IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

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

SIGNATURE DATE: **26 August 2021**

Case No: 35870/2021

In the matter between:

GIBB (PTY) LTD Applicant

and

PASSENGER RAIL AGENCY OF SOUTH AFRICA First Respondent

GLAD AFRICA GROUP (PTY) LTD Second Respondent

JUDGMENT

WILSON AJ:

1 The applicant ("Gibb") seeks interim relief restraining the implementation of two tenders for professional consulting work on rolling stock depots at Salt River and Springfield. The work was put out to tender by the first respondent ("PRASA"), and was eventually awarded to the second respondent (Glad Africa"). Gibb claims that the tender process was vitiated by reviewable

irregularities which resulted in Gibb's unlawful disqualification. Gibb seeks to suspend the work while it tries to demonstrate this by way of review under the Promotion of Administrative Justice Act 3 of 2000 ("PAJA").

2 The requirements for interim relief pending review are well-known. Gibb must persuade me that it has a *prima facie* right to the relief it seeks in Part B. There is room for me to entertain some, but not "serious", doubt about that right, while still granting the relief (*Webster v Mitchell* 1948 (1) SA 1186 (W) at 1189). Gibb must have suffered, or reasonably apprehend, irreparable harm if the interim relief is not granted, and it must have no effective remedy other than an interim interdict to prevent or ameliorate that harm.

3 Finally, the balance of convenience must favour the grant of an interim interdict. It has long been held that the stronger the *prima facie* right, the less the balance of convenience need tilt in the applicant's favour. In other words, a relatively weak *prima facie* right may be compensated for by a balance of convenience firmly in the applicant's favour, and a very strong *prima facie* right can make up for a balance of convenience adverse to the applicant. This is little more than common sense. Apparently weighty cases in the main claim ought to be heard out even if it puts the opposing parties to a great deal of trouble. Even weak but still arguable cases ought nonetheless to be entertained if they cause relatively little trouble to those who have to defend them (*Eriksen Motors (Welkom) Ltd v Protea Motors Warrenton* 1973 (3) SA 685 (A) at 691E-G).

4 Where an interim interdict is sought in restraint of the exercise of statutory powers by an organ of state, the balance of convenience inquiry takes on a

slightly different character. In that instance, a court is bound to weigh what has been called "separation of powers harm". Weighing this harm involves recognising the need to allow the state to continue to exercise its powers and functions, unless "the clearest of cases" has been made out that they are based on an illegality (*National Treasury v Opposition to Urban Tolling Alliance* 2012 (6) SA 223 (CC) ("*National Treasury")* at paragraph 47).

5 In this matter, there is little doubt in my mind that Gibb has demonstrated that it reasonably apprehends irreparable harm if the tender is implemented. It also lacks any realistic remedial alternative to an interim interdict. Although there was some argument from Mr. Mathipa, who appeared together with Mr. Mosikili for PRASA, that a demonstrably unlawful tender process might allow Gibb to claim damages in the ordinary course, the damages then claimable are highly unlikely to provide a surrogate for actually winning the tender after a fair process, which is presumably what Gibb seeks to achieve in this application and the review to follow (see, in this respect, *Olitzki Property Holdings v State Tender Board* 2001 (3) SA 1247 (SCA) at paragraphs 31 and 42).

6 This case turns, then, on the strength of Gibb's *prima facie* right to the relief it claims, and whether that right can overcome any prejudice to PRASA the interim relief might cause, including any "separation of powers harm".

7 If there were apparent irregularities in the tender process, and if those apparent irregularities would, once established, amount to grounds of review under PAJA, then it can, in my view, be accepted that Gibb has established a *prima facie* right of some strength (*Allpay Consolidated Investment Holdings*

(Pty) Ltd v Chief Executive Officer, South African Social Security Agency 2014 (1) SA 604 (CC) ("*Allpay*") at paragraph 44). It is, accordingly, to the irregularities Gibb alleges that I now turn.

The irregularities alleged in the tender process

8 Mr. Moultrie, who appeared together with Mr. Scott for Gibb, staked his case on three alleged irregularities. The first involved the role of reference letters in the assessment of the bids received as part of the tender process. The second involved the extent to which Gibb could be said to have delivered a project methodology for the implementation of the work that was generic, rather than addressed to PRASA's specific needs at Salt River and Springfield. The third concerned whether the apparent substitution of Deutsche Bahn engineers with other engineers in Glad Africa's bid ought properly to have precluded the award of the work to Glad Africa.

The reference letters

9 PRASA required all those who bid for the work to show the organisational experience necessary to take it on. This was demonstrable, so the invitation to tender said, by delivering reference letters from entities for whom the bidders had previously worked which contained the amount, type and value of the work done for those entities. There is no dispute that the reference letters Gibb submitted did not contain all of this information. Some contained none of it at all. But it is equally common cause that the information required to be in the letters was clearly discernible from elsewhere in Gibb's bid. Gibb's bid was penalised with a fairly low score because the information did not appear in the reference letters themselves.

