



NOT REPORTABLE

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

CASE NO. 2300/2022

In the matter between:

LSM SECURITY (PTY) LTD (2015/208312/08)	First Applicant
MKWAZE SECURITY (PTY) LTD (2014/126620/07)	Second Applicant
NUBC SECURITY (PTY) LTD (2013/153977/07)	Third Applicant
NGONYAMA SECURITY (PTY) LTD (2013/087140/07)	Fourth Applicant
and	
MEC, DEPARTMENT OF SOCIAL DEVELOPMENT, EC	First Respondent
GOLDEN SECURITY SERVICES CC	Second Respondent

**REASONS FOR GRANT OF INTERIM RELIEF
PENDING ANTICIPATED REVIEW APPLICATION**

HARTLE J

[1] On Monday, 22 August 2022, I granted an order confirming paragraph 3 of a rule *nisi* which I had granted in an urgent application for an interdict in the preceding week of duty in Gqeberha staying the implementation of a tender award pending likely review proceedings. I also further amended paragraph 4 of the interim order that would require the applicants to initiate the anticipated application for review within a shorter time frame with due regard to the interests of the respondents who would know their fate in respect of the proposed review with certainty in a shorter while.

[2] Having invited the parties to request reasons for my order, both respondents took up my invitation.

[3] The rule was essentially granted in the absence of the first respondent who was served (by email only and *via* a private address of one of its legal directors) minutes before the matter was due to be heard for the first time at 16h30 on Monday, 15 August 2022.¹

[4] My order and the rule *nisi* provided as follows:

- “1. The applicants’ non-compliance with the Rules of this Honourable Court as regard the time limits, forms and service is condoned and the matter is heard as one of urgency in terms of Rule 6(12)(a) of the Uniform Rules of Court;
2. Non-compliance with the provisions of section 35 of the General Law Amendment Act 62 of 1955, is condoned;
3. A *rule nisi* be and is hereby issued, calling upon all interested parties, including the successful bidders, to show cause on 19 August 2022 at 09h30

¹ The second respondent applied successfully and without challenge after the fact to join as the second respondent on the return day. By the launch of the application their identity was alleged to have been unknown to the applicants.

why the following order should not be made pending the finalisation of review proceedings, which is to be instituted in respect of the awarding of the contract under Bid Number: SCMU4-21/220019:

- 3.1 That the respondent is and is hereby interdicted and restrained from in any way implementing the decision to award Bid Number SCMU4-21/220019;
- 3.2 The successful bidder is likewise interdicted from commencing any work under Bid Number SCMU4-21/220019;
- 3.3 The costs of application to be costs in the review application.
4. The orders in the first two paragraphs in the preceding paragraph shall operate as an interim interdict with immediate effect pending finalisation of the judicial review application to be instituted by the applicants within twenty (20) days of this order against the decision of the respondent's Department to award tender number: SCMU4-21/220019, failing which the interim interdict will fall away.
5. That service of this order take place by email to the following email addresses.
 - a) ...;
 - b) ...;
 - c) ...;
 - d) ...
6. The respondent (is) to provide the applicant's attorney with the name and contact details of the person or company that was awarded the contract under the said bid as well as a copy of such contract on or before Wednesday, 17 August 2022 at 12h00.
7. Authorising the applicants to supplement their founding papers, if so advised;
8. The respondent may anticipate the return day upon delivery of not less than twenty-four hours' notice to the applicants' legal representative and the court.
9. The costs stand over for determination in the review application."

[5] On the morning of the launch of the application on 15 August 2022, I received a certificate of urgency from the applicants' counsel which foreshadowed the relief that they required and in which the reasons for the professed urgency were set out. In essence it was alleged that a very likely

constitutionally invalid contract concluded under what was feared to be a flawed tender process was about to be implemented that same day and, since the first respondent was not inclined to suspend its execution pending the resolution of the applicants' declared dispute concerning it, that an interdict was vitally necessary pending a review of the tender process and outcome.

