



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

NOT REPORTABLE

Case no: 4264/2023

In the matter between:

**STEAM DEVELOPMENT TECHNOLOGIES 96
DEGREES PROPRIETARY LIMITED**

Applicant

and

**THE MINISTER: DEPARTMENT OF PUBLIC
WORKS & INFRASTRUCTURE**

Respondent

REASONS FOR THE INTERIM INTERDICT

GOVINDJEE J

The Order

[1] This matter was argued on 26 January 2024. The following order was granted on 30 January 2024:

1. 'The court dispenses with the forms and service provided for in the Uniform Rules of Court.
2. The respondent is interdicted and restrained from proceeding with the tenders:
 - 2.1 PET28/2023: Fort Glamorgan and Mdantsane Prison: 36 months term contract for boiler maintenance, repairs and services ('PET28/2023') and
 - 2.2 PET29/2023: St Albans and Kirkwood Prison: 36 months term contract for boiler maintenance, repairs and services ('PET29/2023')

pending the finalisation of the proceedings currently pending between the parties in this court under case numbers 4175/2022 and 4176/2022 (currently the subject of applications for leave to appeal the dismissal) and the review proceedings in Part B, whichever concludes last, alternatively where any are finally concluded in the applicant's favour.

3. The respondent is directed to extend the closing date of tenders PET28/2023 and PET29/2023 indefinitely subject to paragraph 2, above.
4. The costs of this application are reserved for determination as part of the determination of the application under Part B.
5. The reasons for this order will be furnished upon application by either party in terms of Uniform Rule 49(1)(c).'

Background

[2] The reasons for the order follow. The dispute relates to tenders for boiler maintenance, services and repairs at four prisons (namely, St Albans, Kirkwood, Fort Glamorgan and Mdantsane). Prior tenders for the services were awarded to the applicant by the Department of Public Works and Infrastructure ('the Department')

but expired by effluxion of time. The Department advertised tenders for the services during 2021 ('PET10/2021' and 'PET11/2021') ('the old tenders'). All bids, including that of the applicant, were declared non-responsive and the Department sought to cancel the tenders. The applicant's application to review these decisions ('the first review') was dismissed with costs by Mtshabe AJ on 17 October 2023. An application for leave to appeal against that decision was filed and is pending.

[3] Soon after that application was filed, the Department advertised two new tenders for the same work ('PET28/2023' and 'PET29/2023') ('the new tenders'). The main difference is that the Department seeks to implement a new scoring policy, seemingly adopted during July 2023. Part B of the present application is a review to set aside the new scoring policy and its implementation in the new tenders.

[4] The applicant seeks to interdict the respondent from proceeding with the new tenders pending both the finalisation of the legal proceedings pertaining to the first review and the Part B review proceedings, and to extend the closing dates of the new tenders accordingly. It presently provides the services sought to be procured by the Department, in terms of temporary appointments on a deviation basis.

The Department's submissions

[5] The Department notes that the applicant has been undertaking the necessary and essential repair and maintenance work in question since the latter half of 2022. This, according to the Department, is inherently problematic, uncompetitive and inconsistent with s 217 of the Constitution of the Republic of South Africa ('the Constitution'). It argues that the effect of granting the interim interdict will be to extend the deviation period by a further undefined period to the sole benefit of the applicant. In addition, the Department submits that the requirements for an interim interdict have not been met on either basis advanced. In particular, the quest to stall the new tenders pending the 'finalisation' of the first review proceedings is challenged on the basis of an absence of a prima facie right. The new tenders, and new scoring policy, are justified as consonant with new preferential procurement regulations and the decision of the Constitutional Court in *Minister of Finance v*

Afribusines.¹ The suggestion that consultation or a public participation process was required is criticised as erroneous, inapplicable and impractical.

The requirements for an interim interdict

[6] This court has recently had the opportunity to consider the requirements for an interim interdict in the context of urgent tender proceedings.² What follows is largely a repeat of the legal position sketched in that matter.

