



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

NOT REPORTABLE

Case no: 4495/2023

In the matter between:

ZEN JV

Applicant

and

**DEPARTMENT OF TRANSPORT: PROVINCE
OF THE EASTERN CAPE**

First Respondent

**THE MEC OF THE EASTERN CAPE PROVINCE
DEPARTMENT OF TRANSPORT AND COMMUNITY
SAFETY**

Second Respondent

DOWN TOUCH INVESTMENTS (PTY) LTD

Third Respondent

JUDGMENT

Govindjee J

[1] This is an urgent application to interdict the first respondent ('the Department') from implementing its decisions relating to a tender for the appointment of a civil engineering contractor for the upgrading of a road. The Department awarded the tender to the third respondent ('Down Touch').

[2] Two main issues require determination. The first is whether the matter was properly launched in accordance with the provision of the Uniform Rules in respect of urgency. Secondly, whether the applicant ('Zen JV') has established the requirements for interim relief.

Urgency

[3] Uniform Rule 6(12) provides that a court may dispense with the forms and service provided for in the rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of the rules) as it deems fit.

[4] It is for the applicant to establish, in explicit fashion, the circumstances which is averred render the matter urgent and the reasons why the applicant claims that it could not be afforded substantial redress at a hearing in due course. The degree of relaxation should not be greater than the exigency of the case demands. The major considerations in deciding whether or not to exercise the court's power to abridge the times prescribed and to accelerate the hearing of a matter are the following:¹

- The prejudice that the applicants might suffer by having to wait for a hearing in the ordinary course;
- The prejudice that other litigants might suffer if the applicant is given preference; and
- The prejudice that respondents might suffer by the abridgment of the prescribed times and an early hearing.

[5] Zen JV's explanation as to the degree of urgency is premised on it discovering on 7 December 2023, by way of an internet site, that the Department

¹ *I L & B Marcow Caterers (Pty) Ltd v Greatermans SA Ltd & another; Aroma Inn (Pty) Ltd v Hypermarket (Pty) Ltd & another* 1981 (4) SA 108 (C) at 112H-113A.

had awarded the tender to Down Touch. Papers were drafted over the weekend of 8 and 9 December 2023 and issued soon thereafter. The basis for this haste was the concern that the award of the tender would be followed by the conclusion of a formal contract as well as the incurring of costs in preparation for the commencement of the works, as well as the execution of the works. Zen JV was of the view that the matter should be heard as soon as was reasonably possible to avoid possible prejudice and irreparable harm.

[6] Zen JV was alive to the so-called 'builders' holiday'. Absent any departmental undertaking to cease further implementation of the award, it proceeded on selected time-periods, having obtained a directive from the duty judge to have the matter heard on 22 December 2023. It may be emphasised that the directive in question rightly reserved the question of urgency for this court's determination. Papers were served on the respondents on 12 December 2023. The state attorney seemingly only became aware of the application that afternoon. In essence, the respondents were afforded a period of approximately a week to deliver answering affidavits, and the department was able to do so on 21 December 2023, a day prior to the hearing of the matter.

[7] The correspondence from Zen JV's legal representatives on the morning of 11 December 2023 is also noteworthy. In addition to requesting reasons for the Department's decision, an undertaking was sought that the Department would not proceed further with the implementation of the award of the tender pending the review application to be launched. The correspondence included a covering letter emphasising that urgent attention was required, made reference to the intended urgent interdict application and, in the final sentence, exhorted the Department to afford the matter urgent attention. Suffice to say that no undertaking to stall the implementation of the awarded tender was provided when the Office of the State Attorney engaged in correspondence on 13 December 2023. On 18 December 2023, that office indicated that its instructions were to oppose the urgent application, appending correspondence from the Department which still failed to explain the precise reason for Zen JV's failure to be awarded the bid. The matter followed a predictable course given that approach.

[8] A judicial discretion must be exercised in determining which deviations a court will tolerate in a specific case. Each case depends on its special facts and circumstances, as recognised by Kroon J in *Caledon Street Restaurants*.² The rules are designed to ensure a fair hearing and should be interpreted in such a way as to advance the scope of the entrenched constitutional right to a fair hearing.

