 46, dealing with '*Existing contracting arrangements'*, is also of pivotal importance in the context of this application. It provides:

[50] '(1) Where there is an existing interim contract . . . as defined in the Transition Act in the area of the relevant contracting authority, that authority may –

[51] (a) allow the contract to run its course; or

[52] (b) negotiate with the operator to amend the contract to provide for inclusion of the operator in an integrated public transport network; or

[53] (c) make a reasonable offer to the operator of alternative services, or of a monetary settlement, which offer must bear relation to the value of the unexpired portion of the contract, if any.

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9 Section 41(2).

10 Section 41(4).

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[55] (2) If the parties cannot agree on amendment of the contract or on inclusion of the operator in such a network, or the operator fails or refuses to accept such an offer, the matter must be referred to mediation or arbitration in the prescribed manner to resolve the issue.

[56] (3) The Minister may make regulations providing for the transition of existing contracting arrangements and the transfer of the contracting function in terms of this section or section 41, including the transfer or amendment of existing permits or operating licences to give effect to its provisions in the case of an assignment under section 11 (2).'

[57] [13] The Minister's powers in terms of s 46(3) to make regulations found expression *inter alia* in the provisions of reg 2 of the regulations, the relevant part of which provides:

[58] **'2. Negotiated contracts**

[59] (1) Where a contracting authority has concluded –

[60] (a) a subsidised service contract, interim contract, current tendered contract or negotiated contract in terms of the Transition Act, such contract shall remain in force until it expires or is terminated, but the contracting authority will not thereby be precluded from concluding negotiated contracts under section 41 of the Act in the same area or on the same routes; and

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[61] (b) a negotiated contract in terms of section 41 of the Act or section 47(3) of the Transition Act, this will not preclude it from -

[62] (i) concluding other such contracts with different operators or on different routes, even if such routes are in the same area; or

[63] (ii) providing in such contract for the services to be provided under the contract to be increased or amended in a phased manner during the period of the contract, provided that the total duration of the contract shall not exceed 12 years.

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[65] (2) Where there is a subsidised service contract, interim contract, current tendered contract or negotiated contract as contemplated in the Transition Act, or a contract contemplated in section 46(1) of the Act involving services on BRT routes as part of an IPTN, and such contract has more than three months still to run -

[66] (a) the municipality establishing the IPTN must enter into negotiations with the relevant provincial department and the operator with a view to involving the operator in the operating agreements for the proposed IPTN; and

[67] (b) the funds previously allocated for the routes or areas forming part of the services provided in terms of that contract that will be covered by the BRT services must be allocated to the municipality for funding the network contract, subject to the relevant Division of Revenue Act; and

[68] (c) the province or municipality, as agreed between them and the Department, may conclude a contract in terms of the Act with the existing operator, either by amending the contract or concluding a new contract, or failing agreement with that operator, with another operator or operators, for the remainder of the services, subject to section 11 (2) and (3) of the Act; or

[69] (d) the contract may be allowed to run its course; or

[70] (e) the contracting authority may make an offer to the operator in terms of section 46(1)(c) of the Act.

[71] (3) Sub-regulation (2) shall not prevent the contracting authority from negotiating with the operator as contemplated in that sub-regulation where such a

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contract has three months or less still to run, or, alternatively the contracting authority may allow the contract to run its course in terms of section 46(1)(a) of the Act.

[72] (4) Where a municipality is establishing an IPTN contemplated in section 40 or 41 of the Act, it must make reasonable efforts to involve existing scheduled bus and unscheduled minibus taxi operators on the relevant routes in the proposed negotiated contracts, but where the municipality has made an offer in writing, either individually or by notice in the press to such operators and some of the operators have rejected the offer or failed to respond within 21 days, the municipality may conclude -

[73] (a) one or more negotiated contracts with other operators in terms of section 41(1) of the Act; or

[74] (b) subsidised service contracts or commercial service contracts for the services.

[75] (5) Any dispute with regard to the matters contemplated in this regulation must be resolved in terms of the procedures set out in regulations 6 to 9 . . .' (i.e. by mediation and/or arbitration).[11]

[76] Discussion

[77] [14]The factual background concerning the history of the negotiations between the parties has been traversed in great detail in the

11 These latter regulations will be considered in more detail later. See paras [92] and [94] below.

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voluminous papers filed of record. I do not find it necessary for purposes of this judgment to embark on a detailed analysis of the factual background as most of the debate before me revolved around the proper interpretation of secs 41 and 46 of the Act, read with reg 2(5). In this regard, both sides submitted full and well-reasoned heads of argument, which were of great assistance to me. In addition, oral argument by learned counsel on both sides occupied two full court days. To deal fully with the extensive arguments and counter-arguments would be a mammoth task, which would unduly delay delivery of this judgment. It would also in my view be an unnecessary task, as the parties are fully aware of each other's contentions relating to the various issues. Mindful of the need for the parties to achieve some measure of certainty and finality as soon as possible, I shall accordingly attempt as briefly as possible to summarise the reasons for my main findings.

