IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)

Case No: 936/2019

Date heard: 25 April 2019

Date delivered: 21 May 2019

NOT REPORTABLE

In the matter between:

AERO-DUCT MOYA CC	**Applicant**
And	
MINISTER OF PUBLIC WORKS	**First Respondent**
AIR-TEK MANUFACTURING (PTY) LTD	**Second Respondent**

JUDGMENT

Goosen J:

[1] This is an application seeking interim relief pending the finalisation of a review application to set aside the award of a tender. The applicant is the unsuccessful tenderer. The first respondent abides the decision of the court, whereas the second respondent opposes the relief.

[2] The application was commenced on truncated time periods. The second respondent was able to file an answering affidavit and, by the time the matter came before this court, the question of the urgency with which the application was commenced was no longer an issue.

[3] On 3 August 2018 the first respondent advertised a tender for the installation of air-conditioning equipment at the provincial headquarters of the South African Police Services at Zwelitsha. The return date for submission of tenders was 31 August 2018. The call for tenders stipulated certain obligatory requirements. These included, *inter alia*, that tenders comply with pre-qualification criteria for preferential procurement; be rated with a CIDB contractor rating designation of 7ME or higher; be registered on the National Treasury Central Supplier Database, and submit a valid original or certified copy of the B-BBEE status level verification. The tender document stipulated that only bidders who obtained a B-BBEE status level of contributor 2 level would be considered. The tender would be evaluated on the 80/20 model of evaluation in accordance with the ***Preferential Procurement Policy Framework Act***[1] (hereinafter ***Procurement Act***).

[4] It is common cause that the applicant and second respondent duly submitted tenders (along with 17 other bidders).

[5] On 31 August 2018 the Bid Evaluation Committee (hereinafter the BEC) of the first respondent assessed the responsiveness of the bids i.e. whether the bids submitted complied with the formal requirements stipulated in the tender notice. It determined that the applicant's bid and that of another company (Geshom Construction) was responsive. It found that the second respondent's tender bid was

[1] Act No, 5 of 2000

"non-responsive". This is common cause. I shall return to this and other matters pertaining to the bid evaluation and adjudication process hereunder.

[6] On 3 September 2018 the BEC conducted the functionality phase of the evaluation process. The BEC declined to evaluate the second respondent's bid on the basis that it was non-responsive. It evaluated the applicant's functionality at 88%. Geshom Construction was evaluated at 58%. It then decided to submit the two bids (i.e. the applicant's and Geshom's) for risk assessment to the project manager.

[7] On 17 September 2018 the BEC convened and resolved to re-score Geshom for functionality. This it did on 20 September 2018 finding that it only scored 46%, below the 50% threshold requirement. The risk assessment of the applicant was conducted by Nako Triocon (hereinafter Nako). It submitted a report verifying the information supplied by the applicant and that the applicant represented a low risk to the first respondent.

[8] The BEC thereafter evaluated the bid submitted by the applicant and recommended the appointment of the applicant as the preferred bidder. Its report to this effect, and dealing with the other bidders, was submitted to the Bid Adjudication Committee (hereinafter BAC) on 28 September 2018.

[9] On 2 November 2018 the BEC reconvened. At this meeting it was requested to reconsider its decision to evaluate the second applicant as non-responsive. I shall deal hereunder with the circumstances. For present purposes it is necessary only to record that on 13 November 2018 the BAC met. It decided not to accept the recommendation of the BEC in respect of the applicant. The BAC indicated that the affidavit submitted by the second respondent relating to its B-BBEE status was acceptable.

[10] On 26 November 2018 the BEC met and what had transpired at the BAC meeting was reported to it. The BEC accepted the second respondent's bid and proceeded to assess its bid (and that of 2 other bidders) for functionality. The second respondent received a score of 58%.

[11] On 27 November 2018, at a reconvened BEC meeting, the committee resolved to recommend the award of the tender to the second respondent. On 4 December 2018 the BAC approved the recommendation and the tender award was made to the second respondent. I will touch upon the events subsequent hereto hereunder where relevant.

