IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

76675/17

CASE NO: 76675/17

In the matter between:

19/12/17

THABONG MONITORING SOLUTIONS (PTY) LTD — Applicant

and

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.

(2) OF INTEREST TO OTHER JUDGES: YES/NO.

(3) REVISED.

19/12/2017

DATE

THE NATIONAL GAMBLING BOARD — First Respondent

CAROLINE KONGWA NO — Second Respondent

MINISTER OF TRADE AND INDUSTRY — Third Respondent

ROUTE MONITORING (PTY) LTD — Fourth Respondent

PAYTRONIX SYSTEMS (PTY) LTD — Fifth Respondent

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JUDGMENT

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Murphy J

1. Section 27 of the National Gambling Act[1] ("the NG Act") provides that the first respondent, the National Gambling Board ("the board"), must establish and maintain a national central electronic monitoring system ("the NCEMS") for detecting and monitoring significant events associated with any limited pay-out machine (a gambling machine with a restricted prize), and analysing and reporting that data. The board may contract with any person to supply any or all of the products or services required to fulfil its obligations.[2]

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[1] Act 7 of 2004

[2] Section 27(2) of the NG Act

2. This application is concerned with the tender recently awarded by the board to the fourth respondent Route Monitoring (Pty) Ltd ("Route Monitoring"), under Request for Proposals NGB 004/2016 ("the RFP"), for the supply, installation, commissioning, operation, management and maintenance of the NCEMS, for a period of eight years. The applicant, Thabong Monitoring Solutions (Pty) Ltd ("Thabong"), an unsuccessful bidder for the tender, in Part B of the notice of motion, seeks to review and set aside the decision by the second respondent, Ms Caroline Kongwa, ("Kongwa") awarding the tender to Route Monitoring. It further seeks a declaratory order declaring that the board, duly and properly constituted in accordance with the provisions of the NG Act is the lawful repository of power to issue the RFP, evaluate competing tenders and award the tender.

3. This judgment relates only to Part A of the notice of motion in terms of which Thabong seeks an interim interdict: i) preventing the implementation of the award of the tender; ii) preventing the board and Route Monitoring from effecting the handover of the NCEMS from the current operator, Zonke Monitoring Systems (Pty) Ltd, (Zonke") to Route Monitoring; and iii) directing that the relief shall operate as interim relief pending final determination of the disputes between the parties in Part B.

4. By arrangement with the Deputy Judge President, Part A of the application was set down for hearing on the urgent roll for 13 December 2017. On 5 December 2017 Thabong delivered a brief supplementary affidavit in support of an application to amend its notice of motion. The amendment is aimed at retaining the *status quo* pending the hearing of Part B, in the event that the interim interdict is granted, and seeks an order directing that Zonke shall continue to render the NCEMS services on the same terms and conditions as apply under its existing service level agreement ("SLA") which is due to terminate on 20 December 2017.

**The factual background and contentions of the parties**

5. The award of the tender followed on Kongwa issuing the RFP on 2 December 2016. Thabong and Route Monitoring were two of the three parties that submitted tenders in relation to the NCEMS. The other unsuccessful bidder was the fifth respondent, Paytronix Systems (Pty) Ltd ("Paytronix"). Following evaluations by the

bid evaluation committee ("the BEC") and the bid adjudication committee ("the BAC"), Kongwa approved Route Monitoring as the preferred NCEMS operator. The tender was awarded to Route Monitoring on 31 August 2017. In response to a letter to the board, Thabong was informed on 4 September 2017 that its bid had not been successful. Thabong learnt from the board's website that the successful bidder was Route Monitoring.

6. On 5 September 2017 Thabong requested reasons from the board for its decision. In its response of 11 September 2017 the board took the attitude that the it was entitled to take the full 90 days as contemplated in section 5(2) of the Promotion of Administrative Justice Act[3] ("PAJA") to provide reasons.

7. On 21 September 2017 Thabong gave notice to Route Monitoring and Paytronix of its intention to commence urgent arbitration proceedings in terms of clause 5.11 of the RFP, which *inter alia* provides that any disputes arising in relation to the RFP, the evaluation and/or the adjudication of the RFP or any other matter stemming from the RFP shall be resolved by an arbitration process conducted by an independent arbitrator but this would not preclude any party from seeking urgent interim relief from the ordinary courts. Acting in terms of this provision Thabong referred the matter to the Arbitration Foundation of South Africa. It received a letter from the board on 13 October 2017 disputing the applicability of the arbitration clause on the grounds that only the ordinary courts have jurisdiction to review administrative action under PAJA. Following an exchange of correspondence concerning the arbitration, Thabong resolved that it was required to launch urgent proceedings in this court, which it did on 8 November 2017.

