REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1)	REPORTABLE: Yes☐/ No ☒
(2)	OF INTEREST TO OTHER JUDGES: Yes☐ / No ☒
(3)	REVISED: Yes ☐ / No ☒
Date:	29 August 2023 WJ du

CASE NO: 075024/2023

In the matter between:

SMEC SOUTH AFRICA (PTY) LTD **APPLICANT**

and

SOUTH AFRICAN NATIONAL ROAD AGENCY SOC LTD **RESPONDENT**

JUDGMENT

DU PLESSIS AJ

[1] This is an application for an interim interdict to maintain the *status quo* with regard to the scoring system for tenders, pending the finalisation of a review application. It relates to several open tender invitations that the Applicant contends should not be proceeded with or adjudicated using a new scoring system, pending the finalisation of a review application to set aside a decision to amend the conditions of the tender invitations concerned, which introduced the new scoring system.

[2] The Applicant is SMEC South Africa (Pty) Ltd, a private company active in the infrastructure building industry. The Respondent is the South African National Road Agency SOC Ltd (SANRAL), a state-owned company created in terms of the South African National Roads Agency Limited and the National Roads Act,[1] responsible for the road infrastructure in South Africa.

[3] The Respondent implemented a new scoring system in awarding new and existing tenders. The Applicant wishes to submit tender bids in some of them. A review application is pending in the Eastern Cape Division of the High Court in Gqeberha, where the Respondent's decision to implement a new scoring system in awarding tenders is challenged. The Applicant intends to intervene in that review and to seek similar relief sought by the Applicant and the Second Respondent in that application or, alternatively, to bring a separate review application in this court. The choice depends on issues of jurisdiction, multiplicity of litigation and the number of parties that will have to be involved in such an application. The Applicant has undertaken to proceed with its intervention application, alternatively its review application, by no later than 28 August 2023 according to its Founding Affidavit. However, during argument, they stated they might need more time as this application took some time to prepare.

[4] The Applicant points out that the Respondent admitted under oath in the Gqeberha case that that court order will not only affect the two tenders that form the subject matter in that application, but it will have an effect on all the Respondent's tenders and contracts by placing them on hold until the dispute in the Gqeberha review application is resolved. Yet, the Applicant state, the Respondent refuses to provide an undertaking that it will not proceed to place the tender processes in which the Applicant has an interest on hold, pending the disputes concerned. Therefore this application.

[1] 7 of 1998.

[1] Ad urgency

[5] The Applicant sets out the facts of urgency as follows: the closing dates for the tender invitation pertaining to this application are fast approaching. By the time of the hearing of this application, the first of the extended closing dates had passed. The Respondent indicated that it intends to adjudicate the tenders unless it is interdicted from doing so.

[6] At the heart of the matter lies the review application to and set aside the Respondent's decision to adopt a new Preferential Procurement Policy, which includes a new scoring system.

[7] Should the Respondent continue to adjudicate and implement the tenders applicable in this application, and relief in that review eventually be granted, then all of the steps taken in adjudicating and implementing such tenders would be void. This has a cost implication for persons who submitted the tenders, and it would require the undoing of many actions if the work has commenced. The Applicants seek to avoid this. They do this by applying for an interim interdict based on the reasonable prospect of success in the review application. The interim order of the Gqeberha court on 12 July 2023 triggered the process that started with a letter of demand on 14 July 2023 and ended in this application.

[8] The Respondent notes that a letter of demand was sent on 14 July 2023 for an undertaking by 19 July 2023. When this did not happen, an urgent application was launched. They point out that the matter was then set down for 22 August 2023, with no explanation for the month-long delay between the launch and the set down of the hearing. In argument they stated that if it were really that urgent, they would have afforded the Respondent no more than 72 hours. In reply, the Applicants say that the reason for the delay is to afford the Respondents the maximum time to give notice of intention to oppose and to file an answering affidavit in what they deem a complex matter.

[9] Moreover, the Respondent indicates that the tenders have been open for a long time, with the Applicant only now approaching the court as the closing dates

approach. The new scoring system was made known on 12 May 2023 when the Respondent's Preferential Procurement Policy of 2022 was uploaded to the website. There is thus a two-month delay in bringing the application. Furthermore, they can submit tenders *and* lodge a review application while the adjudication process is pending.

[10] This does not hold, the Applicants reply. This is because the tender invitations were published with the inclusion of the old scoring system. The present application relates to the amendment of the tender invitations. They contend that the mere publication of the policy on the website does not mean that the Applicant had knowledge thereof, and it has no legal effect. It was only in the Gqeberha urgent application that the Respondent admitted that granting the relief sought would put all pending tenders on hold that the Applicant realised that they needed to act with urgency.