[12] As indicated at the outset the applicant herein seeks interim relief pending a review. The interim relief takes the form of an order restraining the first respondent from:

> "2.1.1 concluding an agreement with the Second Respondent pursuant to the award of the tender (tender number PE17/2018: reference number 14/1/8/1/6465/5115), in respect of the installation of air-conditioners at the provincial headquarters of the South African Police Services at Zwelitsha (SAPS)(Reference: WCS 054498) ("the tender"); or
>
> 2.1.2 implementing any agreement concluded between the Respondents pursuant to the award of the tender, or instructing the Second Respondent to carry out any work pursuant to the award of the tender."

[13] It also seeks an order interdicting and restraining the second respondent "*from carrying out any work pursuant to the award of the tender*". It is common cause that, at the stage when the application was commenced, the first respondent had already concluded the agreement with the second respondent and was continuing to carry out work pursuant to the agreement. I shall return to this aspect hereunder.

[14] The review relief sought by the applicant (as set out in what is referred to as "*the second order prayed*") is that the award of the tender be set aside and that the tender be awarded to the applicant. In the alternative to this the applicant prays that the tender be remitted for re-evaluation subject to a declaration that the second respondent's bid is non-responsive.

[15] The grounds upon which it founds its review relief (at this stage of the proceedings) are two-fold. It is alleged that:

a) The BEC and BAC committed an irregularity in allowing the second respondent's tender to participate when it had been determined to be non-responsive and was in fact non-responsive;
b) The BEC and BAC committed an error of law in that they failed to comply with a peremptory duty to investigate "*suspicions and allegations of fronting*" when it was required that they do so.

[16] These grounds are elaborated upon in the papers with reference to sections 6(2)(a), (c), (d), (e), (f), (h) and (i) of the ***Promotions of Administrative Justice Act***[2] (hereinafter **PAJA**). It is alleged for instance that the BEC unlawfully allowed the dictates of a person who was not a member of the committee to influence or determine the evaluation of the second respondent's bid and that the BAC failed to apply its mind to the initial recommendation of the BEC.

[17] It is, of course, trite that a party seeking interim relief *pendente lite* must satisfy four requirements. This includes establishing a *prima facie* right (even if that right is open to some doubt); a reasonable apprehension of irreparable harm if the relief is not granted; a balance of convenience which favours the granting of the relief; and that there is no other suitable or alternative remedy available to the applicant.

[18] Where relief is sought to interdict or restrain conduct pending determination of the lawfulness of such conduct the applicant will be required, in establishing its *prima facie* right, to show that it enjoys a prospect of success in the further proceedings.

[19] It was argued by Mr *Saks*, for the applicant, that the applicant's *prima facie* right is established upon three legs. The first concerns the conduct of the BEC and BAC, which is in essence common cause, in proceeding with the second respondent's bid when it was determined to be non-responsive. The second leg, submitted to be a more serious irregularity, is the failure to investigate suspicions or

[2] Act No 2 of 2000

allegation of fronting. The third component, raised in argument, is the extension of the tender validity period and subsequent conclusion of the contract with the second respondent. These three elements, it was submitted, establish real prospects of success in pursuing the applicant's rights to fair and just administrative action and therefore the *prima facie* right. I shall deal with each in turn.

[20] In regard to the non-responsiveness of the second respondent's bid it is necessary to deal in some detail with the sequence of events. As noted above the BEC determined on 31 August 2018 that the second respondent's bid was non-responsive. It came to this determination on the basis that the affidavit submitted in proof of its B-BBEE status was "*invalid*".

[21] The minute of the meeting records the following:

> "The bidder was found to be non-responsive as the bidder did not comply with all the requirements. Attached an Invalid Affidavit, Annexure C not fully completed."

[22] It is common cause, based upon the documentation furnished by the first respondent to the applicant upon request, that the BAC considered this issue and took a different view. It considered the affidavit signed by a director other than the director authorized to sign documents in respect of the tender, to be acceptable. It is on this basis that the issue was taken up with the BEC.

[23] The BEC minute of 26 November 2018 records the following:

> "General
>
> - Mr Mnyaka provided the BEC with feedback and was held between the BEC and RBAC.
> - Mr Fono noted that the BEE affidavit of Air-Tek Manufacturing and that of Aero Duct Moya are both invalid but the committee must accept that of Air-Tek because RBAC instructed that it's acceptable and that the RBAC Chairperson said that the RBAC will take responsibility for any related queries.