[6] The same reasons were restated in the founding affidavit(s) together with other material averments. In essence the four applicants, all private companies providing security in Gqeberha had in common, apart from the fact that they had previously provided services to the first respondent ("the Department") on various short term contracts,² that they had tendered and competed for the respondent's tender bid (SCMU4-21/220019) issued on 15 November 2021 for the provision of security services at Kwa-Nobuhle One Stop Centre, Protea, CYCC, Erica CCYC and the department's Ibhayi district office for a long term period of thirty-six months.³ The tender closed on 14 December 2021 but was extended until 17 July 2022.⁴

² As at the date of the launch of the application the first applicant's existing short-term contract was due to expire on that same day, but it was not the objective by the temporary interdict proceedings to challenge that inevitability. The history of its short-term stints with the Department that were extended for short intervals at a time before was merely incidental to the features of the matter and bore some relevance to the issue of urgency and the element of balance of convenience (as a consequence to staff that the work cycles would be changing from short to long term arrangements and might not be renewed cyclically as before), but it was not the *prima facie* right relied upon by the applicants for the temporary interdict.

³ The trend up to the date of the impugned tender award had been to engage the services of security providers for short periods at a time with those cycles being extended from time to time at the Department's election.

⁴ Initially they averred that the bid had been extended after the tender validity period has expired, an averment which Ms. Crouse, who appeared for the applicants together with Mr. Mfenyane, assured the court had been an error or mistaken assumption made in the haste of preparing the papers under the exigencies which had prevailed. From the moment of this realization, she confirmed that the alleged irregularity relied upon in this respect had been promptly abandoned. It was an obvious mistake because the copy of the notice of extension of validity of the bid (SM 6) self-evidently reflects the initial validity period to have been for four months (120 days). It was most unfortunate that this contradicted the assertion made in the founding affidavit that the tender had expired 90 days from the closing date of the bid. Ms. Crouse attributed this mistake to negligence on the part of the applicants' legal representative which she accepted without hesitation as a blunder. I was inclined to accept her *bona fides* in this respect though the respondents sought to make capital of the obviously mistaken premise as an indication of the applicants' supposed *mala fides*.

[7] The applicants, despite tendering for security services on a long-term basis, were uncertain why their bids in respect of the new contract model had come up short, or alternatively why the successful bidder had been awarded the tender. Indeed, they had heard a rumour that the tender had been awarded to an undisclosed bidder hailing from East London who was not a member of the Gqeberha Security Forum (“the Forum”), an unregistered voluntary association representing the interests of security service providers within Gqeberha inclusive of themselves.

[8] Reasons were sought on their behalf initially by the Forum (this on 21 July 2022 a day after the rumour surfaced among their employees that the tender had been awarded), and later (on 10 August 2022) by an attorney acting on behalf of five named bidders including the four applicants after the realisation that the first respondent was not going to answer the Forum’s request for information or documentation.

[9] The first respondent cited a lack of authority and privacy reasons why it could not consider the Forum’s objections. One of these objections (which the applicants in passing aligned themselves with in the founding papers)⁵ included

⁵ This was not the primary reason for the applicants’ concerns with the tender process but they alleged in summarising their concerns that the successful tenderer “is not even from Gqeberha by all accounts.” It was not clear incidentally whether it was an actual condition of the tender that the bidder had to be a local entity. The second respondent was keen to impress upon the court though that it had a Gqeberha connection or footprint in the local area and the first respondent justified its appointment as the successful bidder on the basis of an application of “local preference”. The first respondent clarified to the applicants’ legal representative in its formal reasons, probably in response to the Forum’s concern raised that the winning bidder “is” not based in Gqeberha, that such a preference was included in the bid document but suggested that it was a preference rather than a qualification criterion for the award of the tender. In order to “qualify” for local preference, so they rationalised, services providers were required “to provide documents to support local presence”. Without putting up any documents, the first respondent claimed that the unnamed “service provider” had complied with this “requirement” by “providing the required supporting documents which were found acceptable by all the committees”. Elsewhere the first respondent alluded to a meeting held on 3 August 2022 arising from “(its) requirement that at least 50% of the successful tenderer’s staff had to be local and have previously been employed by existing service providers”. I accepted therefore that in all probability it was a requirement of the tender that the successful bidder had to be based in Gqeberha and the first respondent certainly seemed constrained to want to justify that the winning bidder (self-evidently unknown to the Forum representing security providers in Gqeberha) had met its requirement in this respect. The applicants’ attorneys however came with a different approach in their quest to get to the bottom of things.