[7] The applicant must establish:³

- (a) that the right which is the subject-matter of the main application(s) and which it seeks to protect by means of interim relief is clear or, if not clear, is *prima facie* established, though open to some doubt;
- (b) That, if the right is only *prima facie* established, there is a well-grounded apprehension of irreparable harm if the interim relief is not granted and it ultimately succeeds in establishing its right;
- (c) That the balance of convenience favours the granting of interim relief; and
- (d) That the applicant has no other satisfactory remedy.

[8] Even if all these requirements are met, the court still enjoys an overriding discretion whether or not to grant the interim interdict. In cases where a clear right is not established, there is authority going back to Van der Linden's *Institutes*, and entering our law via *Setlogelo v Setlogelo* in 1914, that explains the correct approach.⁴ Applicants for interim relief are required to establish at least a *prima facie* right to relief, even if open to some doubt. They need not establish that right on a balance of probabilities.

[9] The oft-quoted passage from *Webster v Mitchell* explains the enquiry as follows:⁵

¹ *Minister of Finance v Afribusines* 2022 (4) SA 362 (CC).

² *Zen JV v Department of Transport: Province of the Eastern Cape and Others* [2023] ZAECMKHC 140.

³ *L F Boshoff Investments (Pty) Ltd v Cape Town Municipality; Cape Town Municipality v L F Boshoff Investments (Pty) Ltd* 1969 (2) SA 256 (C) at 267B-E.

⁴ *Setlogelo v Setlogelo* 1914 AD 221.

⁵ *Webster v Mitchell* 1948 (1) SA 1186 (W) at 1189-1190.

'In the grant of a temporary interdict, apart from prejudice involved, the first question for the Court...is whether, if interim protection is given, the applicant could ever obtain the rights he seeks to protect. *Prima facie* that has to be shown. The use of the phrase "*prima facie* established though open to some doubt" indicates...that more is required than merely to look at the allegations of the applicant, but something short of a weighing up of the probabilities of conflicting versions is required. The proper manner of approach...is to take the facts as set out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute, and to consider whether, having regard to the inherent probabilities, the applicant could on those facts obtain final relief...The facts set up in contradiction by the respondent should then be considered. If serious doubt is thrown on the case of the applicant he could not succeed in obtaining temporary relief...But if there is mere contradiction, or unconvincing explanation, the matter should be left to trial and the right be protected in the meanwhile, subject of course to the respective prejudice in the grant or refusal of interim relief...the position of the respondent is protected because...the test whether or not temporary relief is to be granted is the harm which will be done...'

[10] That enquiry has subsequently been refined, so that the test is now whether the applicant *should* (not could) obtain final relief on those facts.⁶

[11] Generally, the threshold for an interim interdict in terms of a breached right or in terms of a threat of breach is not showing the *certain* existence of the right. One need only show a right, though at the level of interim relief it may be 'open to some doubt'.⁷ The *prima facie* right must be threatened by an impending or imminent irreparable harm. As Moseneke DCJ held in *National Treasury*:⁸

'The *prima facie* right a claimant must establish is not merely the right to approach a court in order to review an administrative decision. It is a right to which, if not protected by an interdict, irreparable harm would ensue. An interdict is meant to prevent future conduct and not decisions already made. Quite apart from the right to review and to set aside impugned decisions, the applicants should have demonstrated a *prima facie* right that is threatened by an impending or imminent irreparable harm'.

⁶ *Gool v Minister of Justice and Another* [1955] 3 All SA 115 (C).

⁷ *Webster v Mitchell* above n 5 at 1189 and *Gool* above n 6 at 688A, cited with approval in *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd and Others* [2022] ZACC 44 ('Eskom') para 293.

⁸ *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC) ('*National Treasury*') para 50.