8. Thabong contends that the award of the tender was irregular and unlawful, contrary to the express provisions of the NG Act and in contravention of the overriding principle of legality. This contention is based principally on the fact that since 19 August 2014 the third respondent, the Minister of Trade and Industry ("the Minister"), has not appointed a National Gambling Board and thus there exists no entity lawfully empowered to award the tender. In addition, Thabong maintains that

[3] Act 3 of 2000

there were irregularities in the tender submitted by Route Monitoring which should have rendered its bid (proposal) non-responsive and excluded from consideration for evaluation.

9. Section 64 of the NG Act provides that the National Gambling Board, as established under the National Gambling Act, 1996 (repealed by the NG Act) is retained under the NG Act and is a juristic person. The board has the various powers and duties as spelt out in section 65 of the NG Act. These include monitoring and investigating the issuing of national licences, the evaluation of compliance and the like. Importantly, for present purposes, section 65(1)(c)(ii) obliges and empowers the board to establish and maintain the NCEMS in accordance with section 27.

10. Section 67 of the NG Act provides for the composition of the board consisting of a Chairperson and a Deputy Chairperson, not more than three other members appointed by the Minister and four other members, one of each designated respectively by the Ministers of Trade & Industry, Finance, Safety & Security and Social Development. These board members serve until substituted by the Minister who designated that member. Consequently the board must comprise the members referred to in section 67(1), with the need for substitution in the event of any member standing down.

11. The board is required (in consultation with the Minister) to appoint a suitably qualified and experienced person as Chief Executive Officer (CEO) who is subject to the direction and control of the board and responsible for all financial administrative responsibilities pertaining to the functions of the board.[4]

12. It is clear from these provisions that the board is required to perform vital oversight and monitoring of the gambling industry, through its own actions and through the CEO, who is responsible to the board.

13. In their answering affidavits, the Minister and Kongwa explain that the Minister dissolved the board on 19 August 2014 after the suspension and resignation of its

[4] Section 73(1)(a) of the NG Act

members on the basis of allegations of irregularity. The CEO had resigned before this in March 2014. In response to these developments, the Minister, on 3 September 2014, seconded Kongwa and another official, Mr Baleni, to the National Gambling Board and appointed them as "co-administrators". At the time of the secondment, Baleni was employed as the Chief Operating Officer for the Consumer and Corporate and regulatory Division of the Department of Trade and Industry, and Kongwa was employed as Chief Director, Legal Services.

14. The Minister appointed the co-administrators in terms of section 15(3) of the Public Service Act[5] ("the PSA") which permits the Minister or the Director-General to second an employee to any organ of state for a particular service or period. The Minister says that the co-administrators were also designated as the accounting authority of the board in terms of section 49 of the Public Finance Management Act[6] ("the PFMA"). The relevant part of section 49 of the PFMA provides:

> "(1) Every public entity must have an authority which must be accountable for the purposes of this Act.
>
> (2) If the public entity-
>
> (a) has a board or other controlling body, that board or controlling body is the accounting authority for that entity; or
>
> (b) does not have a controlling body, the chief executive officer or the other person in charge of the public entity is the accounting authority for that public entity unless specific legislation applicable to that public entity designates another person as the accounting authority.
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> (3) The relevant treasury, in exceptional circumstances, may approve or instruct that another functionary of a public entity must be the accounting authority for that public entity."

15. The National Gambling Board is listed as a public entity in Schedule 3 of the PFMA.

16. The appointment of Baleni and Kongwa was approved by National Treasury on 28 November 2014. The appointment was initially to last until 31 March 2015. The appointment of Kongwa has been extended twice. Mr Baleni resigned during April 2015 whereafter Ms Kongwa continued as the sole administrator.

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[5] Act 103 of 1994
[6] Act 1 of 1999

17. No new board has been appointed since 2014, despite the obligation imposed on the four Ministers to do so in terms of section 67 of the NG Act. The Minister explained that the reason for not appointing a new board is that the previous board had a record of impropriety and in his view the model under the Gambling Act requiring a board is obsolete, and legislative measures are being put in place to effect a change.