- Mr Chipangura advised that the BEC go back and verify the reasons as to why other bidders were made non-responsive. He further advised that Pfunzo be made responsive because they have their own Resolution of Board of Directors and the Annexure C be relaxed as it was previously done before.
- Mr Mnyaka advised the member that Pfunzo is non-responsive but can be scored and he will further consult and report back to the BEC.
- The following bidders were then scored for functionality:

Pfunzo	50%
Air-Tek Manufacturing	58%
Flat-Foot Engineering	66%

- Mr Ndwandwa alluded to the fact that, for Air-Tek Manufacturing PA15.1 Resolution of Board of Directors was not signed by the majority shareholder to give authority to the signatory in the document. Mr Fono and Mr Chipangura further indicated that this could be the case of possible fronting. Mr Mnyaka dismissed the concern and said that the members who share these sentiments have no proof thus Air-Tek is to remain responsive. "

[24] Mr *Saks* argued that the report to the BEC by Mr *Mnyaka*, the secretary of the BEC, regarding the news of the BAC constitutes interference in or dictation to the BEC and is, therefore, an irregularity. He further submitted the acceptance of the second respondent's bid as responsive also an irregularity.

[25] Mr *Nepgen* argued that the acceptance of the second respondent's bid as responsive, and therefore as qualifying for further consideration does not constitute a reviewable irregularity. This is so because the decision to award the tender to the second respondent is not a divisible administrative decision. He further argued that the initial stance of the BEC that the affidavit supporting the second respondent's B-BBEE status is invalid has no factual foundation.

[26] In its answering affidavit the second respondent avers that the bid documents do not require that the affidavit in proof of its B-BBEE status be deposed to by the person duly authorised to sign the bid documents on behalf of the company. The

second respondent further avers that the deponent authorized to sign the affidavit (*Boshoff*) is the person authorized to depose to such B-BBEE verification affidavits and, further, that said affidavits are, in terms of the Code of Practice provided for in the Regulations, valid for a year. These specific answers to the charge that the affidavit was "*invalid*" are not met in reply save with a general denial. Instead, the applicant suggests that the fact that *Boshoff* deposed to the B-BBEE affidavit rather than *de Vos* (who was authorized to sign the bid documents) presents further evidence in respect of the alleged fronting. An issue which will be addressed more fully hereunder.

[27] In respect of the applicant's reliance upon the BEC's initial determination of the second respondent's bid as non-responsive, the documents put up by the applicant do not establish that the affidavit was indeed "*invalid*". *Prima facie* the basis of the initial determination appears to be incorrect. Accordingly the BAC decision not to accept the BEC's initial recommendation and to require the BEC to deal with the second respondent's bid as responsive appears to be unassailable. This is of course a matter to be determined in the review in due course. At this stage of the proceedings the applicant need only establish that there is a prospect of success on review in order to found its *prima facie* right.

[28] I am not persuaded that such prospect exists in so far as the alleged irregularity in the process is concerned. The principal basis upon which the applicant founded its case for interim relief, however, was not the alleged irregularity regarding the treatment of the second respondent's bid as responsive. It was that the first respondent had failed in its duty to investigate a reasonable suspicion of fronting. This failure to act, it is submitted, vitiates the reasonableness of the award.

[29] The applicant founded its argument upon the content of the BEC minute of 26 November 2018 (quoted above) where the fact that the majority shareholder did not sign the Resolution of the Board of the second respondent is noted and it is stated that this could be a case of fronting.

[30] The concept of a "*fronting practice*" is defined in the ***Broad-Based Black Economic Empowerment Act***[3] to mean:

> "'**fronting practice**' means a transaction, arrangement or other act or conduct that directly or indirectly undermines or frustrates the achievement of the objectives of this Act or the implementation of any of the provisions of this Act, including but not limited to practices in connection with a B-BBEE initiative-
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> (a) in terms of which black persons who are appointed to an enterprise are discouraged or inhibited from substantially participating in the core activities of that enterprise;
>
> (b) in terms of which the economic benefits received as a result of the broad-based black economic empowerment status of an enterprise do not flow to black people in the ratio specified in the relevant legal documentation;
>
> (c) involving the conclusion of a legal relationship with a black person for the purpose of that enterprise achieving a certain level of broad-based black economic empowerment compliance without granting that black person the economic benefits that would reasonably be expected to be associated with the status or position held by that black person; or
>
> (d) involving the conclusion of an agreement with another enterprise in order to achieve or enhance broad-based black economic empowerment status in circumstances in which-
>
> (i) there are significant limitations, whether implicit or explicit, on the identity of suppliers, service providers, clients or customers;
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> (ii) the maintenance of business operations is reasonably considered to be improbable, having regard to the resources available;
>
> (iii) the terms and conditions were not negotiated at arm's length and on a fair and reasonable basis;"

