



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO.: 16642/2022

(1)	REPORTABLE: YES / NO ✓
(2)	OF INTEREST TO OTHER JUDGES: YES/NO ✓
(3)	REVISED. ✓
<u>31 August 2023</u>	
DATE	 SIGNATURE

In the matter between:

RAIL REFURB CC

Applicant

and

**SOUTH AFRICAN NATIONAL
ROADS AGENCY**

Respondent

JUDGEMENT

SARDIWALLA J:

[1] This is an opposed urgent application in terms of the provisions of Rule 6(12)(a) of the Uniform Rules of Court for interim relief to suspend the legal consequences of the respondent's alleged unlawful termination of two contracts entered into between the parties.

[2] The Applicant sought the following relief:

“1. Condoning the parties' truncation of time periods for filing of papers, to the extent necessary.

2. Suspending the legal validity of the decision of the respondent to issue termination notices to the applicant in respect of Contact SANRAL N.002-057-2021/1 and Contact SANRAL N.002-078-2021/1 (“the Contracts”) pending the finalisation of any action and/or judicial review proceedings launched by the plaintiff against the respondent in respect of the Contracts (“the main action”).

3. Directing any and all proceedings to be instituted as part of the main action referred to in paragraph 2, above, shall be served and filed within 20 (twenty) days of the date of this order, failing which the order in paragraph 2, above, will cease to have effect.

4. Directing that the interim suspension provided for in paragraph 2, above, will not affect the respondent's ability to employ alternative service provision for the Contracts in terms of the Public Procurement Management Act No. 1 of 1996.

5. To the extent necessary, directing that this matter referred to the Judge President of the Division for the purposes of special allocation.

6. Ordering that the costs of this application -

a. if opposed, shall be granted against any such party seeking to oppose this application;

b. if not opposed, directing that costs shall be costs in the cause of the main action.

7. Further and / or alternative relief.”

Background to the Application:

[3] The following are the material facts of the matter:

3.1 Rail Refurb commenced work on two road maintenance contracts with SANRAL's Western Region on 16 August 2021. The contracts included the repair and replacement of pavement asphalt on various public roads, which included the removal of old / reclaimed asphalt from the road surface.

3.2 The reclaimed asphalt, also referred to as “milled material” contained bitumen. Bituminous material, including asphalt, is designated as hazardous waste under National Environmental and Waste Management legislation and regulations. As a

result, certain prohibitions and obligations are placed on its stockpiling, disposal or recycling.

3.3 It is common cause that the respondent does not hold a Ministerial exemption from the regulations regarding the handling of hazardous waste material (section 74 of the National Environmental Management: Waste Act No. 59 of 2008).

3.4 Rail Refurb and SANRAL's Engineers, Q&A Consulting, disagreed as to the appropriate handling of the reclaimed asphalt. Rail Refurb informed SANRAL on multiple occasions that the stockpiling of the material had to be done at designated waste management facilities in terms of the Waste Management Act. Rail Refurb suggested two sites, AECI Much Asphalt George and AECI Much Asphalt Port Elizabeth. It also requested SANRAL to specify other designated locations that met the requirements of the Waste Act and regulations.

3.5 The Engineers and SANRAL according to the RAIL REFURB initially engaged in site meetings on the common assumption that the material should be treated as hazardous waste. However, later, while continuing to acknowledge bituminous material constituted hazardous waste, the engineers proclaimed that they did not consider the reclaimed asphalt in this instance to be hazardous waste. They instructed that it be stockpiled at any location identified by themselves and not transported to designated waste management facilities. This included instructions to stockpile on rest areas along the roadside and on private farm land.

3.6 Rail Refurb informed SANRAL that these instructions were not only in breach of both SANRAL and Rail Refurb's environmental obligations but were also in breach of the contracts in that its pricing of rates for the contracts relied on cross-subsidisation of certain complementary rates. These rates were determined based on the work set out in the contract data.