18. Section 51 of the PFMA delimits the responsibilities of accounting authorities. They relate *inter alia* to maintaining effective systems of financial and risk management and internal control, an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective and a system for properly evaluating all major capital projects. Section 51(1)(h) of the PFMA provides that an accounting authority for a public entity "must comply, and ensure compliance by the public entity, with the provisions of this Act and any other legislation applicable to the public entity."

19. As mentioned, following evaluations by the BEC and the BAC, Kongwa approved Route Monitoring as the preferred NCEMS operator and advised Route Monitoring accordingly. This is the decision constituting administrative action (as defined in PAJA) which Thabong seeks to review.[7] On 11 September 2017 Kongwa concluded an SLA with Route Monitoring. This further step was a consequence of her decision to award the tender to Route Monitoring, and the performance of this contract would constitute the implementation of the award of the tender.

20. Thabong contends that Kongwa exercised the power to award the tender on a construct based primarily on section 49 of the PFMA, which it says is erroneous. The principle of legality requires that organs of state may act only in accordance with

[7] All the respondents insist that Thabong was obliged to review the Minister's appointment of Kongwa as administrator and accounting authority, and that it failure to do so is fatal to its case. I doubt that is correct. Thabong seeks to review the decision which had direct, external impact upon it, namely the award of the tender to Route Monitoring. However, for reasons that will become apparent, it is unnecessary to decide the point in the application for an interim interdict, although it has some relevance to the question of urgency.

powers conferred upon them by law.[8] According to Thabong, Kongwa was not authorised to act in the stead of the board in awarding and implementing the tender to Route Monitoring. The suggestion that Kongwa was the duly appointed accounting authority for the board, it argues, is flawed.

21. The Minister and Kongwa maintain that Kongwa acting as the sole administrator and the accounting authority is authorised by section 49(2)(b) of the PFMA and is therefore regular. Section 50(2) of the PFMA expressly envisages an individual (as opposed to a collective) being an accounting authority. It provides that a member of an accounting authority or, if the accounting authority is not a board or other body, "the individual who is the accounting authority", may not act in a way that is inconsistent with the responsibilities assigned to an accounting authority in terms of the PFMA. Thus, the PFMA explicitly contemplates an individual performing the role of an accounting authority. Moreover, in the event of any inconsistency between the NG Act and the PFMA, section 3(3) of the PFMA provides that the PFMA will prevail. The respondents thus submit that as the accounting authority Kongwa was within her rights to exercise the powers in section 27(1) and (2) of the NG Act and in fact, in terms of section 51(1)(h) of the PFMA had a duty to do so.

22. Thabong submits that the provisions of the PFMA must be interpreted differently. In its opinion, if a statute such as the NG Act provides for a public entity to have a board, then only such board can be the accounting authority for that entity. Section 49(2)(b) of the PFMA, it reasons, only applies where the entity does not have a controlling body, in the sense that there is no statutory or regulatory provision making provision for a board, or the entity has not itself appointed a board. It argues that the provision cannot be invoked in circumstances like the present, where the NG Act expressly requires both the appointment and the continuing existence of a board and the Minister removes or dissolves the board (which he is entitled to do) but deliberately fails to secure the appointment of a new board, comprising the members referred to in section 67(1) of the NG Act.

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[8] *Fedsure Life Assurance Limited & Others v Greater Johannesburg Transitional Metropolitan Council & Others* 1999 (1) SA 374 (CC) at para 56; and *Gerber & Others v Member of the Executive Council for Development Planning and Local Government, Gauteng, and Another* 2003 (2) SA 344 (SCA) at para 35

23. The view of the Minister is that any absence of a board as a matter of fact (even in circumstances where this has occurred as a result of the failure of the Minister to secure a replacement board) triggers section 49(2)(b) of the PFMA. He maintains that this interpretation is supported by section 49(3) of the PFMA, which permits the relevant treasury, in exceptional circumstances, to approve or instruct that another functionary of a public entity must be the accounting authority for that public entity; which is what has happened here. Thabong submits this approach is subversive of the express provisions and purpose of the NG Act, which requires the continual existence of a board. It doubts that the malfeasance of the previous board, and the Minister's opinion that the idea of a board being obsolete, can constitute "exceptional circumstances" justifying the non-appointment of a board for more than three years.