[12] Irreparable harm is an element in cases where the right asserted by the applicants, though *prima facie* established, is open to some doubt. In such cases, the accepted test to be applied is whether the continuance of the thing against which an interdict is sought would cause irreparable injury to the applicant. If so, the better course is to grant the relief, but only if the discontinuance of the act complained of would not involve irreparable injury to the respondent.⁹

[13] As to the balance of convenience, *Webster v Mitchell* goes as far as to state that if there is greater possible prejudice to the respondent an interim interdict will be refused.¹⁰ The balance of convenience enquiry must be applied cognisant of the normative scheme and democratic principles that underpin the Constitution.¹¹ In other words, when a court considers whether to grant an interim interdict it must do so in a way that promotes the objects, spirit and purport of the Constitution.¹² According to *EFF*, this invariably attracts various constitutional issues into the adjudication process, including possible issues regarding separation of powers, the constitutional duties of the parties that may be frustrated by the order and any constitutional rights implicated in the matter.

[14] Where legislative or executive power will be 'transgressed and thwarted' by an interim interdict, it should only be granted 'in the clearest of cases and after careful consideration of the possible harm to the separation of powers principle'.¹³ In *EFF*, Khampepe J explained that a court must carefully scrutinize whether granting an interdict will disrupt executive or legislative functions, thus implicating the separation and distribution of power as envisaged by law.¹⁴ It is in that instance that an interim interdict would only be granted in 'exceptional cases in which a strong case for that relief has been made out'.¹⁵

⁹ *Setlogelo* above n 4 at 227.

¹⁰ *Webster* above n 5 at 1192.

¹¹ *National Treasury* above n 8 paras 46-47.

¹² *EFF v Gordhan and Others* 2020 (6) SA 325 (CC) ('*EFF*') para 40.

¹³ See *National Treasury* above n 8 and *EFF* above n 12 para 110: the standard is applicable to constitutional matters and is triggered only where 'the effect of the interdict is to prevent the exercise of public power. The standard may not be invoked in a commercial or contractual matter that has nothing to do with the exercise of public power: *EFF* above n 12 para 110.

¹⁴ The separation of powers doctrine, embedded in the architecture of the Constitution, requires courts to ensure that all branches of government act within the law. It also demands that courts must refrain from entering the exclusive terrain of the other branches of government unless the intrusion is mandated by the Constitution itself: *National Treasury* above n 8 para 44.

¹⁵ *EFF* above n 12 para 48 and *National Treasury* above n 8 para 47.

[15] In *Eskom*, Madlanga J also considered *National Treasury* and *EFF* as part of the enquiry as to the 'balance of convenience'.¹⁶ It is useful to highlight the distinction drawn in *EFF* as to the applicability of a more stringent requirement(s):

'[58] How would an interim interdict hinder the Public Protector in the exercise of her powers, or prevent her from exercising her functions once the report is released and in the public domain? ... The Public Protector is not rendered ineffective since the investigation has been completed, the SARS Report has been finalised and published and the interim interdict is sought merely to protect the prima facie rights of an applicant...

[59] While I acknowledge that *OUTA* is distinguishable on the facts from the present matter, it is this very distinction that highlights the lack of prospects of success in the present case ...

[60] What is evident from the above is that the interim order sought in *OUTA* would thwart the executive from carrying out its statutory and budgetary duties as required by statute [to raise revenue through tolls, a power vested by statute]. Plainly put, it would prevent the executive from doing what it was meant to do. Here, the interim interdict sought is different. The Public Protector has already performed the duties and functions that the Constitution requires of her. As I have stated before, the SARS Report has been completed. Her powers have been exercised and the SARS Report has been published. The interim interdict sought in the High Court therefore did not have the effect of subverting her constitutional powers.'

Interdict pending review

[16] It is convenient to consider this dimension of the application first. On the facts, I have little difficulty in following the various authorities that have maintained the status quo pending the finalisation of a review application concerning the scoring system for the tenders in question.¹⁷ These authorities have relied on the principle that a party in the position of the applicant will not be able to obtain 'pragmatic and

¹⁶ *Eskom* above n 7 para 299. The majority indicated that a balancing exercise involving a sliding scale was applicable: the more policy laden or polycentric the decision, the more the role this 'factor' must play in influencing the outcome, and vice-versa. Affected fundamental rights would always play a critical role in the balancing exercise: *Eskom* above n 7 para 303.