3.7 Rail Refurb instituted complaint procedures as provided for in the provisions of contract and sought to engage SANRAL on this issue.

3.8 SANRAL meanwhile sought to terminate the contracts on four purported grounds for termination, that arise directly from the stockpiling dispute, namely, (a) Rail Refurb's alleged non-compliance with the Engineer's instructions; (b) its alleged failure to provide a breakdown of its rates; and (c) its alleged failure to have sub-contracting teams on site all stem from this impasse.

3.9 It is common cause that SANRAL expects that its contracts are carried out in

compliance with environmental regulations.

3.10 The parties agreed that Rail Refurb would provide support for the classification of the asphalt and the proper manner for its disposal. Rail Refurb obtained a report by GIBB (“the expert report”) to this effect. The expert report's conclusion and recommendations were as follows:

“Asphalt is classified as hazardous waste in terms of the National Environmental Management: Waste Amendment Act (Act 26 of 2014) and the National Waste Information Regulations (GNR 625 of 2012). As such it needs to be managed in accordance to legislation related to hazardous waste. The stockpile area used for asphalt would need to be registered with DEADP if it has the capacity to store in excess of 80m³ of asphalt. If the stockpile area is below this threshold it would not need to be registered. The duty of care principal would still need to be applied and the asphalt would need to be stored in a manner that does not result in pollution or environmental degradation. Recycling of asphalt is favoured over disposal in terms of the waste management hierarchy. It is therefore recommended that Rail Refurb transports the asphalt to Much Asphalt for recycling. Rail Refurb would need to ensure that Much Asphalt has the correct permits, registrations or license in place to allow them to recycle asphalt. The existing permit appears to be limited to waste disposal activities.”

3.11 On 8 November 2021, in the first notice in terms of 15.1 of FIDIC, SANRAL stated that Rail Refurb must “formally disclose all appointed subcontractors and submitted the required documentation as per the Contract”.

3.12 Various notices followed and correspondences during this period and on 9 February 2022, SANRAL issued a notice of termination on the purported basis of RAIL REFURB’s non-compliance with the terms of the contract.

3.13 This application was launched on 17 March 2022.

[4] The Respondent filed a notice of opposition. However, the respondent filed its answering affidavit and supplementary answering affidavit 5 weeks late and sought condonation in respect of both. The applicant opposed the condonation stating that the reasons for the late filing were inadequate and that the matter should be heard unopposed. The matter was heard on the unopposed motion court roll.

[5] The applicant also sought leave to file a further affidavit as evidence in the main application.

Applicant's Argument

[6] The Applicant contends the respondent unlawfully terminated the two contracts and that the termination has consequences not only in respect of non-performance for those two contracts but also for the applicant's ability to tender for future contracts. The reporting of the non-performances triggers reporting to the CIDB and National Treasury in which the applicant risks being blacklisted from further public contracts. Therefore until the illegalities are established in the appropriate litigation proceedings the applicants ability to tender for work is unfairly prejudiced. It is on this basis that the applicant applies for the suspension order until the main proceedings are finalised.

[7] The Applicant submits that this would be just and equitable for the following reasons:

7.1. The contracts would remain cancelled, and SANRAL would therefore be free to ensure the remaining work is completed within the prescripts of applicable public service provisions.

7.2. It is only the legal basis for the purported termination — or the lack thereof — that would await final determination. A court will decide in due course if it is a result of SANRAL's breach and subsequent repudiation, as alleged by Rail Refurb, or if it is due to Rail Refurb's non-performance as alleged by SANRAL.

7.3. Rail Refurb's challenge to SANRAL's cancellation and reporting and restriction decisions can run to completion through litigation and any separate procedural channels provided for under SANRAL's internal processes.

7.4. In the interim, Rail Refurb is protected from the harsh and possibly business ruining position it will otherwise encounter, until it is vindicated or if it is vindicated in respect of the contracts at issue.