24. In addition to its contention that the award of the tender was made illegally, Thabong challenges the merits of the award. In terms of section 217(1) of the Constitution, read with section 51(1)(a)(iii) of the PFMA, the procurement of the NCEMS must be effected in a manner which is fair, competitive, cost effective, transparent and equitable. The RFP contains stipulations that proposals which did not comply with certain provisions and directives would be considered non-responsive and would not be considered for evaluation. The minutes of the BEC meeting held on 15 March 2017 reflect a measure of non-compliance by Route Monitoring in that: i) it did not separate the bid price calculations from the technical proposal as per requirement on the RFP; ii) it only initialled but did not complete and sign the provisional standard conditions of contract as per requirements of the RFP; and iii) all parts of the proposal were on one compact disc not separated according to the various parts/envelopes.

25. Thabong maintains that the consequence of this non-compliance should have been that Route Monitoring's bid was "non-responsive" and should not have been considered for evaluation, as stipulated in paragraph 9.1.1 of the RFP. However, the resolution of the further meeting of the BEC held on 5 April 2017 recorded that Route Monitoring would be requested to sign the special conditions of contract "as the omission of the signature was not material" and that a decision was taken to proceed with technical functionality evaluation of Route Monitoring in phase 2 of the

evaluation process. At this same meeting it was resolved to eliminate Paytronix and Thabong for their non-compliance with certain provisions of the RFP.

26. The documentary record suggests that both the BEC and the BAC held the view that our law permits condonation of non-compliance with peremptory requirements where condonation is not incompatible with the public interest and if such condonation is granted by the body in whose favour the provision was enacted. Thabong maintains that this is a mistaken approach. The acceptance by an organ of state of a tender which is not compliant with a request for a bid is usually an invalid act falling to be set aside,[9] and as a general principle an administrative authority has no inherent power to condone failure to comply with a peremptory requirement unless it has been afforded a discretion to do so.[10] In *Dr JS Moroka Municipality v Betram (Pty) Ltd*[11] the SCA held that non-compliance with a peremptory requirement of a tender could not be condoned in the public interest. If no discretion is afforded to the functionary, then it has none. Thabong therefore takes the position that the tender of Route Monitoring did not comply with the peremptory requirements contained in the RFP, which should have resulted in the bid being considered non-responsive and not open for evaluation.

27. The respondents challenge these submissions on the basis that they fail to take account of the new approach to irregularities in tendering laid down more recently by the Constitutional Court in *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency and Others.*[12] There, when discussing "the proper legal approach," the court held that the suggestion that "inconsequential irregularities" are of no moment conflates the test for irregularities and their import. Non-compliance with a mandatory condition prescribed by an empowering provision is a ground of review under PAJA provided it is material.[13]The materiality of compliance with legal requirements depends on the extent to which the purpose of the requirements is attained. Froneman J put it as follows:

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[9] *Chairperson, Standing Tender Committee & Others v JFE Sapela Electronics (Pty) Ltd & Others* 2008 (2) SA 638 (SCA) at para 11
[10] *Minister of Environmental Affairs and Tourism & Others v Pepper Bay Fishing (Pty) Ltd* 2004 (1) SA 308 (SCA) at para 31
[11] [2014] 1 All SA 345 (SCA)
[12] 2014 (1) SA 604 (CC)
[13] Section 6(1)(b) of PAJA

"The proper approach is to establish, factually, whether an irregularity occurred. Then the irregularity must be legally evaluated to determine whether it amounts to a ground of review under PAJA. This legal evaluation must, where appropriate, take into account the materiality of any deviance from legal requirements, by linking the question of compliance to the purpose of the provision, before concluding that a review ground under PAJA has been established.

Once that is done, the potential practical difficulties that may flow from declaring the administrative action constitutionally invalid must be dealt with under the just and equitable remedies provided for by the Constitution and PAJA. Indeed, it may often be inequitable to require the rerunning of the flawed tender process if it can be confidently predicted that the result will be the same.