10 Mr. Moultrie argued (and there was no submission to the contrary) that Gibb would likely have received a high score had the reference letters been read together with material in the bid which amply demonstrated Gibb's organisational experience to the required standard. PRASA's failure to do just that was, Mr. Moultrie argued, irrational.

11 Mr. Mathipa met this case with the rejoinder that the invitation to tender said what it said. PRASA asked for the reference letters to contain information that that was not present in Gibb's reference letters. PRASA could not, he submitted, be expected to go hunting for it elsewhere.

12 There is some attraction to this argument, but I think that attraction is superficial. If PRASA was required to go hunting, it did not, by all accounts, have to go very far. It could have gleaned the information required by reading Gibbs' bid as a whole. The question is whether it was required to do that. I think that it is at least arguable that it was.

13 Section 2 of the Preferential Public Procurement Framework Act 5 of 2000 ("the Procurement Act") requires that the tenders be evaluated according to a scoring system which has regard to price, empowerment criteria, and the need to implement the Reconstruction and Development Programme, unless other "objective criteria" justify the award to the successful tenderer. In this case, the criterion of organisational experience was one of these other "objective criteria" specified in the invitation to tender, according to which the tenderers' "functionality" should be assessed. The Preferential Procurement Policy Framework Regulations, 2017 ("the Regulations"), which apply to the award of the tenders, define "functionality" as "the ability of a tenderer to provide

goods or services in accordance with specifications as set out in the tender documents".

14 The reference letters were intended to assist PRASA to score Gibb on its functionality, one aspect of which was its organisational experience. It seems to me that PRASA might have unduly fettered itself when making its assessment. What it was required to do was assess Gibb's organisational experience, not Gibb's capacity to follow the invitation to bid to the letter. If PRASA blinded itself to the bigger question of functionality, by an over-fastidious approach to the form of the reference letters submitted, it seems to me that its decision may have lost contact with the empowering provisions it was meant to enforce: the Regulations, section 2 of the Procurement Act, and section 217 of the Constitution, 1996, to which the Regulations and the Procurement Act give effect. In that event, the grounds of review set out in sections 6 (e) (i) and (iii) may well be made out. At least some of the grounds enumerated in 6 (f) (ii) may also be established.

15 It is, of course, not necessary to reach any definitive conclusions in this respect. It nonetheless seems to me that Gibb has sketched out a case of this nature, and that, at present, that case stands uncontradicted. There was some suggestion in argument that strict compliance with the reference letter requirements was necessary to ensure that the information contained in them came from a source other than the bidder, but that seems to me to be a point to be considered in the substantive review application. It does not, in itself, answer the charge that PRASA evaluated Gibb's bid with an unlawfully narrow vision.

The project methodology document and the role of Deutsche Bahn

16 PRASA's evaluators also took a dim view of Gibb's project methodology, which was said to be "generic and not aligned properly with the scope of work in each case". Owing to the commercial sensitivity of its contents, PRASA did not produce the full methodology document in its papers before me. I was taken instead to a list of its contents, which, on their face, seemed tailored to PRASA's scope of work.

17 There was also no dispute at all that Deutsche Bahn engineers, originally punted as an attractive feature of Glad Africa's bid, appeared to have dropped out at some unspecified stage. Mr. Mathipa submitted that this did not affect the validity of the award of the tender, but may have contractual consequences if the Deutsche Bahn engineers do not materialise at a later stage.

18 I am not sure that is correct. There is some force in Mr. Moultrie's argument that, if the work was awarded and the contract signed on a representation that Deutsche Bahn's experience or expertise would be brought to bear on the work, which then turned out to be inaccurate, then the contract might well have been unlawfully awarded and signed.

19 On the view I take of this case, however, it is not necessary for me to embark upon a more detailed examination of these grounds. Gibb has already established what is, on its face, a material irregularity in the way its organisational experience was assessed. No doubt – serious or otherwise – has been thrown on its case as it is currently presented, although there may be an answer in due course as the papers mature.

20 It is not clear to me whether the absence of that irregularity would have prevented Gibb's disqualification. It is, however, plain from the decision in *Allpay* that the materiality of an irregularity is not determined by whether it would have led the tender process to a different outcome. The test is whether a ground of review under PAJA has been established on its own terms (see *Allpay*, para 23). I am satisfied that Gibb has established a *prima facie* right to the relief it seeks in Part B in that sense.

The balance of convenience

21 Much was made in Gibb's argument of how much more expensive Glad Africa's bid is than Gibb's own. This was said to be relevant to the balance of convenience. The sheer expense of the successful bid does raise an eyebrow (at least R346 million over the odds, by Mr. Moultrie's reckoning). But I do not think that I can say that there is no or little inconvenience to PRASA in suspending the implementation of the work because that might turn out to save PRASA money.