[31] The definition was inserted in the Act by s 1(e) of the ***Amendment Act***[4] and came into operation on 24 October 2014. "*Fronting practice*" is a very serious

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[3] Act No, 53 of 2003

[4] Act No, 46 of 2013

irregularity which undermines the objects sought to be achieved by the preferential procurement policy sanctioned by the Constitution.

[32] As was noted in ***Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency, and Others***[5]:

> "[47] Economic redress for previously disadvantaged people also lies at the heart of our constitutional and legislative procurement framework. Section 217(2) provides for categories of preference in the allocation of contracts and the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination. Section 217(3) provides for the means to effect this, in the form of national legislation that must prescribe a framework within which the policy must be implemented."

[33] At par [51] the court said:

> "[51] Various Codes of Good Practice have also been issued under the Empowerment Act. These include measures and scores of management control and of skills development. The Empowerment Act and the regulations make it clear that broad and sustainable involvement by black people is required, and that the development and transfer of the necessary skills are an integral part of such transformation."

[34] After citing a passage from that court's judgment in ***Viking Pony Africa Pumps (Pty) Ltd t/a Tricon Africa v Hidro-Tech Systems (Pty) Ltd and Another***[6], the court said:

> "[54] The court further held that an investigation into '(w)hat happens behind the scenes matters the most when the shareholding is said to be a façade'. Does this mean that an investigation into the propriety of empowerment credentials becomes necessary only after a complaint has been lodged, and that there was no obligation on SASSA to ensure

[5] 2014 (1) SA 604 (CC) at par [47]
[6] 2011 (1) SA 327 (CC)

> that the empowerment credentials of the prospective tenderers were investigated and confirmed before the award was finally made? I think not, for the reasons that follow.
>
> [55] Substantive empowerment, not mere formal compliance, is what matters. It makes a mockery of true empowerment if two opposite ends of the spectrum are allowed to be passed off as compliance with the substantive demands of empowerment. The one is a misrepresentation that historically disadvantaged people are in control and exercising managerial power, even when that is not the case. That amounts to exploitation. The other is to misrepresent that people who hold political power necessarily also possess managerial and business skills. Neither situation advances the kind of economic empowerment that the Procurement and Empowerment Acts envisage. Both employ charades."

[35] In ***Viking Pony*** the Constitution Court was called upon to consider when the duty to investigate circumstances in which preference may have been obtained by fraudulent means. The facts of that matter are briefly the following[7]. Viking Pony and Hidro-Tech are companies that supply and install mechanical and electrical equipment for water and sewerage treatment works. Both competed for tender for such work at local and provincial government level. Hidro-Tech considered that Viking Pony had secured a disproportionate degree of success notwithstanding that Hidro-Tech had on occasions submitted lower tender prices. It caused this to be investigated and believing that the percentage of shares held by previously disadvantaged individuals did not reflect their participation in management, it lodged a complaint. The litigation followed its dissatisfaction with the investigation.

[36] Central to the decision in the case was the interpretation of Regulation 15(1) of the *Preferential Procurement Regulations*, 2001[8]. Regulation 15(1) of the 2001 Regulations read:

> "15.(1)An organ of state must, upon detecting that a preference in terms of the Act and these regulations has been obtained on a fraudulent basis, or any specified goals are not attained in the

[7] See Viking Pony (*supra*) at par [5] – [13]

[8] Government Gazette 22549, 2001 GN R725, 10 August 2001

performance of the contract, act against the person awarded the contract."