Assessing the materiality of compliance with legal requirements in our administrative law is, unfortunately, an exercise unencumbered by excessive formality. It was not always so. Formal distinctions were drawn between 'mandatory' or 'peremptory' provisions on the one hand and 'directory' ones on the other, the former needing strict compliance on pain of non-validity, and the latter only substantial compliance or even non-compliance. That strict mechanical approach has been discarded. Although a number of factors need to be considered in this kind of enquiry, the central element is to link the question of compliance to the purpose of the provision. In this court O'Regan succinctly put the question in ACDP v Electoral Commission as being 'whether what the applicant did constituted compliance with the statutory provisions viewed in the light of their purpose'. This is not the same as asking whether compliance with the provisions will lead to a different result."[14]

28. Thus, the materiality of irregularities is determined primarily by assessing whether the purposes served by the tender requirements have been substantively achieved.[15] The respondents in the present case suggest that the alleged non-compliance with the requirements was not material in that the purposes of the requirements were not thwarted. But they also contend that the RFP gave the accounting authority a discretion to condone any irregularity. Thus in clause 5.1.1.2 the board reserved the right to reject any bid which does not conform to instructions and specifications detailed in the RFP. In terms of clause 6.1.2 the board is required to undertake a thorough, detailed evaluation of all bids and "to facilitate this process, bidders may be required to provide additional information in writing that clarifies

[14] At para 28-30
[15] At para 58

particular aspects of their bid. Likewise clause 8.3.1 provides that to assist in the examination, evaluation and comparison of bids, the board may, at its "discretion, ask any bidder for clarification of the bidder's bid, including breakdowns of the prices and other information that the NGB may require". It goes on to stipulate that the request for clarification and the response shall be in writing or by fax or email, but no change in the price or substance of the bid shall be sought, offered, or permitted except as required to confirm the correction of arithmetic errors discovered by the board in the evaluation of the bids. And finally clause 8.5.2 provides that a "substantially responsive" bid is one which conforms to all the terms, conditions, and specifications of the RFP, without material deviation or reservation." The respondents contend that the record shows that the irregularities were not material or that condonation of the irregularities of Route Monitoring's bid was granted fairly in accordance with the appropriate discretion.

29. Thabong complains that the stance taken towards its bid was less generous. In the record of the first meeting of the BEC, concerns were raised about: i) reference letters made out to Zonke Monitoring Solutions (ZMS) and to Bidvest Monitoring Solutions, from which the BEC could not establish any relationship between Thabong and those entities; ii) the requisite letter of certification submitted was made out to ZMS and not Thabong; and iii) Thabong having submitted a tax clearance certificate made out to Bidshelf 81, the name used before changing to Thabong Monitoring Solutions. At the following BEC meeting held on 5 April 2017 a legal opinion was apparently presented which advised that: i) the reference letters issued to Zonke could be accepted as those of Thabong as Thabong explained in its company profile that Zonke's staff would move to Thabong as shareholders and employees; ii) Thabong could be regarded as Zonke in a different name, although the company profile did not provide sufficient documentary proof of the exact relationship between Thabong and Zonke; and iii) that in accordance with the principles of fairness, Thabong should be given an opportunity to augment its bid. However, the BEC concluded that Thabong could not be asked to supplement its bid because no link could be established between Thabong and Zonke.

30. Thabong therefore claims that the difference in the approach of the BAC and the BEC to the respective tenders of Thabong and Route Monitoring was unfair. In the

case of Route Monitoring, the BEC was prepared to condone non-compliance with possibly a peremptory requirement, but declined to permit an opportunity to Thabong to clarify its relationship with Zonke, indicating a lack of impartiality and procedural fairness.

31. Kongwa reiterates in her answering affidavit that Thabong failed to furnish reference letters relating to it, but instead submitted those relating to Zonke and Bidvest Monitoring Solutions ("BMS"). It did not explain its relationship with Zonke and BMS. Zonke will in fact cease to exist upon its contract terminating on 20 December 2017. This, according to Kongwa, was a fatal failure of Thabong's bid. It was not something that could be condoned or where corrected because it was material as it related to its structure as a juristic person.

32. Thabong accordingly submitted that it has demonstrated a strong *prima facie* right to have the award of the tender to Route Monitoring set aside on review. It does not state that it is inevitably entitled to be the successful tenderer. It asks merely to be permitted to participate in a tender process, subject to the statutory oversight and control of a duly constituted board, and to have its bid adjudicated in a manner which is fair and impartial, as required by section 217(1) of the Constitution read with section 51(1)(iii) of the PFMA. However, before turning to whether Thabong has established the requisites for the grant of an interim interdict, it is necessary to comment briefly on the question of urgency.