22 A better practical argument for the proposition that the balance of convenience favours Gibb is that I was given no reason why a suspension of the work at a relatively early stage would cause PRASA or the public at large any great upheaval. The progress of the tenders, which were initiated in late November 2018, has been fairly leisurely to date. Gibb was finally notified of the outcome of the process on 25 June 2021. I accept, as Mr. Mathipa submitted, that the COVID-19 restrictions might, to some extent, have slowed the tender process down through no fault of PRASA. But that is not the same as saying that there is some looming future inconvenience or harm to which I should have regard.

I do not mean to suggest that PRASA would not be inconvenienced at all by the suspension of the work. I accept that depot modernisation is, as Mr. Mathipa and Mr. Mosikili submitted in their heads of argument, "a very important national project". But projects undertaken by the state are all presumptively very important to some extent. That does not in itself mean that they may not be interrupted if they may have been unlawfully advanced. More specificity was required from PRASA in this respect. None was given.

23 For its part, Glad Africa did not oppose the grant of interim relief. While not dispositive of the balance of convenience, that, too, is a fairly strong indication that the scales tip towards Gibb.

24 Over and above this, I am acutely aware of the need to respect PRASA's freedom of movement within the sphere of power it exercises. That is the definitional requirement of the separation of powers. But it is precisely because I am satisfied that there is a *prima facie* case to answer that PRASA has exceeded those powers, by operating an unlawful tender process, that any "separation of powers harm" is more apparent than real in this case.

25 The concept of "separation of powers harm" as deployed in the *National Treasury* case was aimed at something different. In that matter the Opposition to Urban Tolling Alliance had made a number of policy-based arguments that went, at best, to the proposition that the state, in the exercise of powers everybody accepted it had, failed to weigh a number of social considerations properly. This case is on a different footing. The allegation is that PRASA has failed to give effect to section 2 of the Procurement Act. If that allegation turns out to be right, then any separation of powers concern will evaporate, because

it will have been established that PRASA has exercised a power it does not have. There can be no objection based on the separation of powers, if the separate powers being exercised are not really powers at all.

26 A substantial, and largely unanswered, claim that PRASA has failed to give effect to material features of the controlling legislation is, it seems to me, clear enough to take this case into the category of the "clearest of cases" identified in the *National Treasury* decision.

Order

27 It follows that Gibb has made out a case for interim relief. Gibb did not seek costs against Glad Africa in the event that it was successful. There was no suggestion that costs should not follow that result in respect of PRASA. There was an unopposed application to substitute Glad Africa for what is apparently one of its subsidiary entities. It is formal and uncontroversial. It is granted. On the draft order I was given, that substitution appears to extend to the citation of Glad Africa in Gibb's founding affidavit. Since a founding affidavit is not a pleading that requires formally amending, that part of the relief is not competent. I will nonetheless record Glad Africa's full citation in my order.

28 I make the following order –

28.1 The forms and service provided for in the Rules of Court are dispensed with and the matter is heard as one of urgency in terms of Rule 6 (12).

28.2 The second respondent is substituted with **GLAD AFRICA CONSULTING ENGINEERS (PTY) LTD** ("Glad Africa"), a private

company duly incorporated under the laws of the Republic of South Africa and having its principal place of business at Hertford Office Park, Block G, 2nd & 3rd Floor, 90 Bekker Road, Midrand, South Africa.

28.3 The first and second respondents are interdicted and restrained, pending the final determination of the relief sought in Part B of this application, from taking any steps to implement:

28.3.1 the first respondent's decision to award the tender advertised under RFP no. HO/PT/DM/141/12/2018 concerning, amongst other things, the appointment of a multidisciplinary consulting engineering company to render professional engineering services (stages 3 to 6) for the upgrading of the Salt River Rolling Stock Depot; and

28.3.2 the first respondent's decision to award the tender advertised under RFP no. HO/PT/DM/140/12/2018 concerning, amongst other things, the appointment of a multi-disciplinary consulting engineering company to render professional engineering services (stages 3 to 6) for the upgrading of the Springfield Rolling Stock Depot.

28.4 The parties shall forthwith approach the office of the Acting Deputy Judge President for the expedited case management and hearing of Part B.

28.5 The applicant's costs in Part A of this application, including the costs of two counsel, shall be paid by the first respondent.

28.6 The determination of the second respondent's costs in Part A is reserved pending the determination of Part B of this application.

S D J WILSON
Acting Judge of the High Court

This judgment was prepared and authored by Acting Judge Wilson. It is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 26 August 2021.

HEARD ON: 18 August 2021

DECIDED ON: 26 August 2021

For the Applicant:	R Moultrie SC T Scott Instructed by Mkhabela Huntley Attorneys Inc
For the First Respondent:	MK Mathipa T Mosikili Instructed by Lucky Thekisho Attorneys Inc
For the Second Respondent	A Bham SC J Mitchell Instructed by Schindlers Attorneys