the fact that the tender had according to information been awarded to a security company not based in Gqeberha. A further complaint was that the bid had been awarded to the winning bidder as opposed to “any lower priced tenders”. This raised a concern regarding the competitiveness of the respective bids in the absence of a list of prices. The Forum expressed an interest not only in the reasons that would make everything clear, but also asked the Department to make available to it copies of the evaluation and adjudication reports, including any functionality score cards to provide a basis for it to assess whether there were any grounds to review its decision.⁶

[10] The applicants’ attorneys, when they joined the fray in a letter written to the Department 20 days later, pressed in on the fact that the applicants had not been provided with any reasons for the assumed rejection of each of their bids, this inference flowing from the fact that a successful bidder had been selected. They intimated that they were not in the know why they had been trumped by the “successful bidder” or, conversely, what the reasons were for the granting of the tender to the successful bidder. Self-evidently they wished to be apprised of reasons and regarded the absence of these as a matter of concern and a basis to conclude that the tender had not been awarded in a manner consistent with section 217 of the Constitution. Additionally, they sought an undertaking that pending the resolution of the issue raised, viz their entitlement to be so apprised and their concerns allayed that something might be amiss (“the dispute”), that the implementation of the tender to the successful bidder in the meantime be held over.

[11] The first respondent recognized the applicants’ entitlement to the information sought but requested time to collate the necessary information. The

They simply wanted to know why their client’s bids had been disqualified, or conversely stated, on what basis the winning bidder had made it through successfully to the exclusion of their clients.

⁶ These were not provided by the first respondent even to the court.

applicants' attorneys agreed but again insisted on the necessary undertaking being given that it would suspend the commencement of the tender pending resolution of the "dispute". (The first respondent was however resolute throughout that the implementation of the winning bid would not be suspended.)

[12] When the first respondent was ready to respond (late on Friday afternoon the 12th at the close of business) after having purportedly exhaustively looked at the records relative to the process, instead of simply providing the specific reasons for the rejection of the applicants' bids, vaguely asserted in their formal response ("reasons") that the "winning bidder" (unnamed) had succeeded essentially because 40 of the 45 bids received were "not acceptable" for various reasons mentioned, none of which were specifically attributed to material shortcomings on the part of any of the applicants. The implication by the reply is that their bids were considered nonresponsive and or unacceptable due to noncompliance with the specifications and conditions of the tender, but the reasons in each case why their bids fell to be so disqualified were strangely left unstated. Logically attention to detail would have removed any doubt that their bids had been disqualified for valid reasons in each instance if these had pointedly been provided and, in the event that the information had revealed at what stage each of them had fallen out of the game, exactly why that had been the case. (It goes without saying that transparency is vital in any tender process.)

[13] As indicated above, even though the first respondent had not been asked by the applicants' attorneys why the winner bidder was not based in Gqeberha, this information was volunteered, probably in response to the objections raised by the Forum. Also volunteered to the applicants' attorneys was the revelation that the winning bidder's tender had not been the lowest priced, a matter of concern to them since price is a significant factor in the procurement of

Government goods and services. Indeed, it came to light in the answering papers that the value of the winning bid was in excess of four million rands higher than the second applicant's bid, and substantially exceeded the three other applicants' bids as well, which made it everyone's business and in the public interest to know how and why the second respondent had pipped its competitors in these peculiar circumstances.)