[37] The 2001 Regulations were repealed by the 2011 Regulations[9]. The 2011 Regulations were in turn repealed by the 2017 Regulations[10]. These took effect on 1 April 2017. Regulation 14 of the 2017 Regulations provides as follows:

"Remedies

14.(1) Upon detecting that a tenderer submitted false information regarding its BBBEE status level of contributor, local production and content, or any other matter
required in terms of these Regulations which will affect or has affected the evaluation of a tender, or where a tenderer has failed to declare any subcontracting arrangements, the organ of state must-

(a) inform the tenderer accordingly;

(b) give the tenderer an opportunity to make representations within 14 days as to why-

(i) the tender submitted should not be disqualified or, if the tender has already been awarded to the tenderer, the contract should not be terminated in whole or in part;

(ii) if the successful tenderer subcontracted a portion of the tender to another person without disclosing it, the tenderer should not be penalised up to 10 percent of the value of the contract; and

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[9] Preferential Procurement Policy Framework Act, 2000: Preferential Procurement Regulations, 2011, Government Notice No. R.502, 8 June 2011. The 2011 regulations provided as follows in Reg 13:
"Remedies
13. (1) An organ of state must, upon detecting that:
(a) the B-BBEE status level of contribution has been claimed or obtained on a fraudulent basis; or
(b) any of the conditions of the contract have not been fulfilled,
act against the tenderer or person awarded the contract.
(2) An organ of state may, in addition to any other remedy it may have against the person contemplated in sub-regulations (1)-
(a) disqualify the person from the tendering process;
(b) recover all costs, losses or damages it has incurred or suffered as a result of that person's conduct;
(c) cancel the contract and claim any damages which it has suffered as a result of having to make less favourable arrangements due to
such cancellation;
(d) restrict the tenderer or contractor, its shareholders and directors, or only the shareholders and directors who acted on a fraudulent
basis, from obtaining business from any organ of state for a period not exceeding 10 years, after the audi alteram partem (hear the
other side) rule has been applied; and
(e) forward the matter for criminal prosecution."

[10] Preferential Procurement Regulations, 2017, Government Gazette 40553 GN R.32, 20 January 2017

(iii) the tenderer should not be restricted by the National Treasury from conducting any business for a period not exceeding 10 years with any organ of state; and

(c) if it concludes, after considering the representations referred to in subregulation (1)(b), that-

(i) such false information was submitted by the tenderer-

(aa) disqualify the tenderer or terminate the contract in whole or in part; and

(bb) if applicable, claim damages from the tenderer; or

(ii) the successful tenderer subcontracted a portion of the tender to another person without disclosing, penalise the tenderer up to 10 percent of the value of the contract.

(2)(a) An organ of state must-

(i) inform the National Treasury, in writing, of any actions taken in terms of subregulation (1);

(ii) provide written submissions as to whether the tenderer should be restricted from conducting business with any organ of state; and

(iii) submit written representations from the tenderer as to why that tenderer should not be restricted from conducting business with any organ of state.

(b) The National Treasury may request an organ of state to submit further information pertaining to subregulation (1) within a specified period.

(3) The National Treasury must-

(a) after considering the representations of the tenderer and any other relevant information, decide whether to restrict the tenderer from doing business with any organ of state for a period not exceeding 10 years; and

(b) maintain and publish on its official website a list of restricted suppliers."

[38] In ***Viking Pony*** the Constitutional Court held[11]:

"[31] I am satisfied that 'detect' generally means no more than discovering, getting to know, coming to the realisation, being informed, having reason to believe, entertaining a reasonable suspicion, that allegations, of a fraudulent misrepresentation by the successful

[11] Supra at par [31] and [32]

> tenderer, so as to profit from preference points, are plausible. In other words, it is not the existence of conclusive evidence of a fraudulent misrepresentation that should trigger responsive action from an organ of State. It is the awareness of information which, if verified through proper investigation, could potentially expose a fraudulent scheme.
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> [32] The context within which 'detect' is used in reg 15(1) dictates that the word be interpreted broadly. It would be incorrect to construe it to mean that something is detected only when its existence has already been conclusively established as a fact. Obtaining any information that gives rise to a reasonable suspicion that preference points might have been fraudulently awarded does amount to a detection. There are, however, different degrees and levels of detection. At the one level the information might be somewhat scanty yet capable of exposing corruption in a particular tender. At times the information detected might be conclusive. It is the level of detection that determines the appropriateness of the action to be taken against the alleged offending party."