[78] Prayer 1 - Mediation / Arbitration

[79] [15] As mentioned earlier, the applicant is aggrieved at certain aspects of the negotiations with the City. In prayer 1 the applicant asks the court to order that the disputes outlined in its founding affidavit be referred to mediation and/or arbitration in terms of regs 2, 6, 7, 8 and 9.

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The application is based on the provisions of s 46(2) of the Act as well as reg 2(5) quoted above.

[80] [16] The essential difference between the parties in this regard relates to their competing contentions concerning the inter-relationship between the provisions of ss 41 and 46. The City contended that the Act draws a clear distinction between contracts entered into in terms of s 41, on the one hand, and existing contracts as contemplated by s 46(1), on the other. The Act also distinguishes, so it was argued, between two types of negotiations, namely negotiations that precede the conclusion of *new* s 41 contracts and negotiations in terms of s 46(1)(b) aimed at amending existing *interim* contracts. Mediation and arbitration are relevant in relation to the latter category, but not in relation to the former. *In casu*, the negotiations that gave rise to the disputes between the parties occurred in the context of s 41 negotiations, according to the City.

[81] [17] The applicant, on the other hand, sees the two sections as 'Siamese twins', being intimately inter-related. This means that the provisions for mediation and arbitration are available not only in the context of negotiations taking place in terms of s 46, but also in the context of s 41 negotiations. This is so, according to the applicant,
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because the mediation/arbitration mechanism, which was initially created with negotiations under s 46 in mind, 'has been extended to cover s 41 negotiations as well'.

[82] [18]On a factual level, there is ample support in the record for the City's contention that the negotiations giving rise to the present disputes occurred in the context of s 41. Tracing the history that preceded the present application, including the contents of the applicant's founding affidavit herein, it is apparent that the applicant and its legal representatives initially viewed the negotiations between the parties as being conducted exclusively in terms of the provisions of s 41. If this is so (as appears to be the case), then it is clear that that section does not provide for disputes to be referred to mediation or arbitration. The focus accordingly shifts to the applicant's argument that it is entitled to invoke the provisions of reg 2(5) to justify mediation/arbitration in the context of s 41 negotiations.

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[83] Interpretation of reg 2(5)

[84] [19] It will be recalled that reg 2(5) provides that any dispute with regard to a matter contemplated in reg 2 must be resolved in terms of the mediation and arbitration procedures contained in regs 6 to 9.

[85] [20] It was in relation to this part of the claim that the City brought its counter-application to have the provisions of reg 2(5) declared *ultra vires* and invalid. In summary, the City pointed out that the sole source of the Minister's power in the Act to make regulations regulating the mediation or arbitration of disputes is in s 46(2). What s 46(2) allows the Minister to regulate, so it was argued, is the *manner* in which the dispute must be referred to mediation or arbitration; not the *matters* that may be referred. Thus, the sub-section does not authorise the Minister to require the mediation or arbitration of disputes arising from s 41 negotiations, such as those contemplated by reg 2(4). If reg 2(5) purports to provide for mediation and arbitration also in relation to s 41 disputes, then it would be *ultra vires* the Act and consequently in conflict with the principle of legality which underlies our new constitutional order.

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[86] [21] There is much force in this argument on behalf of the City. However, in the light of my conclusion regarding the City's alternative argument, it is not necessary to come to any definite conclusion regarding the validity of reg 2(5). In line with the well-established principle of interpretation that a court must prefer any reasonable interpretation of legislation which would preserve its constitutional validity over an interpretation which would result in it being unconstitutional,[12] the City argued that the provisions of reg 2(5) ought to be 'read down' so as to make the procedure available only in the context of negotiations in terms of s 46. (This latter interpretation, I may add, was also supported by the National Minister herein.)