[9] Zen JV seeks to exercise the constitutional right to lawful, reasonable and procedurally fair administrative action and to hold the Department, as an organ of state, to the procurement of goods and services in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. This is clearly not a case where urgency was self-created as a result of any delay in launching proceedings on the part of the applicant. If anything, and bearing in mind the vagaries associated with launching proceedings during the end-of-year recess, Zen JV erred on the side of rapidity. Nonetheless, considering that what may have been expected of the Department in opposing the proceedings would simply be disclosure of its reason(s) for favouring Down Touch, it afforded the respondents adequate opportunity to present an opposing case. Other than the usual inconveniences associated with urgent applications, it cannot be said that there was other prejudice to the respondents or the administration of justice. It might be added that Zen JV's case is a strong one, as will be illustrated. While it may have been brief in explaining the circumstances which rendered the matter so urgent as to proceed by way of the truncated time-frames described, the risks of loss of substantial redress in the event that it is successful but forced to wait in the queue to argue part B of the motion, is apparent.

[10] Considering the papers in their entirety, I am satisfied that the relief sought in Part A is urgent, and that the truncated time-frames imposed was commensurate, appropriate and reasonable in the circumstances. While there are certainly times where, by way of non-suiting an applicant, a court may wish to emphasise strict adherence to the rules, and maximum consideration of the interests of the other party and its legal representatives, this is not such an instance.

² *Caledon Street Restaurants CC v D'Aviera* 1998 JOL 1832 (SE).

The requirements for an interim interdict

[11] Zen JV seeks interim relief, pending review proceedings, and must therefore establish:³

- (a) that the right which is the subject-matter of the main application 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.

[12] 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.

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

'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

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.

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...'

[14] 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

[15] 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.⁷

[16] 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.⁸ The balance of convenience enquiry must be applied cognisant of the normative scheme and democratic principles that underpin the Constitution.⁹ 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.¹⁰ 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.

[17] 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

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

⁷ *Setlogelo* above n 4 at 227.

⁸ *Webster* above n 5 at 1192.

⁹ *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC) ('*National Treasury*') paras 46-47.

¹⁰ *EFF v Gordhan and Others* 2020 (6) SA 325 (CC) ('*EFF*') para 40.

careful consideration of the possible harm to the separation of powers principle'.¹¹ 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.¹² 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'.¹³

[18] In *Eskom*, Madlanga J also considered *National Treasury* and *EFF* as part of the enquiry as to the 'balance of convenience'.¹⁴ Considering the submissions advanced by counsel for both sides in respect of the applicability of the test described in *National Treasury*, it may be useful to highlight the distinction drawn in *EFF* as to its applicability:

'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.

¹¹ See *National Treasury* above n 9 and *EFF* above n 10 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 10 para 110.

¹² 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 9 para 44.

¹³ *EFF* above n 10 para 48 and *National Treasury* above n 9 para 47.

¹⁴ *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd and Others* [2022] ZACC 44 ('*Eskom*') 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* para 303.

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.'

A prima facie or clear right

[19] Zen JV is only required to prove a *prima facie* right that *may be open to some doubt* at this stage of proceedings.¹⁵ As Moseneke DCJ held in *National Treasury*:¹⁶ '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'.

[20] 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'.¹⁷

[21] Zen JV avers that its tender was, in all respects, competent. It may be accepted that its tendered price was the lowest – more than R30 million less expensive than Down Touch. The Department argues that Zen JV has conflated the requirements for the award of the tender, and that its bid was rightly eliminated at the 'eligibility stage' or first phase of the process, and prior to any consideration of price, which was accordingly irrelevant.

[22] In particular, the Department maintains that Zen JV's tender did not comply with the following requirement that Zen JV concedes was material:

'A suitably qualified and experienced full time Construction Health and Safety Officer(s) to manage the contractor's health and safety obligations on site who:

¹⁵ *Eskom* above n 14 para 245.

¹⁶ *National Treasury* above n 9 para 50.

¹⁷ *Webster v Mitchell* above n 5 at 1189 and *Gool* above n 6 at 688A, cited with approval in *Eskom* above n 14 para 293.