**Urgency**

33. Thabong has not made out a compelling case for urgency. There is nonetheless an inherent measure of urgency in the fact that the tender will be finally implemented on 21 December 2017. But, as the respondents rightly point out, there is undeniably an element of self-created urgency in this case.

34. Thabong became aware of the tender award on 4 September 2017 and only launched its application more than two months later on 4 November 2017. Some of the delay is attributable to it first pursuing the arbitration route which it legitimately assumed it was obliged to do in terms of the RFP. Still, Thabong did not proceed

with the arbitration expeditiously. Its erstwhile attorney wrote to the board on 5 September 2017 and requested reasons why its bid was unsuccessful. The board responded to this query on 11 September 2017, indicating (somewhat unreasonably) that it would provide reasons within 90 days. Thabong could have referred the matter to arbitration at that date. Instead, on 21 September 2017 (ten days later) it sent correspondence to the other bidders indicating that it wished to proceed with arbitration. Thabong only initiated the arbitration on 10 October 2017, a month after the board responded to its query. The delay in this regard is not adequately explained on the papers. On 13 October 2017 the board and Thabong exchanged further correspondence. More than two weeks later, on 27 October 2017, Thabong abandoned the arbitration. No explanation is provided for this delay either. Thabong, as stated, only filed its application on 8 November 2017. That delay is also not explained, particularly in light of the fact that much of the preparatory work had already been done in referring the matter for arbitration. The matter accordingly was needlessly delayed and the urgency is to some extent of Thabong's own making.

35. The respondents contend furthermore that Thabong was obliged to bring a review much earlier; either when it questioned the authority of Kongwa in late 2016 or when she issued the RFP in early 2017. If that is correct, the application for review would be time barred in terms of section 7(1) of PAJA which requires proceedings for judicial review to be instituted not later than 180 days after the date on which the person concerned became aware of the relevant administrative action. The respondents maintain that since the relevant administrative action was either the appointment of Kongwa or the issuing of the RFP, the review application is time barred and the application for an interim interdict consequently cannot be entertained as urgent.

36. The submission, in my view, is not sustainable. The relevant part of the definition in section 1 of PAJA defines administrative action as a decision "which adversely affects the rights of any person and which has a direct, external legal effect". The requirement that a decision have a direct, external legal effect means that the decision must entail a determination or deprivation of the rights of an affected person that has some immediacy or finality. If a decision has involved several steps taken by different authorities and only the last has direct impact on the rights of the affected

person, all previous steps lack direct effect, and only the last decision may be taken to court for review. The idea is to concentrate judicial review pragmatically on final decisions of immediate consequence instead of allowing or requiring challenges to a series of preliminary or intermediate decisions.[16] The decision which adversely affected Thabong, and had a direct, external legal effect on it, was the award of the tender. Thabong acquired knowledge of that decision on 4 September 2017 and the question of urgency must be assessed with reference to that date.

37. Despite the absence of a full explanation for the various delays and the insufficiency of the reasons advanced by Thabong in support of urgency, I am satisfied on balance that the matter should be heard. Given the intricacy of the matter, the delays were not inordinate. The matter is complex, the issues at stake are important and the interests of justice require a decision to be rendered. To my mind, these considerations are sufficient to permit leniency and justify hearing the matter as urgent.

**The requisites for an interim interdict**

38. The requisites for the right to claim an interim interdict in our law were authoritatively established in *Setlogelo v Setlogelo*.[17] They are: i) a *prima facie* right even if it is open to some doubt; ii) a reasonable apprehension of irreparable and imminent harm to the right if an interim interdict is not granted; iii) the balance of convenience must favour the grant of the interim interdict; and iv) the applicant has no other satisfactory remedy. In the exercise of the judicial discretion to grant an interdict these requisites are not judged in isolation but in conjunction with one another.[18]

39. Courts, however, grant temporary restraining orders against the exercise of statutory powers by organs of state only in exceptional cases when a strong case for