¹⁷ See *SMEC South Africa (Pty) Ltd v South African National Road Agency SOC Ltd* (unreported case not 075024/2023) (High Court of South Africa, Gauteng Division, Pretoria) ('*SMEC*') and *H&I Construction v SANRAL & Others* (unreported case no. 1731/2023) (High Court of South Africa, Eastern Cape Division, Gqeberha).

practical' just and equitable relief in a pending review application in the event that a party in the position of the Department is not interdicted from implementing a new scoring system in the interim:¹⁸

'Relief capable of being implemented is part of the fundamental right to have disputes adjudicated in a court of law. And this is dependent on the *status quo* (before the new scoring system) being maintained.'

[17] The key question as to whether a *prima facie* case has been made out for interim relief, including whether the applicant 'should' obtain the relief it seeks, draws the prospects of success in the review application into the enquiry. The other requirements for the granting of interim relief must also be established, and considered holistically, and through the constitutional prism, as part of the process to determine whether to exercise the discretion to interdict the new tenders.

[18] The analysis of the Preferential Procurement Policy Framework Act, 2000¹⁹ the Preferential Procurement Regulations, 2022 and the Broad-based Black Economic Empowerment Act, 2003²⁰ ('the BBBEE Act') in the decisions to which I have been referred need not be repeated. The applicant echoes the arguments advanced in those matters. The applicant has at least established on a *prima facie* basis that it enjoys the right to participate in a tender bidding process, and to have its bids evaluated and adjudicated with a system which is fair, lawful and constitutionally compliant. That right is threatened by the introduction of a scoring system that seemingly failed to consider a relevant code of good practice issued in terms of the BBBEE Act. The applicant's detailed submissions on the mandatory application of the Construction Sector Code, as amended, its significance in the context of the Construction Sector Transformation Charter and the BBBEE Act, and the contrast with the new scoring policy, have simply been ignored by the Department in its papers and during argument. The applicant has, for this reason alone, satisfied the requirement of a *prima facie* right to protect the relief it seeks in the Part B proceedings, based on non-compliance with the applicable legal framework for preferential procurement policy-making.²¹ This bearing in mind that the Promotion of

¹⁸ *SMEC* above n 17 para 12 and following.

¹⁹ Act 5 of 2000.

²⁰ Act 53 of 2003.

²¹ For a comparable recent illustration of the application of similar considerations in granting an interim interdict, see *H & I Civil & Building (Pty) Ltd and Another v City of Cape Town and Others* [2024]

Administrative Justice Act, 2000,²² ('PAJA') provides that administrative action that was materially influenced by an error of law may be judicially reviewed.²³ No serious doubt has been cast upon the case advanced and the simple suggestion that the new policy 'complies with the constitutional, statutory and regulatory framework and complies with the approach adopted by the Constitutional Court...' is left unsubstantiated.

[19] The other requirements for granting the interim interdict pending the review have also been satisfied. In particular, the balance of convenience favours the applicant, bearing in mind the constitutional underpinnings and strength of its application. While it may be accepted, generally speaking, that it is undesirable for the Department to be forced to contract for work on a 'deviation' or ad hoc basis over an extended period of time, on the papers before me that prejudice cannot be said to override the risks to the applicant if the new tenders are not interdicted. It may be emphasised that the application has been launched on the narrow basis that only the new tenders are to be interdicted, and not all tenders where the Department chooses to adopt and implement a fresh approach to scoring. As such, any impact on the exercise of executive power is minimised so that application of a more stringent test appears to be unwarranted.²⁴

[20] As a result, it is unnecessary to determine the applicant's point that the Department had undertaken not to proceed with the new tenders until a date to be extended upon the lodging of an application for leave to appeal the first review judgment. In my view it is also unnecessary to opine as to the validity of the plethora of other grounds of review linked to the Part B proceedings, including the detailed submissions regarding the participation process and legitimate expectation of consultation in respect of the new scoring policy.