- (i) Is registered with SACPCMP as a Professional Construction Health and Safety Agent (Pr CHSA) or Professional Construction Health and Safety Manager (Pr CHSM) or Professional Construction Health and Safety Officer (Pr CHSO);

AND

- (ii) Has a minimum of five (5) years' experience as a Construction Health and Safety Officer on surfaced road construction projects.

A completed returnable schedule E: Tenderer's Key Personnel to be provided. Attach to each schedule proof of indicated professional registration with the specified professional body ... Failure to comply with the requirements of this clause and applicable returnable schedule will render the tender offer non-responsive.'

[23] The Department's only stated basis for declaring Zen JV's bid unresponsive was that its Construction Health and Safety Officer, Ms Ndamase, only had four years' experience as such an officer, as opposed to the prescribed five years. It may be accepted that if this were the case, the bid was properly excluded from further evaluation and / or adjudication.

[24] But the submission is simply not borne out by an ordinary consideration of various attachments to Zen JV's papers. It is necessary to duplicate the relevant information submitted by Zen JV, below:

'Table B: Tenderer's Key Personnel (Construction Health and Safety Officer) For Returnable Schedule E

Name: Zandile Ndamase	Key Position: Construction Health and Safety Officer	SACMC MP Reg No ...	SACPCMP Category ...	Currently Employed by tenderer: Yes	No of Years Experience: 20
Client and Project Name	Description of Project	Project End Date and Duration on Project	Value of Project	Position Held	Contact Person and Firm
SANRAL	Upgrade of R63...	Current	R714 m	Safety Environmental Officer	...
SANRAL	Upgrade of N2 ...	Sept 2016 – April 2019	R645 m	"	'...'

'CV Summary

Position: Construction Health and Safety Officer

Name: Zandile Ndamase ...

Experience

Company name	Dates Employed	Position of Employment	Major Contracts	Approx. Value	Brief Description of Contract
Rumdel...	October 2016	Safety Environmental Officer	N2 Tetyana Site	488 Million	Upgrading of National Route N2 ...
Rumdel ...	2019-2022	Safety Environmental Officer	R61	214 Million	Upgrading of the Road from R61 ...
Rumdel	2022 – present	Safety Environmental Officer	R63	714 Million	Upgrading of R63...'

[25] There is no need to make a definitive finding as to the dispute of fact for present purposes. It bears emphasis that the papers must be read in the customary manner required for consideration of interdictory relief, in accordance with *Webster v Mitchell*, as modified by *Gool*. That being the case, while there may be some doubt about Ms Ndamase's years of relevant experience, *prima facie* Zen JV has demonstrated a right to the award of the tender. This is its case on the papers and that submission is not seriously cast in doubt by the Department's version on its papers, also considering the inherent probabilities. Consideration of 'schedule E' together with the 'CV summary' *prima facie* supports Zen JV's submission that Ms Ndamase complied with the stipulated five-year requirement. This is so even if a strict interpretation is afforded to the discrepancy between 'September 2016' and 'October 2016', so that the later date is utilised. That discrepancy certainly cannot, on its own, serve to disqualify the entire bid.

A well-grounded apprehension of irreparable harm and absence of an alternative remedy

[26] Zen JV has also established that, if a review is successful in due course, there may not be an appropriate remedy available as the work that is the subject of the

tender may have been performed. The consequence would be that the relief would not have practical effect. Put differently, and as argued by Mr *De La Harpe*, lapse of a significant period of time during which the tender is implemented in favour of Down Touch may result in Zen JV obtaining a hollow judgment should it succeed with its review. It may also be accepted that there is clearly no other remedy available to Zen JV pending the review of the Department's decision.

Balance of convenience

[27] As indicated, a court may not fail to consider the probable impact of granting interdictory relief on the constitutional and statutory powers and duties of the state functionary or organ of state against which the interim order is sought.