[39] The court went on to state[12]:

> "[34] Whenever an enterprise is plausibly accused of having furnished false information in its tender documents, the organ of State responsible for the tender is, upon becoming aware of the alleged misrepresentation, under an obligation to investigate the matter. This stems from the tenderer's obligation to vouch for the truthfulness and correctness of the information provided in terms of reg 14. Furthermore, the organ of State has the power to call upon any tendering enterprise to submit satisfactory documentary proof of any issue relating to the tender. This would be done to enable the organ of State to investigate and satisfy itself about the correctness or otherwise of the issues relating to the tender. In sum, reg 15 enjoins the organ of State to 'act against' any tenderer that seems to have flouted the law."

[40] Mr *Saks*, relying upon the authority of ***Viking Pony***, argued that the test for determining the trigger to act against a tenderer suspected of a fronting practice is not onerous. It is sufficient if there is a reasonable suspicion. He further argued that it

[12] At par [34]

must be borne in mind that the "*suspicion*" was one raised by members of the BEC and that it was premised upon the second respondent's tender documents.

[41] Mr *Nepgen* countered the argument on the basis that (a) ***Viking Pony*** and ***Allpay*** are to be read in the context of the Regulations as they then read; and (b) that, in any event, no reasonable suspicion existed which would trigger the obligation to act.

[42] It is indeed so that the regulations have undergone important changes since the decision in ***Viking Pony***. However, the use of the phrase "*upon detecting*" has not altered the fundamental basis upon which the obligation to act is triggered. The finding by the Constitutional Court is clear. All that is required is information that gives rise to a reasonable suspicion. It must be plausibly averred that the tenderer has provided false information.

[43] Once that threshold is established the organ of state is obliged to act in accordance with reg 14 of the 2017 Regulations. Regulation 14 sets out not only the procedure to regulate its action against the tenderer but also the remedies available to the organ of state.

[44] The essential question in the present matter is whether that which was before the BEC and BAC was sufficient to trigger the obligation to act in accordance with reg 14. For purposes of the present application this need only be established on a *prima facie* basis.

[45] Mr *Nepgen* submitted that the question is to be answered in the negative. He submitted that the high water mark of the applicant's reliance upon this alleged ground of review is to be found in the content of the minute of the BEC meeting of 26 November 2018. The only basis upon which the issue was raised was the fact that the majority shareholder had not signed the resolution of the board of directors.

[46] Mr *Nepgen* submitted that the statement, as recorded in the minute, is not in itself evidence of the existence of a reasonable suspicion of fronting, nor the existence of a plausible basis for such allegation. He argued, quite correctly in my

view, that it must be accepted that the BEC members had had regard to all of the documents submitted by the second respondent in its bid. This would include, inter alia, proof of its B-BBEE status, in the form of the affidavit referred to earlier. That affidavit falls within the ambit of Regulation 1 of 2017[13].

[47] In addition to this the second respondent's tender bid included a confirmation by the accountant of the second respondent of the shareholding of the second respondent. The letter states that Air-Tek Holdings (Pty) Ltd holds 49% of the shares and that *Moegamad Kahaar* holds 51% of the shares with the equivalent voting rights. Also included are the share certificates which confirm this.

[48] These documents, it was submitted, point to the full and accurate disclosure of relevant information by the second respondent. On the basis of these documents, which were before the BEC, there can have been no reasonable suspicion of a fronting practice.

[49] Mr *Nepgen* further pointed to the applicant's reliance on the declaration of designated groups for preferential procurement (PA-40) as being wholly misplaced. That declaration was not the basis for the comment made about fronting. The declaration refers to the shareholding of Air-Tek Manufacturing, i.e. the second respondent, whereas it declares the shareholding of Air-Tek Holdings. This was, he submitted, an error rather than evidence of fronting. Insofar as the declaration indicates a discrepancy in the actual shareholding of the second respondent elsewhere disclosed in the tender documents, it is against the second respondent in regard to qualifying preference points. At best for the applicant, the discrepancy may have required the first respondent to call upon the second respondent to clarify. In that event, it would have furnished the explanation set out in its answering affidavit. The discrepancy on its own could not found a reasonable suspicion of a fronting practice. Mr *Nepgen* also pointed to the minutes of the meeting of the BAC of 4 December 2018 which records that a risk assessment of the second respondent had been done. Such risk assessment verify the information supplied.