[87] [22]It appears that reg 2 mirrors the framework of ss 41 and 46 of the Act: first, reg 2(1) expressly recognises the difference between s 41 negotiations and contracts, on the one hand, and s 46 negotiations and existing contracts, on the other. It recognises that existing contracts shall remain in force until they expire or are terminated; but that a contracting

12 Cf eg *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) para 36 and the cases cited in n 31.

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authority, such as the City, will not thereby be precluded from concluding a s 41 contract in the same area or on the same route.[13]

[88] [23] Secondly, reg 2(2) reiterates the three options available under s 46 to contracting authorities faced with existing contracts. Thus, it provides for the alternatives of -

[89] • negotiating an amendment to an existing contract or concluding a new contract: reg 2(2)(a) '*and*' (b) '*and*' (c) (read together), which accord with s 46(1)(b); '*or*'

[90] • allowing an existing contract to run its course: reg 2(2)(d), which accords with s 46(1)(a); '*or*'

[91] • a contracting authority offering a monetary settlement: reg 2(2)(e),which accords with s 46(1)(c).

[92] [24] Where reg 2(5) provides in broad, general terms that any dispute with regard to the matters contemplated in reg 2 must be resolved by way of mediation and/or arbitration, it must, in my view, be

13 See reg 2(1)(a).

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interpreted restrictively to mean that the dispute in question must be one that is capable of being resolved in terms of the procedures set out in regs 6 to 9. These latter regulations, in turn, provide for mediation and arbitration only where a contracting authority and an operator cannot reach agreement under ss 46(1) or 46(2) of the Act. Thus, reg 6 provides:

[93] 'Where a contracting authority and an operator cannot reach agreement *under section 46(1) of the Act*, the matter must be referred to mediation under regulation 7 if not urgent, or to arbitration under regulation 8 where the contracting authority has at any time decided that the matter is urgent.' (Emphasis added.)

[94] [25] Mediation is provided for in reg 7 and arbitration in reg 8. Regulation 8(1) provides:

[95] 'Where a matter must be referred to arbitration *under section 46(2) of the Act* and the contracting authority notifies the operator in writing that the matter is urgent, the matter must proceed to urgent arbitration in terms of this regulation.' (Emphasis added.)

[96] [26] Reading reg 2(5) in its context and in conformity with the Act, it appears therefore that the disputes that may be referred to

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mediation and arbitration are those that arise from an inability to reach agreement on the matters referred to in s 46(2), and no others.

[97] [27] This must be so, in my view, because compulsory mediation and/or arbitration is inappropriate for s 41 negotiations. If it were otherwise, absurd consequences could follow. If the City were obliged to reach consensus on every issue and with every participant in the process, failing which it could be compelled to go to mediation and arbitration, then the City, as contracting authority, could become endlessly bogged down in mediation and arbitration proceedings. This would make it impossible to reach timely s 41 agreements and would likewise make it impossible for the City to fulfil its statutory mandate in terms of s 40 of the Act to take steps 'as soon as possible after the commencement of the Act' (on 8 December 2009) to integrate services into the larger public transport system.

[98] [28] Moreover, the City could end up with 'negotiated contracts' imposed on it which it would never voluntarily have concluded and on terms which, conceivably, neither the City nor its negotiating partners would have agreed to. This would be inimical to the scheme of s 41. As it was put by counsel for the City, s 41 imposes on contracting
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authorities an obligation to negotiate, not an obligation to agree. It confers the necessary discretion on contracting authorities to adopt a position in such negotiations (as a negotiating party in any commercial negotiations would be entitled to do). Mediation or arbitration is not what is contemplated by the Act and the regulations with regard to deadlocks reached in the s 41 negotiation process. Rather, the Act and regulations contemplate two other potential deadlock breaking mechanisms: in terms of reg 2(4), when a municipality is negotiating in terms of s 41, it may make an offer in writing, either individually or by notice in the press, to the operators with which it is negotiating, and give them twenty one days to respond. (Effectively, this is a 'take it or leave it' option.) Alternatively, the City can at any stage elect to go out to tender rather than pursue a negotiation process.[14]

[99] [29] To sum up thus far, I conclude that reg 2(5) does not provide a mechanism for compulsory mediation/arbitration in the context of s 41 negotiations, with the result that the relief claimed in prayer 1 is not competent. It follows, further, that it is unnecessary to make any order with regard to the City's counter-application.

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14 See s 41(4) and cf ss 42(4) and 43(1).

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[100] Prayer 1A – Mediation/arbitration in terms of s 46(2)

[101] [30] In prayer 1A the applicant asks the court to declare that in relation to 'the inclusion of the applicant in Phase 1 (Milestone 1A)' of the City's IPTN, it is entitled, in terms of s 46(2) of the Act, to mediation in the manner prescribed in reg 7(1) to 7(14); and failing settlement of the matter by mediation, to have the matter referred to binding arbitration in the manner prescribed in reg 8(2) to 8(13) or as directed by the court.