[14] This absence on the part of the Department in playing open cards provided a reasonable basis for the first applicant to contend that the process was quite conceivably procedurally unfair and fell to be reviewed in terms of section 6 (2)(c) of the Promotion of Justice Act, No. 3 of 2000 ("PAJA"). It pointed out further the real possibility that the first respondent had elevated irrelevant considerations and ignored relevant considerations in getting to its decision to award the tender to the second respondent. Finally, the first applicant asserted that if the first respondent had intended to apply objective criteria in terms of section 2 (1)(f) of the Preferential Procurement Policy Framework Act,⁷ it had been obliged to stipulate that criteria in the tender documents in clear terms which it had not done.

[15] Rather curiously the first respondent imagined that the Department had given good and proper reasons to the applicants' attorneys in its formal reasons despite not saying clearly and unequivocally why each of the applicants' bids had been disqualified if indeed that was the assumption they were expected to draw from the Department's terse reply, namely that each of their bids were nonresponsive or that they had each been disqualified for one or other of the collective generic reasons advanced relating, *inter alia*, to prior experience, good standing with the Department of Labour or deficient pricing schedules having been provided etc. Even assuming there was good reason for them to

⁷ No 5 of 2000.

be dropped from the competition the preferring of the second respondent as the winning bidder required some explanation in all the circumstances which on the face of it was also lacking in the formal reasons except for the feeble assertion that the Department could do what it had done despite the fact that the winning bidder had not come in with the lowest price.

[16] In justifying that the Department was compelled to resist the applicants' demand that it suspend the implementation of the tender, the first respondent ironically expressed the hope that its "detailed responses" (*sic*) would serve to convince them "that the Department's processes were compliant and in line with all prevailing legislation, prescripts and policies regulating public procurement." In a separate letter giving cover to its formal reasons, it further expressed the hope that it had covered all the applicant's "concerns" and would be surprised if litigation were to ensue "despite the reasons proffered by the Department". It rather mischievously suggested that it was "safe in the knowledge that (it had) tried (its) level best to stave off (the dispute)". (This stance that it had said all it wanted to or had to be said was repeated in its answering affidavit. It, for example, denied that the applicants had not received the assurances that they were entitled to, lamenting that its formal reasons were "as comprehensive as one could want." Mr Mullins who appeared on behalf of the first respondent also surprisingly sought to impress upon the court in arguing the department's case that it had made a full and frank disclosure in giving an account for its administrative conduct.)

[17] Not unexpectedly, however, since the applicants were self-evidently not made any wiser why any of their bids had been rejected (it was not even indicated if they were among the 40 or the 5 or the other categories of exclusion for each reason) or why they had not measured up to the winning bidder, they launched the interdict proceedings on the ensuing Monday, the urgency then

envisaged having been occasioned by the late Friday afternoon reply with the expectation in the offing that the first respondent would implement its decision at the next working day.

[18] The object by the urgent relief was to bar the commencement of the new contract (feared to have been unlawfully and unfairly awarded to the winning bidder at their expense) pending the obtaining of the necessary particulars of the successful tenderer (who the Department notably referred to in the formal reasons only as “the winning bidder”) with a likely review application expected to be launched in the near future. The applicants also required a copy of the contract entered into with the winning bidder (which was not provided even to this court in the answering papers).⁸

[19] The basis for the applicants concerns throughout was the apparent secrecy surrounding the issue of the award firstly to a bidder whose identity was unknown to them or the Forum (they mistakenly believed that the information regarding the award had not been published by the Department by the date of the application whereas the official bulletin of 5 August 2022 bears this out)⁹ and, secondly, because they had not been brought up to speed regarding why their bids had been rejected, this despite the purported comprehensive reasons furnished that had significantly not lifted the veil in any manner. Indeed, the Department’s attempt at clearing the air had instead revealed the further detail that the winning bidder’s bid had also not been the lowest, which on its own provided a real basis for concern.