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[13] Reg 1 defines "proof of B-BBEE status level of a contributor" means, inter alia,: *"(b) a sworn affidavit as prescribed by the B-BBEE Codes of Good Practice; "*

[50] It is not for this court to decide whether or not evidence now establishes a basis to trigger the obligation to act in accordance with reg 14. In order to found a claim for interdictory relief pending a review based on alleged non-compliance with reg 14 it must be shown that at the time of the award there existed a reasonable suspicion that the second respondent had supplied false information regarding its B-BBEE status, local production and content or any other matter required which would affect the evaluation of the tender. All that the applicant can point to is that contained in the BEC minute. This, in my view, falls short of what would, in terms of ***Viking Pony*** amount to detection.

[51] A final basis upon which the applicant relies to establish a prima facie right is the alleged extension of the period of validity of the offer constituted by the successful tender. In this regard the applicant relies upon the judgment in ***Joubert Galpin and Searle v Road Accident Fund and Others***[14] where it was held that the award of a tender after the expiry of a tender validity period was in effect *ultra vires*.

[52] The facts, as alleged by the applicant, are that the tender validity period was extended after the date of expiry of the validity period stipulated by the tender notice. It is alleged that the final date for submission was 28 August 2018 and that the tender validity period was 56 days. On the applicant's calculation the tender validity period expired on 23 October and the purported extension only occurred on 15 November 2018. In support of this the applicant refers to a letter sent by the Supply Chain Manager Mnyaka to the second respondent dated 15 November 2018 in which the consent to extension is signed on that date.

[53] A perusal of the document (Annexure AA3 to the Founding Affidavit), however, indicates that the then current validity period extended to 15 November 2018 and that the extended period would expire on 15 January 2019[15]. It is, in my view, of some significance that the applicant nowhere in its founding affidavit raises this issue as a ground upon which it seeks either interim or review relief[16]. Indeed the founding papers proceed upon the basis that the tender process continued (in the

[14] 2014 (4) SA 148 (ECP) at par [74]
[15] The letter itself refers to the existing period extending to 21 November 2018 whereas the second page refers to 15 November 2018.
[16] It is of course entitled to supplement its grounds in accordance with Rule 53.

sense that the BEC and BAC deliberations proceeded) until 4 December 2018 when the award was made to the second respondent.

[54] In setting out the events which gave rise to the commencement of this application the applicant refers to correspondence addressed to the first respondent in January 2019 enquiring regarding process of the bid process. On 30 January 2019 the first respondent dispatched its letter to the applicant advising that it was unsuccessful. What followed was correspondence regarding the applicant’s intention to challenge the award and, on 15 February 2019 a request for reasons and for documents. There is no reference to the fact that any award after 23 October 2018 would be invalid by reason of the expiry of the tender validity period.

[55] The only reference to this issue occurs in the applicant’s replying affidavit in reply to the averment by the second respondent that it concluded a written contract with the first respondent on 15 January 2019; in raising the matter it refers to and annexes the extension letter referred to above, a copy of which it can only have obtained pursuant to its request for documents.

[56] Mr *Nepgen* did not press that the applicant be precluded from raising the issue since it was only raised in reply. Had he done so it would, in my view, have been appropriate to preclude a belated supplementing of the applicant’s case in reply. Mr *Nepgen* instead submitted that even if it is to be assumed that there is some merit in the point, it cannot assist the applicant in respect of interim relief. That is so because at best for the applicant it could contend, at the review, that the award be set aside. The applicant cannot contend for an apprehension of irreversible harm based upon this ground since, even if the point succeeds the tender process may at best have to re-open.

[57] The document upon which the applicant bases this point does not support the point. It indicates that the tender validity period then was 15 November 2018 and that it was to be extended to 15 January 2019. It was indeed so extended and the contract was concluded on 15 January 2019. No doubt this issue will in due course be addressed in the review. For present purposes what is required is the assertion of

a right, which is *prima facie* established. I am not satisfied that the applicant has met this threshold.

[58] I have already indicated that I am not persuaded that the applicant has established a *prima facie* right on the basis alleged. Even if I am wrong in this conclusion I am of the view that the applicant has also not succeeded in establishing other requisites for interim relief.

[59] It is common cause that the second respondent has already commenced the works and that the works are continuing. The irreparable harm for which the applicant contends consists therein that the failure to restrain the continuation of the works will inevitably have the result that the contract may very well have been completed by the time that the review is decided. In that result the applicant may then be left with no substantial redress in the review.