[8] The applicant submitted that Rail Refurb's vindication in due course has strong prospects of success and if the interim remedy is not granted and it is blacklisted then it would have already been substantially prejudiced by being forced to give up its entitlement to compete in years' worth of work and potential tenders. This prejudice cannot be remedied once the litigation is finalised.

[9] On 8 August 2022 the applicant filed a further affidavit and application to submit further evidence as in the correspondences exchanged regarding the respondents "internal

restriction” or “separate process” the applicant was notified of the respondents intention to ban the applicant from tendering for the respondent’s contracts for a period of 10 years. That three months after the applicant submitted its response to the separate process it is yet to receive a response. Therefore there is no assurance that the applicant will be notified before the internal restriction is put in place or when this will occur and therefore the threat of blacklisting remains a real and imminent threat. The order for suspension remains the only just and equitable remedy in the circumstance.

[10] In support of the relief for suspension the applicant relied **on EFF v Gordhan** where the Constitutional Court confirmed the decision of Potterill J which suspended the remedial action of the Public Protector’s pending review application against the Public protector’s report. The court held the following:

“[114] The power to suspend the operation of the Public Protector’s remedial action is sourced from section 172(1)(b) of the Constitution. If in a matter like the present, it is considered just and equitable to suspend a remedial action pending a determination of the review in which the validity of the remedial action is impugned, a court may grant the suspension. Guidance for issuing the suspension is derived from considerations of justice and equity.

[115] A determination of a just and equitable order of necessity requires a careful consideration of interests of parties on both sides of the litigation. The order must be fair and just when all relevant factors are taken into account. What is just and equitable in a given case, depends on the facts of that particular case. This sort of enquiry entails a flexible approach in pursuit of justice and equity in every matter.”¹

[11] Therefore the order of suspension is discretionary and flexible and whilst it will consider more than reparable or irreparable harm and that the granting of the remedy is not dependent declaring that the respondent’s conduct was unlawful. There is no prejudice to the respondent. That it is common cause that the applicant faces prejudice as a consequence of the termination and therefore there is no other motive than to protect its rights. What this court needs to determine is whether the remedy is just and equitable and if it has the power to grant that remedy.

¹ Economic Freedom Fighters v Gordhan and others 2020 (6) SA 325 (CC) at paras 114 and 115

[12] Regarding the issue of cross-subsidisation the applicant denied the allegations and stated that this method has been used before on other sites and there has not been an issue. That the real issues is not the low rates or the applicant's unwillingness to work on low rates bit rather whether the engineer can instruct the applicant to do anything the engineer chooses.

[13] The applicant submits that the remedy of the action for damages is misconstrued by the respondent in that it is confusing reparable harm of the contractual damages in respect of the two contracts and irreparable harm in respect of future tenders which is not remedied with contractual damages. The reasons for the late filing which also related to the internal restriction process as alleged is still no answer for the late filing and should not be accepted. Lastly that the internal restriction process triggered only substantiates the prejudice that the applicant faces if the remedy is not granted.

Respondent's Argument

[14] The respondent did not heads of argument but did file an answering affidavit and supplementary answering affidavit albeit 5 weeks late. The opposed the application for the following reasons:

- 14.1. the founding affidavit does not set out a factual and legal basis for the relief sought in prayer 2 of the Notice of Motion;
- 14.2. there is no basis of the relief sought as a whole;
- 14.3. the applicant is attempting to interdict proceedings that have its own procedural fairness steps;
- 14.4. the applicant has failed to establish a reasonable apprehension of harm;
- 14.5. the relief interdicts the exercise of a statutory power by another arm of state; and
- 14.6. the applicant is seeking a court-sanction for its abandonment of its obligations under a lawful contract.

[15] That whilst the applicant alleges that it had commenced work on 16 August 2021 that by 9 February 2022 it had failed to appoint a key person who was required to assist the applicant and the respondent in achieving its goals. That despite notices from the engineer that it failed to remedy the breach on two occasions and on this basis the respondent exercised its rights to terminate.