⁸ The first respondent was not even bothered to confirm when the Department had awarded the tender. This date (6 July 2022) was coincidentally revealed by the second respondent.

⁹ The winning bidder is however referred to in the bulletin as “Golden Security” only without reference even to the fact that it is a close corporation.

[20] Leaving aside the applicants' initial mistaken assertion that the validity period for the bid had been irregularly extended, as well as the general complaint that the tender was driven under the auspices of constitutionally invalid regulations¹⁰ the applicants pleaded that their exclusion (if one had to read in that they were amongst the 40 whose bids were found to have been unacceptable or non-responsive) had, by the absence of good and sound reasons which had been requested, left them uncertain that the Department's decisions were informed and grounded on a sound and lawful consideration underpinned by the legal framework and permeated by considerations of fairness. The obvious harm to them thereby, indeed to any tenderer in such a situation bereft of meaningful helpful information that the Department should have offered without hesitation, is that their right to have participated in the tender process subject to the rules created within the legal framework, appeared to have been compromised. As for the reasons fobbed off on them, the Department had said absolutely nothing that could placate them to the contrary that the process had been beyond reproach.

[21] The Department added nothing more by its answering affidavit to the formal supposedly exhaustive reasons it had given in its letter to the applicants' attorneys that had gone before, rendering it appropriate for this court to have determined their adequacy or lack of utility, at least on a provisional basis, right

¹⁰ This argument was made on the back of the declaration of their invalidity by the Constitutional Court in *Minister of Finance v Afribusines NPC 2002 (4) SA 362 (CC)*. Ms. Crouse explained that it was necessary to reserve the applicant's rights in respect of this ground depending on its import once the fully informed reasons for the administrative decision were to hand. She assured the court that the applicants were not by including it as a possible ground for the anticipated review merely throwing the net as wide as possible. Rather the applicants needed to be astute lest there was any impact by the impugned regulations and their import ultimately.

then and there.¹¹ It did however declare for the first time the identity of the “winning bidder” which it claimed was a fact well known to the applicants.¹²

[22] The first respondent opposed the application and in summary did so on the grounds that the applicants had failed to comply with the provisions of the State Liability Act, 20 of 1957 (which failure it contended was fatal to the application);¹³ that the application was not urgent alternatively urgency had been self-created;¹⁴ that the applicants had not been honest with the court regarding their knowledge of the identity of the successful bidder,¹⁵ that it had

¹¹ The applicants had asserted that the presumption in section 5 (3) of PAJA operated in their favour in this respect. It was argued on behalf of the respondents that the presumption could only be relied on in proceedings for judicial review but I can perceive of no reason why the effect of a lack of good and proper reasons would not be relevant in interdict proceedings as a precursor to an actual PAJA challenge arising therefrom. In any event, the reasons had been given finally, after a claimed exhaustive process, so it was not unreasonable to assess their adequacy against that background. Logically they were deficient as they did not say why each of the applicant’s bids had been discounted, or why their removal from the competition would have been especially warranted. The deficiency of the reasons provided by the Department was demonstrated further by the first respondent belatedly claiming in the answering affidavit that the 4th applicant had not filed a bid and thus lacked “locus standi” to have been in the consideration at all. Logic dictates that if the Department had carefully studied each bid to source a reason for an early disqualification, then the answer that the 4th applicant had not filed a bid at all would surely have suggested itself in the formal reasons given already. Instead, the unfortunate impression created is that the Department was paying mere lip service to its obligations to provide reasons for the sake of transparency.