[60] In ***National Treasury and Others v Opposition to Urban Tolling Alliance and Others***[17] it was stated that:

> "[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."

[61] As noted in the quoted passage it is not necessary to grant relief *pendente lite* in order to protect the right to review. What must be shown is that in the review the applicant has some prospect that it will obtain an order awarding the contract to it or that upon the matter being remitted that consequence is probable. It has, in my view, not advanced such a case.

[17] 2012 (6) SA 223 (CC) at par 50

[62] The contention that the harm consists therein that the applicant was not awarded the contract conflates the apprehension of irreparable harm with the balance of convenience. The applicant's argument in regard to the consideration of balance of convenience was this: the right we assert is clear therefore the balance of convenience ought not to play a significant role. Whilst a sound general proposition, it misses the point that the determination of the balance of convenience always falls to be considered. This requires that the harm to be endured by the applicant be weighed against the harm which the respondent will bear. (See ***Outta*** (*supra*) at par [52].)

[63] The second respondent has, in its answering affidavit, set out in some detail the prejudice and harm it is likely to suffer in the event that the interim relief is granted. It points out that the contract concluded with the first respondent is a re-measurement contract and that contract price adjustment does not apply. This means, it says, that when the price of labour, equipment, fuel and material increases these costs are borne by the second respondent. In the event that the implementation of the contract is delayed and these costs increase the second respondent will bear the cost.

[64] The second respondent states that practical completion of the contract must be achieved within 12 months of the commencement date which was on 15 January 2019. It has incurred site establishment costs (of R 36 300) and has placed orders for material from suppliers to the value of R 5 205 741.58. Capital equipment, which includes all the air-conditioning equipment, has already been delivered to site.

[65] The second respondent's affidavit sets out the extent of work already completed at 4 of the blocks of the complex. It is not necessary to repeat those averments, which are uncontested. The effect is that a substantial portion of the works has already been executed.

[66] The second respondent states further that it has purchased additional equipment (including a vehicle); it has concluded agreements for accommodation of staff; appointed sub-contractors and has manufactured certain items to be installed.

It has submitted payment certificates in an amount in excess of R 9.3 million of which an amount of R 4.6 million has been paid.

[67] The applicant's answer to this is to the effect that the suspension of the contract will have no effect upon the work done and the materials supplied. It further states that the second respondent either has been or will be paid for the work done and for materials supplied. In effect it is contended that the prejudice to be suffered by the second respondent can be addressed in a claim that it may have against the first respondent.

[68] This is, in my view, no answer to the substantial prejudice that the second respondent avers will flow from the granting of interim relief. Having regard to all of the relevant factors I am unable to conclude that the balance of convenience favours the granting of interim relief. The application accordingly fails on this ground also.

[69] I do not consider it necessary to deal with the existence of an alternative remedy. It is by now well established that in general in circumstances such as the present the proper remedy where relief is sought on review to set aside the award of a contract is to restrain its implementation *pendente lite*.

[70] Mr *Nepgen*, however, raised a further aspect given the essential basis upon which relief was sought, namely the available remedies provided for by reg 14 of the 2017 Procurement Regulations. The proper course, he argued, was for the applicant to avail itself of those remedies which may include pursuing the relief which was granted in the ***Viking Pony*** matter.

[71] It is, for the reasons already set out above, not necessary to decide the issue. I have reservations as to whether the remedies provided for in reg 14 would preclude a court from, in an appropriate case, interdicting the implementation of a contract awarded in breach of the Procurement Regulations pending a judicial review where such relief is otherwise warranted. I need not, however, decide the issue.

[72] In the result the following order will issue:

The application for interim relief pending the finalization of the applicant's review application is dismissed with costs, including the reserved costs of 16 April 2019.

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G.G GOOSEN

JUDGE OF THE HIGH COURT

Obo the Applicant:	*Adv D.J Saks*
Instructed by:	*Friedman Scheckter , 75 2nd Avenue, Newton Park, Port Elizabeth*
	Tel: (041) 395 8412
	Ref: Mr Friedman
Obo the 2nd Respondent:	*Adv J.J Nepgen*
Instructed by:	*JGS, 173 Cape Road, Mill Park, Port Elizabeth*
	Tel: (041) 396 9234
	Ref: Mr Parker