[16] In addition the applicant failed to also submit a breakdown of its rates as requested by the engineer and simply fobbed off the engineer and the respondent. Further to this the applicant failed to submit its subcontracting arrangements to the engineer and disregarded the instruction of the engineer regarding the stockpiling of milled material. Upon enquiries there is no evidence that the respondent's suggestion to the stockpiling issue required the applicant to be in breach of any statute. That in any event it seemed that the applicant's contention was not that the engineer lacked the power to give this instruction but that the instruction was not a viable option for the applicant. The expert report conclusion does not state that the instruction was unlawful nor could the expert reach such a conclusion.

[17] The respondent alleged that the true motive was that the applicant realised that it had under-priced certain activities and hoped to strong-arm the respondent in either agreeing to haul the milled material or to re-negotiate the terms of the contract including rates payable to it. For this reason the respondent alleged the applicant had not yet instituted review proceedings and that in any event the applicant had instituted a claim for damages and this application should be dismissed for this reason alone as the applicant has an alternate remedy.

[18] The respondent attacked the filing of the additional affidavit into evidence alleging that the applicant was attempting to impugn the process which it had participated in and this constitutes an abuse of process. More so as the applicant did not seek to interdict that process. The respondent submits that it is well within its rights in terms of policies to impose internal restrictions.

[19] In respect of the condonation the respondent submits that there is no prejudice to the matter from the delaying in filing the papers late and that the interests of justice favour the condonation sought by the respondent in that fair adjudication can only be achieved if all the relevant facts are presented to the courts.

Urgency

[20] The general principles applicable in establishing urgency are dealt with in Rule 6(12) of the Uniform Rules of this Court. The importance of these provisions is that the procedure set out in Rule 6(12) is not there for the mere taking. Notshe AJ said in **East Rock Trading 7**

(Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others ²in paras 6 and 7 as follows:

“[6] The import thereof is that the procedure set out in rule 6(12) is not there for taking. An applicant has to set forth explicitly the circumstances which he avers render the matter urgent. More importantly, the Applicant must state the reasons why he claims that he cannot be afforded substantial redress at a hearing in due course. The question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of absence of substantial redress in an application in due course. The rules allow the court to come to the assistance of a litigant because if the latter were to wait for the normal course laid down by the rules it will not obtain substantial redress.

[7] It is important to note that the rules require absence of substantial redress. This is not equivalent to the irreparable harm that is required before the granting of an interim relief. It is something less. He may still obtain redress in an application in due course but it may not be substantial. Whether an applicant will not be able obtain substantial redress in an application in due course will be determined by the facts of each case. An applicant must make out his case in that regard.”

[21] Urgent applications must be brought in accordance with the provisions of rule 6(12) of the Uniform Rules of Court, with due regard to the guidelines set out in cases such as **Die Republikeinse Publikasies (Edms) Bpk vs Afrikaanse Pers Publikasies (Edms) Bpk**³ as well as a well-known case of **Luna Meubelvervaardigers (Edms) Bpk v Makin and Another**⁴.

[22] This leaves the requirement of the applicant’s ability to obtain proper substantive redress in due course, for consideration. Obviously, and where a matter is struck from the roll for want of urgency, then the merits of the application remains undetermined. It follows that the application can still be considered and granted by a Court in the ordinary course. But I understand that in this case, there is a unique consideration. Considering the undeniable realities of litigating in the ordinary course, by the time the action for damages and the review application is determined the applicant would have been blacklisted for years and would be

² (11/33767) [2011] ZAGPJHC 196 (23 September 2011)

³ 1972(1) SA 773 (A) at para 782A - G

⁴ 1977(4) SA 135 (W), see further also *Sikwe vs SA Mutual Fire and General Insurance* 1977 (3) SA 438 (W) at 440G - 441A.

unable to apply for potential public tenders which an action for damages would not be able to remedy. The applicant in my view, is therefore not able to obtain substantive redress in the ordinary course. However even if the application failed on urgency, it is possible, in appropriate circumstances, to even dispose of the matter on the merits, where a matter is regarded as not being urgent, instead of striking the matter from the roll. The Court in **February v Envirochem CC and Another**⁵ dealt with this kind of consideration, and even though the Court accepted that urgency was not established, the Court nonetheless proceeded to dismiss the matter in the interest of finality and so the matter should be dealt with once and for all.