[11] As for substantive remedies in due course, the Respondent states that the Applicant can intervene in the Gqeberha High Court matters. It could have just applied for intervention since it has already granted similar interim relief. The matter is, therefore, not urgent.

[12] The Applicant argues that it is undesirable of a government body to continue to engage in behaviour that appears to be unconstitutional, despite a review application being underway or anticipated. Such scenarios have led to a series of legal precedents demonstrating the harmful impacts of such actions and the suitable solution for addressing them. These cases show that should the Respondent not be interdicted from implementing the new scoring system now, the Applicant will not be able to obtain pragmatic and practical just and equitable relief in the review application. 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.

[13] The question thus is whether the Applicant will be able to obtain substantial redress in due course. For the right it seeks to protect, I think not. In *Millennium*

Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province,[2] the court was faced with a tender process that has run its course but was then set aside after review. In that case, it could not give the Applicant relief, as the tender was awarded and the work started. Equally, in *Chairperson, Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd,*[3] the court was faced with a situation where it had to, due to effluxion of time, allow an invalid administrative act to stand as the successful tenderer has done so much work that any order will no longer be capable of practical implementation. In other words, should the Respondent continue to adjudicate the tenders based on the new system, and the Applicant is eventually successful in the review application, then the Applicant will not have substantial redress.

[14] There is no other way to stop possible unlawful conduct than with interim relief. The question is, however, if they made a case for it. The answer hinges on whether they have a reasonable prospect of success in the review application.

[15] The Respondents raised the issue of *locus standi* with reference to the deponent of the Founding Affidavit (Manager Commerical and Legal of the Applicant) and the bringing of the application (the attorneys). However, based on case law,[4] and in the absence of a rule 7 notice, this argument stands to be dismissed.

[2] Ad merits: interim relief

[16] The Applicants argue that the Gqueberha court granted the relief and that this is at least persuasive authority that there is a reasonable prospect of success in the review application. The Respondent disagrees, stating that this case pertains to open tenders, while in the Gqueberha court, relief was sought for two specific tenders that were already closed. The outcome of that review application will not have an automatic application on the tenders in this case, specifically because the Applicant has not submitted a tender yet.

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[2] 2008 (2) SA 481 (SCA).

[3] 2008 (2) SA 638 (SCA).

[4] See for instance *Ganes v Telecom Namibia Ltd*. [2003] ZASCA 123; [2004] 2 All SA 609 (SCA) para 19.

[17] The importance of "reasonable prospects of success" links with the requirements for an interdict, specifically the "prima facie right". The question before me is thus whether the Applicant has a reasonable chance of success in the review application, and if so, if it proved the requirements for an interim interdict. This was set out again in *National Treasury and Others v Opposition to Urban Tolling Alliance*[5] , namely

> The test requires that an applicant that claims an interim interdict must establish (a) a prima facie right even if it is open to some doubt; (b) a reasonable apprehension of irreparable and imminent harm to the right if an interdict is not granted; (c) the balance of convenience must favour the grant of the interdict and (d) the applicant must have no other remedy.

(i) Prima facie right

[18] The Applicant argues that they have a prima facie right that the procuring process be conducted lawfully. They summarise their argument for the review application to show the possible unlawfulness and unconstitutionality.

[19] It starts with s 217 of the Constitution provides that

> (1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.
>
> (2) Subsection (1) does not prevent the organs of state or institution referred to in that subsection from implementing a procurement policy providing for-
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> (a) categories of preference in the allocation of contracts; and
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> (b) the protection or advancement of persons, or categories of persons, disadvantaged by fair discrimination.
>
> (3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented.

[20] This is done in terms of the Preferential Procurement Policy Framework Act[6] and regulations issued in terms thereof. The applicable regulations in this regard are the Preferential Procurement Regulations, 2022. In terms of these regulations, there is a point-based system in which certain points are awarded for specific

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[5] 2012 (6) SA 223 (CC).

[6] 5 of 2000.

goals. Depending on the size of the tender, it is either 10[7] or 20[8] points that may be granted for specific goals.