[28] That said, it must be acknowledged that interim interdicts against organ of state in tender disputes are commonplace, resulting in the suspension of tender awards pending judicial reviews.¹⁸

[29] In the present circumstances, there is limited intrusion into the exclusive terrain of another branch of government, and correspondingly little cause for concern as to 'separation of powers harm'.¹⁹ The court is not required to intrude into a 'policy laden and polycentric decision of the executive, as was the case in *National Treasury*.²⁰ 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'.²¹ Furthermore, the exercise of the Department's powers in respect of tender awards in general is not rendered ineffective should this particular tender be interdicted on an interim basis. The Department has already performed an important component of its duties and functions in respect of this tender and granting the interim interdict would not have the effect of subverting its powers. The balance of convenience favours Zen JV in circumstances where the tender was awarded only recently and the formalisation of

¹⁸ Cf *EFF* above n 10 para 22.

¹⁹ See *National Treasury* above n 9 para 47. *Down Touch Investments (Pty) Ltd v The South National Road Agency Soc Limited* 2020 JDR 2278 (ECG) para 44.

²⁰ *National Treasury* above n 9 para 67-8.

²¹ *Eskom* above n 14 para 302.

the contract is only to occur on or about 15 January 2024. The tender is for a period of 36 months. The prejudice to Zen JV in the event that the implementation of the tender is not interdicted at this stage, considering the circumstances, outweighs any prejudice to the Department.

Conclusion

[30] Considering the affidavits as a whole, the requirements for an interim interdict have been met.²² It is appropriate in those circumstances for the court to exercise its discretion and grant the interim relief sought. 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 goes without saying that the grant of an interim interdict does not, and should not, affect the review court's decision when making its final decision and should not have an effect on the determination of the rights in the main application.²³

[31] It follows that Zen JV is entitled to the costs of this application. I have considered the large amounts involved in the tender, and the extent of the papers in deciding whether to allow the costs of two counsel. The legal issues involved in the matter, although not without a level of complexity, are typical of interim interdict applications involving a challenge to the award of a tender by an organ of state. At the end of the day, the issues in dispute were narrow and the arguments advanced suitably brief. In my assessment, it cannot be said that the retention of two counsel was a 'wise and reasonable precaution' so as to justify the costs of two counsel.

Order

[32] The following order is issued:

1. The court dispenses with the forms and service provided for in the Uniform Rules given the urgency of the matter.

²² *Eriksen Ltd v Protea Motors and Another* 1973 (3) SA 685 (A) at 691C-G.

²³ *EFF* above n 10 para 47.

2. Pending the finalisation of the review of the First Respondent's decisions relating to the tender for the appointment civil engineering contractor for the upgrading of road DR08034 from N2 to R61 via Clarkebury (20km) Phase 1, under tender number SCMU10-23/24-0001 ('the Tender').
 - 2.1. The First Respondent is interdicted and restrained from, in any way, further implementing its decision to award the Tender to the Third Respondent.
 - 2.2. The First Respondent is interdicted from entering into any agreements relating to, or associated with, the award of the Tender to the Third Respondent.
 - 2.3. Should the First Respondent have entered into any agreements relating to, or associated with, the award of the Tender to the Third Respondent, the First Respondent is interdicted and restrained from implementing the terms of such agreements.
3. The orders contained in paragraph 2 above shall serve as an interim interdict, pending the finalisation of the review in Part B.
4. The First Respondent is to pay the costs of the application.

A GOVINDJEE
JUDGE OF THE HIGH COURT

Heard: 22 December 2023

Delivered: 28 December 2023

Appearances:

For the Applicant:

Adv D H De La Harpe SC & Adv K L Watt
Counsels for the Applicant
St George's Chambers, Makhanda

Instructed by:

Drake Flemmer & Orsmond Inc.
Attorneys for the Applicant
Quenera Office Park
12 Quenera Drive
Beacon Bay
East London

C/o:

De Jager & Lordan
2 Allen Street
Makhanda
Email: Marius@djlw.co.za

For the Respondent:

Adv L N Ntsepe
Counsel for the 1st & 2nd Respondents
Club Chambers, Gqeberha

Instructed by:

State Attorney
Attorney for the 1st & 2nd Respondents
29 Western Road
Central
Gqeberha
Email: MSisilana@justice.gov.za