ZAWCHC 15 paras 39 - 44.

²² Act 3 of 2000.

²³ S 6(1)(d) of PAJA.

²⁴ *Down Touch Investments (Pty) Ltd v The South National Road Agency Soc Limited* 2020 JDR 2278 (ECG) para 44.

Interdict pending leave to appeal

[21] It has been settled that an application for leave to appeal or the noting of an appeal does not revive an interim order which has been discharged.²⁵ An applicant whose interim order (with or without a rule nisi) was discharged would therefore be obliged to bring a further application for an interim interdict pending the outcome of any appeal, should it require such relief.²⁶ There is, however, authority, cited with approval by Van Loggerenberg in *Erasmus: Superior Court Practice*,²⁷ that s 18(1) of the Superior Courts Act, 2013²⁸ applies to all decisions, including those dismissing an application for judicial review.²⁹ Accepting that authority would seemingly on its own suspend the cancellation of the old tender, in accordance with s 18(1), pending the outcome of the applicant's application for leave to appeal.³⁰

[22] Absent submissions on the point, I do not intend to express any firm views on the outcome in *Uitzig* or its implications. I proceed on the basis that it remains necessary to consider the requirements of an interim interdict, including the establishment of a prima facie right, pending an application for leave to appeal. For

²⁵ *MV Snow Delta Serva Ship Ltd v Discount Tonnage Ltd* 2000 (4) SA 746 (SCA) para 6.

²⁶ See *Kelly Group Ltd and Another v Solly Tshiki & Associates (SA) (Pty) Ltd and Others* 2010 (5) SA 224 (GSJ) ('*Kelly Group*') para 19.

²⁷ DE van Loggerenberg *Erasmus: Superior Court Practice* (OS, 2023, D-121).

²⁸ Act 10 of 2013.

²⁹ *Uitzig Secondary School Governing Body v MEC for Education, Western Cape* 2020 (4) SA 618 (WCC) ('*Uitzig*'). Also see AC Cilliers, C Loots and HC Nel *Herbstein and Van Winsen: The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* (5th Ed) (2009) ch44–p1485. Section 18(1) states that 'subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal'. In this matter, the applicants had applied to the SCA for leave to appeal a High Court decision dismissing their application to have an administrative decision, made by the respondent, set aside on review. The MEC relied on SCA precedent that in cases where a claim or an application was dismissed, such order was not suspended pending an appeal. Following that approach, the MEC argued that a litigant who had lodged an application for leave to appeal and who wished to prevent the execution and implementation of an administrative decision (pending that application for leave to appeal) was required to apply for an interdict rather than rely on s 18(1). In holding that the opposite was true, the court highlighted the differences between s 18(1) and the common law. The purpose of s 18(1) was to provide protection to a litigant pending a full investigation of the matter by the court of appeal. To only suspend decisions where orders were granted would strip a litigant in the position of the applicants of that protection, and would unjustifiably discriminate against them. Absent an application in terms of s 18(3) of the Superior Courts Act, 2013, s 18(1) protected the rights of the applicants and suspended the execution and implementation of the order of the court a quo.

³⁰ *Uitzig* above n 28 para 17. Also see *Janse Van Rensburg v Obiang and Another* 2023 (3) SA 591 (WCC); *Public Protector of South Africa v Speaker, National Assembly and Others* 2023 (4) SA 205 (WCC).

reasons that follow, I am satisfied, when considering the affidavits and the requirements for an interim interdict in their totality, that there is a real prospect of success on appeal and that it is appropriate in the present circumstances to grant the relief sought.³¹

[23] In coming to this conclusion, it may be noted that the court enjoys jurisdiction to grant the interim interdict considering the absence of any prior determination by this court that the applicants do not have at least a prima facie case.³² The judgment of Mtshabe AJ was concerned with questions of final relief.³³ Importantly, it may also be emphasised that, unlike the situation in *Granbuild* and *Aqua Transport*, there has been no determination of an absence of reasonable prospects of success on appeal.³⁴ There is therefore no need to persuade the court that a decision pertaining to an assessment of prospects of success on appeal was wrong.