[21] This should be read with the Broad-based Black Economic Empowerment Act[9] that created a system to promote the achievement of the constitutional right to equality, to increase broad-based and effective participation of black people in the economy, to promote a higher growth rate, increase employment and more a more equitable outcome distribution, to establish a national policy on broad-based black economic empowerment to promote the economic unity of the nation, the common market, and to promote equal opportunity and access to government services.[10]

[22] The Applicants state that the new scoring system was introduced through an addendum to all tender invitations then pending and all the new tender invitations. Before introducing this system, a company's B-BBEE level could account for 0 – 10 or 0 – 20 of the points, depending on its B-BBEE level. With the new system, a B-BBEE level, regardless of the level, now only accounts for a maximum of 1 or 2 points, depending on the contract size. Added to that is the possibility of another 5 points (if the maximum is 10) based on being wholly black-owned and 4 points (if the maximum is 10) if targeted enterprises are subcontracted. This, the Applicants state, renders the Broad-based Black Economic Empowerment Act[11] a nullity. Compliance with the Preferential Procurement Policy Framework Act[12] is also undermined, as compliance now only amounts to a fraction of the points. All the money companies spent to obtain a high B-BBEE score would now mean nothing. This usurpation of the national B-BBEE policy by a narrow referral to black ownership and sub-contracting, the Applicant states, is destructive of the national policy and, thus, the achievement of the constitutional right to equality and the rest. The Applicant says that the loss of the points in that category cannot be overcome

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[7] Contracts above R50 million in value.

[8] Contracts below R50 million in value.

[9] 53 of 2003.

[10] FA par 25.

[11] 53 of 2003.

[12] 5 of 2000.

with a price reduction. This means that the Applicant will be excluded from being considered for the award of any tenders.

[23] These facts will be used in the review application in terms of s 6(2)(a), (b) and (c) of the Promotion of Administrative Justice Act[13] in that the administrator who took the decision was not authorised to do so by the empowering provision and/or acted under a delegation of power which was not authorised by the empowering provision;[14] a mandatory and material procedure or condition prescribed by an empowering provision was not complied with; and the action was procedurally unfair.

[24] The Applicant will further argue in the review application that the decisiosn is contrary to s 217 of the Constitution, as it is not fair, equitable, transparent, cost-effective and competitive and does not promote the purpose of the procurement policy envisaged in s 217(2) and (3) of the Constitution and the framework created by legislation. This leads to a review in terms of s 6(2)(d), (e), (f), (h) and/or (i) of PAJA.

[25] To determine all this, it is necessary to have regard to all the facts, which is why the review application is important.[15]

[26] On the above, the Applicant has a reasonable prospect of success and should be allowed to take the decision on review and have an effective remedy available. The right to partake in a constitutionally compliant procurement process is a clear right.[16] The right to have a review application heard in which the court would be able to grant just and equitable relief is also a clear right. The Applicant has thus established that it has a *prima facie* right.

(ii) Irreparable harm

[27] It follows that any exclusion from participation in a process must be based on a sound and lawful foundation, absent of which, the Applicant will have a *prima facie*

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[13] 3 of 2000.

[14] *Democratic Alliance v President of the Republic of South Africa* 2013 (1) SA 248 (CC), para [27].

[15] *Airports Company South Africa (SOC) Ltd v Imperial Group Ltd* 2020 (4) SA 17 (SCA).

[16] *Down Touch Investments (Pty) Ltd & Another v South African National Roads Agency SOC Ltd and Another* [2020] JOL 48865 (ECG).

right and an apprehension of imminent irreparable harm.[17] The immediate irreparable harm lies in the possibility that its constitutional rights are infringed by being subjected to an unconstitutional scoring system.

[28] The Respondent denies that the Applicant is precluded. They state that no pre-qualification criterion prevents a bidder from submitting the relevant bid. There are no predetermined outcomes – in fact, if the Applicant applies, it may emerge as the successful bidder. Added to this is that the revised scoring method applies to specific goals only, which carry no more than 10 out of the 100 points. The Applicant will earn some of the points in that category. If it wants to improve its score in the black ownership category, it can make use of subcontractors from target enterprises to better the score. The rest of the 90 out of the 100 points relate to pricing, and this might well mean that the Applicant wins the tender. Moreover, in terms of s 2(1)(f) of the Preferential Procurement Policy Framework Act,[18] organs of state may award the tender to a bidder other than the highest-scoring bidder based on objective criteria, which means there is also a possibility there for the Applicant to get awarded the tender.

[29] As to the argument that the Applicant can subcontract to comply, the Applicants argue that this is not cost-effective and that it is important to have the information that is necessary to enable the would-be bidders to decide whether it will prepare a tender.[19]

[30] The Respondents further contend that the harm complained of is speculative as they cannot predict the outcome of the tender process. In fact, they stand an equal chance to the other bidders in being successful. They should submit a tender pending the outcome of the review application.

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[17] *Down Touch Investments (Pty) Ltd & Another v South African National Roads Agency SOC LTD* [2020] JOL 48865 (ECG).

[18] 5 of 2000.

[19] Relying on *Rainbow Civils CC v Minister of Transport and Public Works, Western Cape,* 2013 JDR 0198 (WCC).