Condonation

[23] Condonation is not a mere formality and is not to be had “merely for the asking”. What is required is an explanation not only of the delay in the timeous prosecution but also the delay in seeking condonation for non-compliance. The applicant must show that he did not wilfully disregard the timeframes provided for in the Rules of Court. He is obliged to satisfy the court that there is sufficient or good cause for excusing him from compliance.

[24] Condonation may be refused where there has been a flagrant breach of the rules especially where no adequate explanation is proffered. The applicant should convince the court to exercise its discretion in his favour.

[25] An application for condonation should be brought without delay and as soon as possible once an applicant realizes that he has not complied with a rule of court. And it is not to say where non-compliance was due entirely to the neglect of the applicant’s attorney, condonation will be granted.

[26] In the recent **Mulaudzi v Old Mutual Life Insurance Company (South Africa) Limited and Others, National Director of Public Prosecutions and Another v Mulaudzi**⁶ case the Supreme Court of Appeal set out the factors to take into account when considering an application for condonation at para 26:

⁵ (2013) 34 ILJ 135 (LC) at para 17. See also *Bumatech* (supra) at para 33; *Bethape v Public Servants Association and Others* [2016] ZALCJHB 573 (9 September 2016) at para 53.

⁶ (98/2016, 210/2015) [2017] ZASCA 88; [2017] 3 All SA 520 (SCA); 2017 (6) SA 90 (SCA) (6 June 2017)

“A full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility. Factors which usually weigh with this court in considering an application for condonation include the degree of non-compliance, the explanation therefor, the importance of the case, a respondent’s interest in the finality of the judgment of the court below, the convenience of this court and the avoidance of unnecessary delay in the administration of justice.”

[27] In the earlier case of **Melanie v Santam Insurance Co Ltd**⁷ the then Appellate Division explained the broad approach to be adopted in such an enquiry:

“In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated; they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent’s interest in finality must not be overlooked.”

Interim Interdict

[28] A request for an interim interdict is a court order preserving or restoring the status quo pending the determination of rights of the parties. It is important to emphasize that an interim interdict does not involve a final determination of these rights and does not affect their final determination. In this regard the Constitutional Court said the following:⁸

“An interim interdict is by definition ‘a court order preserving or restoring the status quo pending the final determination of the rights of the parties. It does not involve a final determination of these rights and does not affect their final determination.’ The dispute in an application for an interim interdict is therefore not the same as that in the main application to which the interim interdict relates. In an application for an interim interdict the dispute is

⁷ 1962(4) SA 531 (A)

⁸ In *National Gambling Board v Premier, Kwa-Zulu Natal and Others* 2002(2) SA 715 CC

whether, applying the relevant legal requirements, the status quo should be preserved or restored pending the decision of the main dispute. At common law, a court's jurisdiction to entertain an application for an interim interdict depends on whether it has jurisdiction to preserve or restore the status quo."⁹

[29] The requirements for the granting of an interim interdict are the following: a *prima facie* right, a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted, that the balance of convenience favours the granting of an interim relief, and that the applicant has no other satisfactory remedy.¹⁰ In this regard Holmes JA¹¹ said the following:

"The granting of an interim interdict pending an action is an extraordinary remedy within the discretion of the Court. Where the right which it is sought to protect is not clear, the Court's approach in the matter of an interim interdict was lucidly laid down by INNES, J.A., in Setlogelo v Setlogelo, 1914 AD 221 at p. 227. In general the requisites are –