[24] In coming to this decision I am mindful of the remarks of Olsen J in *Aqua Transport*.³⁵

‘A practice or procedure which involves another judge deciding the quality of prospects on appeal before the judge who heard the main case has decided whether the threshold of reasonable prospects of success on appeal is met undermines s 17(2)(a) of the Superior Courts Act. The section reflects the fact that fairness to all parties dictates that if at all possible the judge steeped in the case must decide the question of leave to appeal. Her or his decision should not be pre-empted by a prior decision of another judge. In my view, unless the application for the interdict is brought before the judge who made the decision subject to appeal, a glaring error on the part of the original judge must be apparent in most cases before interim relief is granted...’

³¹ See the judgment of Schippers J in *Quality Labels Solutions CC & Others v Head of Department of Culture, Sports and Recreation, Mpumalanga Province, & Others* [2013] ZAWCHC 193 paras 18 - 20, cited with approval by Rogers J in *Granbuild (Pty) Ltd v Minister of Transport and Public Works, Western Cape and Another* [2015] ZAWCHC 83 (*‘Granbuild’*) paras 33, 34. Cf *Aqua Transport & Plant Hire (Pty) Ltd v Dube Tradeport Corporation and Others* [2018] ZAKZDHC 50 (*‘Aqua Transport’*) para 38. On the test in *Aqua Transport*, ‘exceptional circumstances’ would be required. Cf *Kelly Group* above n 26 paras 23, 24 and 31, seemingly applying the ordinary test for a prima facie right.

³² *Granbuild* above n 31 para 34.

³³ *Ibid.* Also see *Kelly Group* above n 26 paras 21 – 22. Cf *Aqua Transport* above n 31 para 35.

³⁴ *Granbuild* above n 31 para 35; *Aqua Transport* above n 31 paras 41, 43.

³⁵ *Aqua Transport* above n 31 para 43. Cf *Kelly Group* above n 26 para 18, assuming that leave to appeal would be granted either by the court a quo or by the SCA.

[25] Considering this authority, it is perhaps unfortunate that the parties did not arrange for this application to be heard together with the application for leave to appeal. I am, however, mindful that the learned judge who presided in the first review is no longer acting, so that this option may not have been feasible. This court is regrettably now compelled to express itself on issues that may best have been determined by the learned judge who heard the first review. Given the general discomfort in doing so, it is perhaps fortuitous that the papers before me are such that the applicant's case for interdictory relief pending the leave to appeal processes cannot be gainsaid.

[26] Section 217 of the Constitution ensures that contracts for goods or services are procured in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. Section 33 of the Constitution guarantees the right to just administrative action, including administrative action that is lawful, reasonable and procedurally fair, as detailed in PAJA. On the facts set out by the applicant, it was incorrectly scored when the old tenders were assessed and it was irrational for the Department to have considered it to lack functional ability, particularly considering that it had rendered the boiler maintenance services for some years without complaint. Leaving aside the single bare averment that there are no reasonable prospects of another court coming to a different conclusion to that of the learned judge in the first review, that averment is left unanswered in the Department's papers.³⁶ The court has also had the benefit of applicant's heads of argument in the first review, the subsequent judgment in that matter and the application for leave to appeal. Considering these documents together with the present affidavits, there is a prima facie basis to conclude that the applicant enjoys real prospects of success on appeal and should obtain the primary recourse it seeks, namely to have its bid declared responsive and to be awarded the old tenders. On these papers it has succeeded in demonstrating a prima facie right, including a real prospect of success, to contest the outcome of the first review within the framework of the constitutional right to just administrative action and access to court.

³⁶ See *Bothongo Agriculture GP (Pty) Ltd v Johannesburg Water SOC Limited* [2023] ZAGPJHC 246 para 56.