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[16] Rainer Pfaff & Holger Schneider: "*The Promotion of Administrative Justice Act from a German Perspective*" (2001) 17 *SAJHR* 59 at 70ff; and C Hoexter: *Administrative Law in South Africa* 204-205
[17] 1914 AD 221 at 227
[18] *Eriksen Motors (Welkom) Ltd v Protea Motors* 1973 (3) SA 685 (A) at 692C - G

that relief has been made out.[19] This general principle weighs heavily in assessing the balance of convenience in applications seeking to interdict the exercise of statutory powers. In *National Treasury and Others v Opposition to Urban Tolling Alliance and Others*,[20] Moseneke DCJ clarified the applicable principles as follows:

> "Similarly, when a court weighs up where the balance of convenience rests, it may not fail to consider the probable impact of the restraining order on the constitutional and statutory powers and duties of the state functionary or organ of state against which the interim order is sought.
>
> The balance of convenience enquiry must now carefully probe whether and to what extent the restraining order will probably intrude into the exclusive terrain of another branch of Government. The enquiry must, alongside other relevant harm, have proper regard to what may be called separation of powers harm. A court must keep in mind that a temporary restraint against the exercise of statutory powers well ahead of the final adjudication of a claimant's case may be granted only in the clearest of cases and after a careful consideration of separation of powers harm."

40. Froneman J, in a concurring minority judgment, preferred not to locate the enquiry within the ordinary temporary interdict requirements but rather as a distinct *a priori* question asking whether national legislative or executive power will be transgressed by a temporary interdict; thus recognising the possibility that separation of power considerations may play a limited part in ordinary administrative action, unaffected by national executive policy issues.[21]

***Prima facie* right**

41. Thabong asserts that it has established a strong *prima facie* right "to have the award of the tender to Route Monitoring set aside on review". It maintains that it has the right to participate in a tender process, subject to the statutory oversight and control of a duly constituted board, and to have its bid adjudicated in a fair and impartial manner and in accordance with the relevant legal prescripts.

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[19] *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC) para 44; and *Gool v Minister of Justice and Another* 1955 (2) SA 682 (CPD) at 688F and 689B-C
[20] 2012 (6) SA 223 (CC) paras 46-47
[21] At paras 88-90

42. Mr. Antonie SC, who appeared for Route Monitoring, cautioned the court when determining whether a *prima facie* right has been established not to trespass on the task of the review court by pronouncing too definitively on the merits of the review sought under Part B. The admonition is well made. Suffice it to say, given the countervailing arguments in relation to the powers of an accounting officer under the PFMA, the perhaps immateriality of the deviations in Route Monitoring's bid, together with the possible non-compliance of Thabong' s bid, the alleged *prima facie* right is open to more than some doubt. Moreover, the *prima facie* right a claimant must establish is not merely the right to approach a court in order to review an administrative decision. As explained by the Constitutional Court in *National Treasury*, quite apart from the right to review and set aside impugned decisions, an applicant must demonstrate a *prima facie* right that is threatened by an impending or imminent irreparable harm. A right to review an impugned decision often will not require any preservation *pendente lite*.[22]

43. Routine Monitoring contends that Thabong relies entirely on its right to review and a concern that the review court will have to take into account the fact that the tender has been implemented. This is not entirely true. Thabong asserts the right to participate in a procurement process managed by a board comprised and representative of the different special interests designated in the provisions of section 67 of the NG Act. However, it is correct that Thabong essentially challenges the manner in which the decision was made and seeks reconsideration by a properly constituted board, which may, after further consideration, still award the tender to Route Monitoring. The review court moreover may find that despite any proven illegality it may not be just and equitable to order the re-running of the tender and may merely remit the matter for a fresh decision.

44. Thabong therefore does not have a strong *prima facie* right to have Route Monitoring removed and for it to be substituted as the successful tenderer, and accordingly it cannot be said that this case is one of the strongest or clearest of cases justifying the exceptional interdict of an exercise of statutory powers. In the circumstances, I am reluctant to conclusively evaluate the review grounds in order to

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[22] *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC) para 50

make a definitive finding on the existence of a *prima facie* right. Luckily, given the outcome I reach on the other grounds, I need not resolve the issue and may assume without deciding that Thabong has established a *prima facie* right.[23]

**Irreparable harm**

45. Thabong must also establish that it would suffer, or that it runs the real risk of suffering, irreparable harm if an interdict is not granted. The term "irreparable" implies that the effects or consequences cannot be reversed or undone for instance by an order that would effectively rescind the harm that would ensue should the interim order not be granted. The only harm apprehended by Thabong is that if interim relief is not granted the review court will have to take into account the fact that the operation of the NCEMS was handed over to Route Monitoring. I agree with the respondents that this does not constitute irreparable harm. Upon hearing the matter the review court will have the power to make any order that is just and equitable and to remit the matter to the board. Any harm Thabong suffers in the interim will be neither permanent nor irreversible.