¹² This in my view never raised a genuine dispute of fact. The allegation that the applicants were in the know and were somehow being coy about the identity of the second respondent was simply not justified on the papers. The first respondent said the Department informed the applicants that their bids had been rejected but did not put up proof. They ought to have known from the Bulletin (published on 5 August 2022) that the bid had been awarded to an entity referred to only as Golden Security) but evidently did not. If they were misleading the court that they knew by then they would surely have mentioned the fact of the value of the contract much earlier (also stated in the Bulletin) as this ultimately proved to be of a greater concern in justifying a necessary review application down the line. Rather ironically the basis for arguing this knowledge that they knew exactly who had bested them (supposedly before deposing to the founding papers) rested on hearsay allegations that the director of the first applicant had been party to an official meeting called by the Department on 3 August 2022 at which a discussion was held about the 2nd respondent poaching its employees. At the end of the day the worst that the second respondent could say is that it is inconceivable that the applicants did not know the identity of the successful bidder. However, all indications point to the fact that the applicants were genuinely none the wiser who the winning bidder was. Why ask if they knew the answer to the question. And if they knew, why did the Department merely refer to this entity as the “winning bidder”. Further, the Department failed to say when the applicants were supposedly informed. If they were advised on 6 July 2022, why was the Forum having to contend with “rumours” on 20 July 2022.

¹³ I was unpersuaded by this argument given that the applicants’ attorneys, and the Forum before them, had been quite specific in their engagement with the Department regarding what direction would be taken absent its cooperation.

¹⁴ In this respect too the applicants gave a fair account of all the steps undertaken by them, under the auspices of the Forum, and as a collective. The crunch came when a reply was provided late on the Friday afternoon.

¹⁵ See footnote 12 above.

misled it regarding the validity extension period;¹⁶ that the application was an abuse of this court's processes; that they had not made out a case for the review of the tender award in due course; and that they had not satisfied the requirements for an interim interdict.

[23] The second respondent also opposed the application on the basis of a contrived and abused urgency and supposed non-disclosure by the applicants as to its identity.¹⁷ In respect of the substantive issues it contended that the applicants' had not made out the requirements for the grant of interim relief.

[24] I looked in vain in the first respondents' answering affidavit for any positive assertion that the processes the Department had adopted in getting to their decision to award the tender to the second respondent, or the decision itself, met the requirements envisaged by section 217 of the Constitution. Ironically it put the applicants to the proof of establishing the converse.

[25] Further, what the first respondent never said and was notably absent from the answering papers, is that the second respondent's bid had been compliant in all respects. Indeed, the two respondents appeared to be at opposite ends in one important respect, namely whether it was a requirement or not of the tender that it had to be established in the Gqeberha area. The Department defended its success on the basis that it was a preference not a requirement yet the latter boasted that it had met the requirement! The first respondent also never unequivocally asserted in respect of each of the applicants that their bids were nonresponsive or on what basis exactly, objectively assessed from the actual documentation filed with the Department. Of concern was the fact that both respondents appeared to expect the applicants to prove in a vacuum that their bids were compliant and had a go at them for not doing so. I wondered why the

¹⁶ See footnote 4 above.

¹⁷ See footnote 12 above.

second respondent could have any opinion about this at all since it could not have been privy to what documents had or had not been placed before the Department neither was it its call from a tender adjudication point of view to sit in judgment on the status of each of the applicant's bids.

[26] The second respondent's insistence that the first applicant did not have the requisite experience (a further issue that it could not naturally have been privy to because it was not its obligation to consider and award the tender) appeared to be contrived because a perusal of the tender invitation requires five years of experience in the industry (as opposed to with the Department itself). Ironically the second respondent never asserted that the entity itself was compliant in this respect. (Ms Crouse was well minded in my view to point out the irony that the respondents could not even be bothered to reflect the formal registration number of the second respondent so that the date of the entity's own registration could be established at a glance. Even in the Tender Bulletin, intended by the Treasury to promote openness and transparency, a useful description of the close corporation eludes a reader.)