- (a) a right which, 'though prima facie established, is open to some doubt';*
- (b) a well-grounded apprehension of irreparable injury;*
- (c) the absence of ordinary remedy.*

In exercising its discretion the Court weighs, inter alia, the prejudice to the applicant, if the interdict is withheld, against the prejudice to the respondent if it is granted. This is sometimes called the balance of convenience. The foregoing considerations are not individually decisive, but are interrelated; for example, the stronger the applicant's prospects of success the less his need to rely on prejudice to himself. Conversely, the more the element of 'some doubt', the greater the need for the other factors to favour him. The Court considers the affidavits as a whole, and the interrelation of the foregoing considerations, according to the facts and probabilities; see Olympic Passenger Service (Pty.) Ltd. v Ramlagan, 1957 (2) SA 382 (D) at p. 383D - G. Viewed in that light, the reference to a right which, 'though prima facie established, is open to some doubt' is apt, flexible and practical, and needs no further elaboration."

[30] Where the right is clear "... the remaining questions are whether the applicant has also shown:

- (a) an infringement of his right by the respondent; or a well-grounded apprehension of such an infringement;

⁹ At 730 - 731[49]

¹⁰ See: Eriksen Motors (Welkom) Ltd v Protea Motors Warrenton and Another 1973(3)SA 685 (A)

Knox D Arcy Ltd v Jamison and Other 1996(4) SA 348 (A) at 361

¹¹ In Eriksen Motors (Welkom) Ltd v Protea Motors Warrenton and Another, supra, at 691.

- (b) the absence of any other satisfactory remedy;
- (c) that the balance of convenience favours the granting of an interlocutory interdict.”¹²

[31] In this case the Applicant seeks an interdict suspending the legal consequences of the respondent’s alleged unlawful termination of two contracts entered into between the parties.. The question therefore is whether the applicant has established a *prima facie* right. The approach to be adopted in considering whether an applicant has established a *prima facie* right has been stated to be the following:¹³

*“The accepted test for a prima facie right in the context of an interim interdict is to take the facts averred by the applicant, together with such facts set out by the respondent that are not or cannot be disputed and to consider whether, having regard to the inherent probabilities, the applicant should on those facts obtain final relief at the trial. The facts set up in contradiction by the respondent should then be considered and, if serious doubt is thrown upon the case of the applicant, he cannot succeed.”*¹⁴

Analysis and findings

[32] It is common cause that the respondent has notified the applicant of its intention to ban the applicant from future contracts with the respondent and that this also prejudices the applicant from applying for other potential tenders in terms of the reporting to the CIDB and National Treasury. This will directly and adversely affects the applicant’s rights to participate in future tender processes. In my view, the respondent has offered a reasonable explanation to this Court for its late filing of both answering affidavits but I believe that the interests of justice require me to accept the condonation simply to ensure that all relevant facts are taken into account in determining whether the relief sought is just and equitable in the circumstances.

[33] The respondent admits that it has instituted internal restriction procedures against the applicant. The harm therefore is no longer apprehensible it is now imminent. Whilst the expert report does not provide conclusive evidence or clarity as to whether the instruction by the engineer was lawful or not, the respondent has not tendered any proof to explain that the

¹² Knox D’Arcy Ltd and Others v Jamieson and Others 1995 (2) SA 579 (W) at 592 – 593.

¹³ In Simon NO v Air Operations of Europe AB and Others 1999 (1) SA 217 (SCA).

¹⁴ At 228;

See also Webster v Mitchell 1948 (1) SA 1186 (W) at 1189,

Manong & Associates (Pty) LTD v Minister of Public Works and Another 2010 (2) SA 167 (SCA) at 180.

instruction was in fact lawful and within its rights to do so and therefore not in breach of any legislation. This is any event is the dispute to be determined in the review proceedings and the action for damages.