**The balance of convenience**

46. The requisite of the balance of convenience recognises that in an application for a temporary restraining order there will invariably be at least two competing interests. And those interests are inextricably linked to the harm a respondent is likely to suffer in the event of the order being granted and the harm likely to be suffered by an applicant if the relief sought is not granted.[24]

47. Thabong alleges that the balance of convenience is in its favour because it seeks to prevent patent unlawful conduct and has strong prospects of success. The question of legality is only one factor that this court may take into account. As discussed earlier, the court should not lightly interfere with the decisions of the other arms of government or those of administrative bodies. The affairs of state are better

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[23] See *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC) para 52

[24] *City of Tshwane Metropolitan Municipality v Afriforum and Another* 2016 (6) SA 279 (CC) para 62

conducted when due deference is shown by one branch to another, albeit without undue self-restraint. This is particularly so in a matter where the objection is limited to a claim that the tender was not considered properly. The review court granting any relief after finding a reviewable irregularity will be in a position to take into account all relevant interests, including those of the successful bidder and the public interest.

48. Route Monitoring has concluded or is in the process of finalising various contractual arrangements to give effect to the tender including: i) a new lease agreement for the premises from which it will operate the NCEMS with a rental liability over three years in excess of R7 million; ii) an agreement to refurbish the leased premises at a cost exceeding R5 million; iii) a contract in excess of R5.5 million to secure the services of consultants for the setting up and transitioning the NCEMS; iv) a 24 month contract with Internet Solutions for the hosting of the NCEMS at its premises at a total cost in excess of R7 million; v) a disengagement agreement with Zonke whereby it has paid Zonke over R1 million to acquire use of the routers owned by Fastnet that connect the site data loggers on each limited pay-out machine to the NCEMS; and vi) a 5 year agreement with Fastnet for the provision of wireless data services at a cost of at least R367 745 per month, or over R22 million over the five year period.

49. Route Monitoring has also committed to replacing approximately 782 routers with Fastnet Routers at a cost of about R350 000 and has incurred costs in the sum of more than R16 million in procuring the necessary software, hardware and establishment costs. It furthermore has secured the services of a number of Zonke's employees, who have accepted written conditional offers of employment. These costs do not include the R28 million that Route Monitoring spent in participating in the tender process and preparing its bid.

50. Zonke's contract terminates on 20 December 2017 and will not be renewed by the board. On that date Zonke's agreement with Fastnet (which has not been cited as a party to these proceedings) will terminate and Zonke will be unable to receive data from the limited pay-out machines. That data will be sent to Route Monitoring instead. The result is that the entire NCEMS may become inoperative, to the detriment of the industry and the public at large.

51. Route Monitoring has accordingly demonstrated that it will be significantly prejudiced should the interdict be granted. It has been put to considerable expense in order to prepare to operate the NCEMS. The handover process is almost complete. The delay of Thabong in bringing the application has moreover exacerbated the potential and actual prejudice.

52. In the light of this uncontroverted evidence, there can be little doubt that the balance of convenience favours Route Monitoring. Any prejudice Thabong may suffer arising from any illegality or unfairness in the tendering process is outweighed by the impact an interim interdict would have on the far-advanced hand over arrangements. For that reason alone the interim interdict sought at the eleventh hour must be refused.

**The order**

53. In the premises, the application in terms of Part A of the notice of motion is dismissed with costs, such costs to include the costs of two counsel where applicable.

**JR Murphy**
**Judge of the High Court**

**Date heard:** 13 December 2017
**For the applicant:** Adv NJ Graves SC; Adv B Lekokotla; Adv L Mtukushe
Instructed by Tabacks Attorneys
**For the first and second respondents:** Adv JA Motepe SC; Adv W Lusenga
Instructed by Gildenhuys Malatji Attorneys
**For the third respondent:** Adv M Stubbs
Instructed by the State Attorney
**For the fourth respondent:** Adv M Antonie SC; Adv O Ben-Zeev
Instructed by Dev Maharaj and Associates Inc
**Date of judgment:** 19 December 2017.