



The influence of environmental and similar rights on the balance of convenience in the granting of interim interdicts. A discussion of *WJ Building & Civil Engineering Contractors CC Applicant v Umhlathuze Municipality First and others.*

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- Public procurement entails the procurement, by organs of state, of goods and services from the private sector.
- Often have environmental implications – services sewage, water, waste - local governments.
- Awards often subject of review.
- *Olitzki Property Holdings v The state Tender Board and another* 2001 (3) SA 1247 SCA and *Steenkamp NO v Provincial Tender Board Eastern Cape* 2006(3) SA 151 SCA, no claim for damages.
- Applications for interim interdicts preventing organs of state to award tenders proliferated.
- Delays because of interim interdicts consequences for the environment.

- Tenders for a project known as ‘Mzingazi Village Sewer : Phase 1’
- The applicant’s tender lowest responsive tender R8,7mil.
- The first respondent awarded the tender to the second respondent (R9,7 mil) on condition do work for R8,7 mil.
- Reason: Applicant awarded over last five years projects worth approximately R49.5 million; and the council need to encourage the rotation of service providers.
- Applicant seeks interim interdict.

Prerequisites for interim interdict

- (a) a *prima facie* right, though open to some doubt;
- (b) an injury actually committed or a reasonable apprehension of irreparable harm;
- (c) that the balance of convenience favours the applicant;
- (d) the absence of similar protection by any other ordinary remedy.

- *‘In such cases, upon proof of a well grounded apprehension of irreparable harm, and there being no adequate ordinary remedy, the Court may grant an interdict – it has a discretion, to be exercised judicially upon a consideration of all the facts. Usually this will resolve itself into a nice consideration of the prospects of success and the balance of convenience – the stronger the prospects of success, the less need for such balance to favour the applicant: the weaker the prospects of success, the greater the need for the balance of convenience to favour him. I need hardly add that by balance of convenience is meant the prejudice to the applicant if the interdict be refused, weighed against the prejudice to the respondent if it be granted.’*

Requirements a, b and d.

- In casu court held that with regard to the right to administrative justice and an injury actually committed or a reasonable apprehension of irreparable harm, applicant established a *prima facie* case with strong prospects of success.
- *Steenkamp* case unsuccessful tenderer suffers delictual damages that are purely economic in nature and those damages are suffered because of a bona fide and negligent failure to comply with the requirements of administrative justice in awarding a tender, no claim for delictual damages

Balance of convenience

First Respondent argued:

- No sewer system in the area.
- Mzingazi Village people sub-dividing plots pressure on the system of pit toilets
- Mzingazi Lake contaminated by human waste. Provides water to Richards Bay surrounding areas;
- Project financed National Treasury danger that money not be re-allocated if it not used by the end of June 2013.
- Concern local community react – second respondent historically disadvantaged individuals.

The court held delays since 2008 to date, entirely of the first respondent's making.

- In assessing the harm which would be caused to the first respondent if the interdict were to be granted, no doubt that the exhausting of the remedies available to applicant would take some time to be finalised.
- The procedural conduct of a review should be accelerated to minimise any prejudice caused by the delay of the implementation of the project.
- Granted interim interdict.

- Can not be said that the court ignored the environmental aspects (with regard to the balance of convenience);
- Was not dealt with in any detail - difficult to determine what weight if any afforded thereto.
- The approach that the stronger the applicant's prospects of success, the less the need for it to establish that the balance of convenience favours it - strictly applied.
- The court specifically stated that the environmental problems caused were of the First Respondent's own making. This leaves the impression that the environmental factors were largely ignored by the court when determining the balance of convenience.

- Environmental factors were however at least indirectly afforded some weight when determining what harm the First Respondent would suffer if the interdict was granted.
- Addressed by prescribing accelerated time limits for the review process.
- Laudable - not necessarily ensure a speedy outcome.
 - Delaying tactics.
 - Be referred to trial because of factual disputes.
 - Appeal.

- When courts evaluate the requirements for an interim interdict the determination of the rights and obligations of the parties to the litigation are usually foremost.
- The stronger the prospects of success the less the need for balance of convenience.
- As the organ of state is a party to such proceedings the environmental issues are dealt with through the lens of the obligation of the organ of state to provide services like sewage.
- If it is not to the parties' advantage, the environmental factors will not be brought to the court's attention.
- Re-examination of application of requirements for interim interdict necessary.

Solution: Join proceedings

- Three role players
 - Private sector
 - Organ of state
 - General public
- Public can join proceedings
- *Amicus curiae*
- Only materialise in exceptional cases

Solution: Awareness by courts

- A greater awareness of the possible environmental issues by the courts.
- Environmental issues afforded more weight when determining the balance of convenience.
- Move away from affording the most weight to the rights and obligations of the parties - emphasise environmental issues as a jurisdictional fact when exercising its discretion to grant an order for an interim interdict.
- The practical problem - might not be in the interest of any of the parties to bring the environmental issues to the attention of the court and leading evidence thereon.
- Without evidence impossible for the court to properly take account thereof.

Solution: Compel environmental evidence

- In some way or another, for example through legislation, compel the parties to bring environmental issues to the court's attention.
- Legislate that the court must take environmental factors into account when dealing with these issues.
- This is unlikely to happen.

Solution: Fast Track Proceedings

- The most plausible solution is to fast track review proceedings in public procurement.
- This can be done by creating specialised courts dealing with public procurement.
- This will be in the interest, not only of the environment, but also of public procurement in general.
- Hopefully, one day, courts will also routinely ask “what is in the best interest of the environment”, as a jurisdictional fact, when a matter with environmental implications is heard.