[34] The respondent although clearly entitled to conduct its administrative functions in respect of its internal procedures, in terms of the principles of natural justice is also expected to interact with a person or institute whose rights may be adversely affected by its decisions. In the present matter the respondent has not denied that the applicant has not received a response to its submissions on the internal restriction process or when it endeavours to finalise that process leaving the applicant with no alternative but to approach this Court for relief in the interim. I am satisfied that the Applicants have established a *prima facie* right more particularly to challenge the lawfulness of the termination of the contracts.

[35] It cannot be disputed that the respondent's ban threatens the applicant's aforesaid right to natural justice, fair procedures and will prejudice the applicants. It cannot be denied that if the applicant is not granted the relief that it seeks that the applicant will not suffer irreparable harm. The respondent has failed to set out what prejudice, if any, it will suffer and therefore this Court must accept that there is no prejudice to be suffered by the respondents. This especially so as the contract remains terminated and the respondent is able to appoint another contractor to complete the work. I am therefore satisfied that the balance of convenience favours the applicant.

[36] Notably the respondent did not oppose the filing of the further affidavit as evidence by the applicant and in fact conceded that the facts were true although it stated that this was not material to the issue that this Court had to determine in respect of the relief sought. I disagree as the applicant indicated that this evidence was necessary for the main application and in my view confirmed the apprehension of the prejudice indicated by the applicant.

[37] It is also important to note that the proceedings that the applicant seeks to institute is to review the decision by the respondent. The applicant will be granted the opportunity to clarify whether the instruction by the engineer was lawful or not however, should the interdict not be granted the damage to the applicant's ability to participate in tender processes which would have expired and the potential to successfully obtain those contracts would be irreversible. I agree with the *dicta* in **EFF v Gordhan** *supra* having regard to the principles of equity and

justice I cannot find that there any prospects against the suspension especially none provided by the respondent. It would be considered just and equitable to suspend a consequences of the contracts pending a determination of the review in which the validity of the lawfulness of the termination of the contracts and therefore that this Court has the power in terms of section 172(1)(b) of the Constitution to grant the suspension. The applicant will suffer prejudice if the interim interdict is not granted to which I am satisfied that there is no alternate remedy.

[38] Accordingly, the following order is made:

1. The parties truncation of the time periods for the late filing of papers set out in the Uniform

Rules of Court are condoned.

2. The application seeking leave to file a further affidavit (“the leave application”) is granted and the affidavits and corresponding annexures in the leave application are admitted into evidence in the main application.

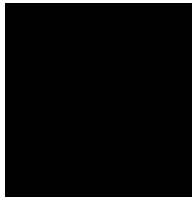
3. It is directed that-

3.1 subject to paragraph 3.2 below, the legal validity of the decision of the respondent to issue termination notices to the applicant in respect of Contact SANRAL N.002-057-2021/1 and Contact SANRAL N.002-078-2021/1 (“the Contracts”) is hereby suspended, pending the finalisation of any action and/or judicial review proceedings launched by the plaintiff against the respondent in respect of the Contracts (“the main action”) in Part B of the applicant’s application; and

3.2 The interim suspension provided for in paragraph 3.1 above, will not affect the respondent’s ability to employ alternative service provision for the contracts term of the Public Procurement Management Act No.1 of 1999.

4. Any and all proceedings to be instituted as part of the main action referred to in paragraph 3.1, above, are hereby directed to be served and filed within 20 (twenty) days of the date of this order, failing which the order in paragraph 3.1, above, will cease to have effect.

5. The respondent to pay the costs of this application, and the cost of the leave application, including the costs of two counsel.



SARDIWALLA J
JUDGE OF THE HIGH COURT

Appearances:

For the Applicant: Adv M D Stubbs
Adv I. Kentridge
Instructed by: Zimri attorneys

For the Respondent: Adv. N January
Instructed by: Dube N attorneys Inc.