[102] [31] Section 46(2) on which this leg of the application is based, must be read together with s 46(1)(*b*). In the context of the present application, this means that the applicant must establish the following requirements before the matter may be referred to mediation or arbitration:

[103] (a)there must be a dispute relating to 'amendment of the contract' or 'inclusion of the operator in such [integrated public transport] network'.[15]; and

15 The further provision in s 46(2) where the operator 'refuses to accept such an offer' is not relevant in the present context and need not be considered.

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[104] (b) such dispute must between 'the relevant contracting authority' and the operator.

[105] [32] As regards the first aspect, it has been shown earlier, in the context of the applicant's claim in terms of prayer 1 (above), that the negotiations between the parties insofar as relevant to the present application took place exclusively in terms of s 41, and not s 46, of the Act. It was only at a later stage of the proceedings, after delivery of the City's answering affidavits herein, that the applicant changed tack by amending its notice of motion to insert prayer 1A, contending that the disputes in question arise from negotiations conducted in terms of *both* secs 41 and 46. However, this contention is not supported by the evidence. The only negotiations with the applicant that took place in terms of s 46 were those that resulted in the conclusion of the further addendum, which expressly records that it was concluded 'pursuant to negotiations in terms of s 46(1)(b) of the [Act] to amend the interim contract in order to . . . provide for the inclusion of the Operator in *MyCiti*'. Those negotiations were concluded successfully, with the result that there is no dispute about the inclusion of the applicant in Phase 1A.

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The negotiations about the precise terms of its inclusion are on-going in terms of s 41 and the applicant is an active participant in this process.

[106] [33] What s 46 acknowledges and regulates is that the conclusion by an operator under an interim contract of a negotiated contract with a municipality under s 41(1) of the Act *may* render it necessary to amend the interim contract to provide for the fact that the operator has been included in the IPTN. In other words, negotiations in terms of s 46(1)(b) about the amendment of an interim contract (but not about inclusion of an operator in an IPTN) must of necessity be preceded by the conclusion of a negotiated contract in terms of s 41. To the extent that a contract in terms of s 41 has not yet been concluded, the applicant's amended claim under prayer 1A therefore puts the cart before the horse.

[107] [34] To sum up: for the reasons given earlier when discussing prayer 1, such disputes as have arisen between the applicant and the City herein are disputes in relation to negotiations aimed at the conclusion of s 41 contracts.

[108] [35] As for the second requirement mentioned above, the question as to the identity of the 'relevant contracting authority' for purposes of

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s 46(2) must be determined in the context of the contractual history summarised earlier.[16] To recap briefly:

[109] • The 'existing interim contract' as contemplated by s 46(1) was concluded between the National Department of Transport and the applicant on 13 March 1997.

[110] • This contract was assigned by the department to the Province on 10 May 2007. It follows that the Province accordingly became responsible for acting as 'contracting authority' for the interim contract 'in the area of that authority' (*in casu*, the Western Cape Province).[17]

[111] • On 30 September 2009 the Province and the applicant concluded an addendum to the interim contract to comply with the provisions of the Division of Revenue Act, 12 of 2009 ('DORA').

[112] • On 20 April 2011 the Province, the applicant and the City concluded a further addendum to the interim contract. However, the City

16 Para [40] above.

17 Sub-secs 11(1)(a) and (6).

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did not thereby become a party to the interim contract. The provisions of the further addendum show that the applicant and the Province remain the only parties to the interim contract and the Addendum. In terms of clause 13.3 of the further addendum the City will become bound as contracting authority by the provisions of the Interim Contract only if and when the Interim Contract is assigned to the City, which has not happened.

[113] [36]It must be accepted, therefore, that the City became a party to the further addendum only, more specifically to those of its provisions relating to the implementation of *MyCiTi*. As far as the interim contract and the addendum are concerned, the applicant and the Province continue to enjoy the rights that they have in relation to the applicants existing routes. It follows that the applicant must look to the Province, not to the City, for mediation in the event of disputes arising which fall within the ambit of s 46(2).

[114] [37] In the light of this conclusion, it is not necessary to consider the further arguments advanced on behalf of the City as to why the relief claimed in prayer 1A cannot be granted.

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[115] Prayer 2 – Negotiating in good faith and reasonably

[116] [38] Having come to the conclusion that the applicant is not entitled to the relief claimed in prayers 1 and 1A, the focus shifts to the alternative relief claimed in prayer 2, namely an order 'directing [the City] to negotiate in good faith and reasonably' with the applicant in relation to the issues which it sought to refer to mediation and arbitration, namely those relating to compensation and market share.