[27] The respondents' criticism of the first applicant that the Department of Labour's certificate of good standing does not reflect that the entity is covered thereby because of a slight difference in name (despite the registration number of the first applicant matching the details of the company vouched for by the certificate) also reflected the extent to which the second respondent was prepared to move the court away from the real issue in this matter which is that the first respondent had fallen woefully short in explaining or justifying why the first applicant had fallen out of the competitive race. Evidently the certificate had served the first applicant well up to that point (it would be of concern if the Department had contracted with it without it being properly registered for

labour purposes) so the respondents' common attack of it in this manner stood out of place.

[28] Concerning the trite established principles for the grant of an interim interdict, the respondents appeared to miss the premise for the interdict, or at least the *prima facie* right relied upon by the applicants, to assert their entitlement to the relief sought.

[29] In *Down Touch Investments (Pty) Ltd and Another v South African National Road Agency SOC Limited and Another*¹⁸ the court had reason in a similar matter to reflect upon the nature of the tenderers' *prima facie* right sought to be established in interdict proceedings pending a review of a tender process as follows:

“There can be no argument that the applicant, like all construction companies is entitled to participate in the tender process subject to the rules created within the legal framework. *It follows that the exclusion from participation must also be informed and grounded on a sound and lawful foundation undergirded by the legal framework and permeated by considerations of fairness. If this is not done and an exclusion appears to be neither fairly nor lawfully grounded, it follows that the applicant would have a prima facie right and would have an apprehension of imminent irreparable harm.* Public good or interest suffers where a state organ such as the first respondent which is constitutionally obliged to encourage and assist in ensuring that the constitutional value system as applies in this country is observed and promoted. This on its own may entitle a wronged tenderer to challenge the process and if a *prima facie* right is established, to be granted an interdict pending the review depending on the facts of each case.”¹⁹ (Emphasis added)

¹⁸ (2064/2020) [2020] ZAECGHC 120 (29 October 2020).

¹⁹ At par [41].

[30] In this instance each of the applicants (including the fourth applicant)²⁰ were alleged to be co-bidders with legitimate expectations of a fair process and outcome.²¹ Once this process had run its course and the decision taken, they were entitled to reasons. This was never in doubt. They were provided with “purported reasons” following a rigorous claimed self-examination by the first respondent of the tender process involving a resource intense exercise that yielded up a comprehensive set of purported reasons that were self-evidently of no utility at all to the interested parties in the end. It begged further questions which the Department appeared to be resolute it would not offer up, alternatively it conveyed the impression that it did not matter in its view because the implementation of the contract arising from that process would be given effect to on the day of the launch of the interdict application. Logically those reasons are inadequate and provide a reasonable basis to conclude that the award of the bid to the second respondent might be set aside on review.

[31] The harm (which the respondents appeared to concede as a matter of logic) is that the implementation of a constitutionally invalid award arising from the feared flawed process was imminent and if allowed to stand pending the very likely review application would undermine the constitutional value of legality. In challenging the claimed constitutionally invalid conduct the review

²⁰ The fourth applicant's interest on this basis was not challenged until the first respondent delivered an answering affidavit. It was not suggested to its attorneys in the formal reasons that had gone before that there was a doubt that it had been in the race at all. It is so that the fourth applicant did not refute the belated allegation, not that it had *not* tendered but rather that the Department had no record of such a tender. To my mind this still established a *prima facie* right not to have been unlawfully excluded from the tender process even if open to some doubt.

²¹ See *Majojobela v MEC for Rural Development and Agrarian Reform, Eastern Cape* [505/2020] (2020) ZAECHC 22 (3 November 2020) at para 26 in which I held that:

“On the issue of legal standing, the applicant does not have to make out a case that the bid would have been granted to it, or that it was poised for success in respect thereof, if the tender process had run its course but for the untimely cancellation thereof. It establishes such standing instead in my view on the basis of its legitimate expectation to a fair outcome in the tender process which, after the bids were closed, left it and its co-bidders in a race to the conclusion entailing an evaluation of the competing compliant bids in due course and a proper adjudication thereof, even if the recommendation flowing from such process was going to be that the tender should be re-advertised.

application would allow the applicants to “delve deeper into the intricate issues entangled in (the matter).”²² Further, the court reminds us in *Down Touch Investments* that:

“.. it might very well be well-nigh impossible to unscramble the consequence of an unlawful administrative action once it is allowed to reach a certain point.”