[31] The Applicants disagree and argue that they cannot be expected to submit a tender in a process they deem unconstitutional and then challenge its constitutionality. A similar issue was before Roger J in *SMEC South Africa (Pty) Ltd v City of Cape Town; SMEC South Africa (Pty) Ltd v City of Cape Town*[20] where he stated that

> In principle, it seems undesirable that a bidder should be at liberty to "take a chance" in the hope that it will be awarded the tender, keeping in reserve an attack on the validity of the tender terms should it be unsuccessful in winning the bid. However, in view of the conclusion I have reached on other aspects, I need not finally decide this point.

[32] I agree with Roger J that the Applicants can not be expected to partake in a possibly unlawful and unconstitutional process and that being unable to do so is harmful.

(iii) Balance of convenience

[33] The Respondent states that where a court seeks to restrain an executive function of government, it must do so very carefully and only when a proper and strong case has been made for the relief and if it is constitutionally appropriate to grant such relief. That aligns with *National Treasury and Others v Opposition to Urban Tolling Alliance.*[21] In that regard, it was pointed out that the Respondent has an obligation to manage the national road network, and the tenders were sent out to comply with this obligation. Preventing the adjudication and awarding of tenders might cripple service delivery and halt the operations of the Respondent. Thus, the balance of convenience favours the Respondent.

[34] *National Treasury and Others v Opposition to Urban Tolling Alliance*[22] qualified the test for an interim interdict by stating that if an interim interdict is sought against the state, the prima facie right cannot simply be the right to take the decision on review.[23] The court stated:

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[20] [2022] ZAWCHC 131 (23 June 2022).

[21] 2012 (6) SA 223 (CC).

[22] 2012 (6) SA 223 (CC).

[23] Par 50.

> Under the Setlogelo test, 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. The right to review the impugned decisions did not require any preservation pendente lite.

[35] The court found that the applicants, in that case, did not have a prima facie right, as the harm they rely upon will not be caused by the decisions they seek to review. Thus, There was a misalignment between the decision under review and the source of the harm. In this case, there is an alignment between the decision that will be reviewed and the source of the harm.

[36] The balance of convenience also favours the Applicants. The Respondents will still be entitled to consider and adjudicate the tenders based on the scoring system that was applicable before the new system, also being the system that was applicable when most of the dates opened for the tenders. It can also elect to extend some of the dates, pending the outcome of the review application. It is not precluded from awarding tenders, merely from applying the new scoring system, pending the outcome of the review application.

(iv) No alternative remedy

[37] As for the alternative remedy, the Respondent argues that the Applicant can intervene in the Gqeberha proceedings. The Applicant, however, highlights that the Respondent, in its answering affidavit, states that the Gqeberha review application will have no practical effect on the tenders in which the Applicants are interested, it only applies to those two tenders.

[38] Apart from taking the decision on review, there is no alternative remedy. And while that application is waiting to be heard, there is no other remedy than an interdict to protect the Applicant's rights.

[3] Order

[39] I, therefore, make the following order:

1. The matter is dealt with as one of urgency, and non-compliance with the rules of court is condoned in so far as may be necessary.

2. The late filing of the answering affidavit is condoned.

3. The Respondent is interdicted and restrained from proceeding with and/or implementing and/or giving effect to the outcome of the tender adjudicating process relating to the tender invitations contained in the list that is appended to the Applicant's Founding Affidavit as Appendix UFA1, pending the final determination of –

   3.1. The review application in the Eastern Cape Division, Gqeberha of the High Court of South Africa under case number 1731/2023; alternatively

   3.2. Any review application relating to the tender invitations concerned that the Applicant may institute in the Gauteng Division, Pretoria of the High Court of South Africa.

4. The Applicant is directed to take all steps necessary to either apply to intervene in the abovementioned review in the Eastern Cape Division, Gqeberha of the High Court of South Africa, alternatively to institute a review application in the Gauteng Division, Pretoria of the High Court of South Africa, within 10 (ten) days of this order.

5. In the event of the Applicant failing to timeously take all steps necessary to apply to intervene or to institute the review proceedings as directed in terms of paragraph 3 above, the interim interdict referred to in paragraph 2 above will *ipso facto* lapse and be of no further force and effect.

6. The costs of this application are reserved *sine die*.

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WJ DU PLESSIS

Acting Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. It will be sent to the parties/their legal representatives by email.

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Counsel the for Respondent:	Mr G Shakoane SC
	Mr C Shongwe
Instructed by:	Phaleng-Podile Attorneys
Date of the hearing:	24 August 2023

Date of judgment: 29 August 2023