[117] [39] Before issuing a *mandamus* directing the City to negotiate in good faith and reasonably, the court must be satisfied that the City has not done so up to now; in other words, that its conduct has been unreasonable or in bad faith. This is a tall order, as bad faith 'is a strong allegation not lightly to be alleged and which is difficult to prove.'[18] It implies fraud or dishonesty: 'the conscious or knowing use of power for ends that are prohibited by law.'[19] As for unreasonableness, this is likewise difficult to establish. What will constitute a reasonable decision will depend on the circumstances of each case:

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18 Michael Fordham QC *Judicial Review Handbook* 6 ed (2012) p 530 par 52.1.

19 Cora Hoexter, *Administrative Law in South Africa* 2 ed (2012) p 278.

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[118] ‘Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected.’[20]

[119] [40] The City accepted unequivocally that it has a duty to act reasonably and in good faith in the s 41 negotiations. Its defence is that it has always conducted itself in that way. In reply, however, the applicant took issue with this defence, stating that on the ‘two key aspects’ of compensation and market share ‘there have been no negotiations at all . . . , let alone good faith negotiations’. The applicant stated that the City has *consulted* about market share – through a notice-and-comment process – and then made a decision; it has not *negotiated* about market share.

[120] [41] The applicant referred in this context to the judgment of the Full Bench of the erstwhile TPD in *Minister of Economic Affairs and Technology v Chamber of Mines of South Africa*,[21] where it was held that the process of negotiation entails, *inter alia*, entering into debate with the

20 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) para 45.

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relevant parties; endeavouring to persuade them to change their attitudes; giving consideration to whether it should not depart from a position already taken for the expediency of achieving compromise; and proceeding with the interchange until agreement or deadlock is reached.

[121] [42] Counsel for the City countered that the process followed by the City complies with the approach required in terms of the *Minister of Economic Affairs and Technology* judgment. In support of this argument, counsel have gone to great lengths to trace in detail the protracted process of negotiation between the City and the applicant. I do not propose repeating the laborious process for purposes hereof. Suffice it to say that, having carefully perused the voluminous record, I am not persuaded that the applicant's complaint is valid. To my mind, the record shows, not that the City has refused to negotiate about these issues at all, but that the parties have negotiated to deadlock on these issues. Thus, with regard to the applicant's claim for compensation, the City formed the view that there is no duty on it to negotiate with the applicant in terms of s 41 about compensation for vehicles and other assets the applicant says will be rendered redundant by Phases 1A and 1B. In the

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21 1991 (2) SA 834 (T) at 836I-J.

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light of my findings above regarding the relief claimed in terms of prayer 1A, it follows that I am satisfied that the City's attitude in this regard is justified.

[122] [43] In the context of a complex and policy-laden process of negotiation stretching over years, as in this instance, I bear in mind that the court should show due deference for the greater expertise and background knowledge of those involved in the process.[22]

[123] [44] In summary, I agree with counsel for the City that the obligation to negotiate reasonably and in good faith does not require the City to keep all the issues open *ad infinitum* in the complex negotiation process. As stated above, the duty to negotiate in a context as set out in s 41 of the Act does not impose a duty to agree. If, notwithstanding protracted negotiations, the parties are unable to reach consensus, it would be futile for the court to compel one of the parties to return to the negotiating table to continue the process. Instead, the Act and regulations provide alternative mechanisms to break deadlock and reach finality.

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22 *Bato Star, supra,* para 46.

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[124] [45] Much of the evidence relied on by the applicant in support of this leg of the application relates to ‘without prejudice’ discussions that took place between the parties during March and April 2012. Reference to these privileged discussions was fiercely objected to by the City and it launched a full-blown application to strike out such material. This was strongly opposed by the applicant who, in turn, applied to refer various factual disputes arising from the discussion for the hearing of oral evidence. In the light of the conclusion to which I have come, it is not necessary for me to make any finding with regard to these competing interlocutory applications. The parties agreed that the costs in respect thereof should be costs in the cause.

[125] Conclusion

[126] [46] To conclude: on the evidence on record, I am satisfied that the City, in adopting the stance that it did, did not act unreasonably or in bad faith. Moreover, its views in this regard were guided and supported throughout by experienced and responsible legal representatives. The fact that the applicant and its legal representatives hold different views cannot justify an inference of bad faith or unreasonableness on the part of the City.

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[127] [47] For the reasons stated above, the relief as formulated in prayers 1, 1A and 2 of the notice of motion cannot be granted. It follows that the need for an interdict as claimed in prayer 3 falls away, as it is entirely dependent on a finding in the applicant's favour on any of those prayers.

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[129] In the circumstances, the application is DISMISSED with costs, including the costs of two counsel.

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[132] B M GRIESEL
Judge of the High Court

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