[32] It was self-evident that no other satisfactory remedy suggested itself. I might have granted the interdict but suggested that it be subject to the applicants have another go at getting information from the first respondent under the guise of The Promotion of Access to Information Act, No. 2 of 2000, or seeking “better” reasons under the provisions of section 5 of PAJA, but to what avail. The Department had made it plain that the reasons provided were as comprehensive as they could be. The point was that the Department had strung the applicants along right up to the end when they in effect said nothing at all, but in saying nothing had raised a reasonable suspicion (which naturally conduced to the likelihood of success in the proposed review application) that the applicants’ exclusion from the tender process, if not the selection of the second respondent as the successful bidder, might have been substantively flawed and falling short of the constitutional standard.

[33] As for balance of convenience, I was persuaded that these favoured the granting of the interdict pending the review. The respondent did not really take the court into its confidence even to state when the award had been made. It was further notably mum on the status of the new contract supposedly in progression. I was concerned that even after the award, discussions were still being had with the second respondent regarding the Department’s “requirement” (presumably of the contract if not of the tender itself) that 50% of the successful tenderer’s proposed staff establishment be from the Gqeberha

²² *Down Touch Investments Supra* at [47].

area. In any event it further boasted that it could issue short term contract to whoever it wanted and would not be dictated to in this regard.²³

[34] The second respondent said nothing from which any real prejudice could be gleaned. Evidently it was only negotiating employment contracts with the first applicant's staff on 12 August 2022 by when it must have been abundantly plain to the respondents that there was a dispute in place about the award of the tender.

[35] In the result I was satisfied that all the elements for the grant of an interim interdict had been met. Whilst the court has the power to grant a restraining order of the kind envisaged by my order, it is a trite principle that it does so only in the clearest of cases. This was one of those instances where I considered that it was "constitutionally appropriate" to intervene in all the circumstances.²⁴

[36] Concerning the issue of costs, I considered that these would follow the result of the review (the applicants did not ask for costs to be finally adjudicated at that juncture), hence I made no final determination in this respect. I considered too that the applicants had made fair concessions, for example, that they had erred in including as a ground of illegality that the tender validity period had been irregularly extended. Although ultimately abandoned this ground had of necessity to be dealt with by the respondents in their answering affidavits. There were other obvious shortcoming in the applicants' papers (for example in the confirmatory affidavits of the second and third applicants) which might impact what costs orders should issue even if (all) the applicants achieve success in the proposed review application.

²³ Ironically the Provincial Treasury issued circular 10 of 2018 in September 2018 already. This was handed up by Mr. Mullins during argument to demonstrate the imperative on the Department to break the pattern of issuing short-term contracts. It had persisted with this practice right up to August 2022 so it appeared notwithstanding the Treasury's condemnation of the practice and drawing of attention to the risks related thereto.

²⁴ See the court's sentiments expressed in *Down Touch Investments, Supra*, at [43]-[45].

B HARTLE
JUDGE OF THE HIGH COURT

DATE OF HEARING: 19 August 2022
DATE OF ORDER: 22 August 2022
DATE OF REQUEST
FOR REASONS: 24 August 2022
DATE OF REASONS: 24 January 2023

Appearances :

For the Applicants : Ms E Crouse SC & Mr. A Mbenyane instructed by SPJ Attorneys, Gqeberha (ref. SPJ/L0010/SJ).

For the First Respondent : Messrs NJ Mullins SC & N Dwayi instructed by State Attorney, Gqeberha (ref. 0979/2002/L).

For the Second Respondent : Mr. OH Ronaasen SC instructed by Friedman Scheckter, Gqeberha (ref. Mr. Friedman).