[27] That right is threatened by the new tenders and the applicant is at risk of irreparable harm, also absent any alternative recourse, in the event that the new tenders are not interdicted pending the likely appeal processes and run to completion.³⁷

[28] The same considerations in respect of possible intrusion into the realm of the executive, as outlined above, apply and support the conclusion reached. In my view, the present circumstances involve only limited intrusion into the exclusive terrain of another branch of government, and correspondingly little cause for concern as to 'separation of powers harm'.³⁸ The court is not required to intrude into a 'policy laden and polycentric decision' of the executive, as was the case in *National Treasury*.³⁹ In any event, the fact that the harm grounding the interim interdict sought amounts to a breach of a fundamental right to just administrative action 'tempers the impact of what may otherwise be too stringent a test'.⁴⁰ Furthermore, the exercise of the Department's powers in respect of tender awards in general is not rendered ineffective should these particular tenders be interdicted on an interim basis. In determining the balance of convenience, while I note the hint of prejudice to the Department in the event that the applicant is permitted to continue to perform necessary work on a deviation basis, there is simply no evidence that the work being performed on this basis is unsatisfactory, overpriced or otherwise prejudicial. Any such prejudice is wholly overtaken and outweighed by the demonstrated prejudice to the applicant if a higher court determines that it ought to have been awarded the old tenders, in circumstances where a new process has been concluded and a new service provider permitted to commence with the same work.

[29] It is appropriate in these circumstances, and considering the affidavits as a whole, for the court to exercise its discretion and grant the interim relief to the extent requested in the notice of motion.⁴¹ The public interest in ensuring cost-effective tender awards, and the scrupulous utilisation of public resources, as required by the Constitution, forms part of this decision. It may also be noted that the applicant has

³⁷ Ibid paras 61-64.

³⁸ See *National Treasury* above n 8 para 47. *Down Touch Investments (Pty) Ltd v The South National Road Agency Soc Limited* above n 24 para 44.

³⁹ *National Treasury* above n 8 para 67-8.

⁴⁰ *Eskom* above n 7 para 302.

⁴¹ *Eriksen Ltd v Protea Motors and Another* 1973 (3) SA 685 (A) at 691C-G.

committed itself, on the papers and during argument, to playing its part in expediting the forthcoming legal proceedings, to the extent that this is a relevant consideration. This will hopefully ensure that the ongoing provision of its services on a 'deviation' basis is minimised rather than extended indefinitely.

[30] Finally, it may be added that this outcome accords broadly with various recent decisions, including *Bothongo Agriculture GP (Pty) Ltd v Johannesburg Water SOC Limited*.⁴² As in the present proceedings, the applicant argued successfully that the effect of implementation of a re-advertised tender, pending a final decision in review proceedings pertaining to an original, cancelled tender, would result in possible mootness and the undermining of the right to approach another court to vindicate the right to just administrative action.⁴³

[31] These considerations informed the decision to grant the order repeated in paragraph 1, above.

A GOVINDJEE
JUDGE OF THE HIGH COURT

Heard: 26 January 2024

Date of order: 30 January 2024

Reasons delivered: 16 February 2024

Appearances:

⁴² *Bothongo Agriculture GP (Pty) Ltd v Johannesburg Water SOC Limited* above n 36.

⁴³ *Ibid* para 9.

Counsel for the Applicant: Adv JJ Neppen
Chambers, Gqeberha

Instructed by: Joubert Galpin & Searle Attorneys
Applicant's Attorneys
Email: jac.marais@adams.africa

C/o: Huxtable Attorneys
26 New Street
Makhanda
Email: law1huxattorneys.co.za

Counsel for the Respondent: Adv RG Buchanan SC
Chambers, Gqeberha

Instructed by: Office of the State Attorney
Respondent's Attorneys
Email: MicBotha@justice.gov.za

C/o: Whitesides Attorneys
53 African street
Makhanda
Email: barrowsec@whitesides.co.za