

**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

Case number: 16266/2024

In the matter between:

WASTEWANT WASTE MANAGEMENT (PTY) LTD Applicant

and

CITY OF CAPE TOWN First Respondent

RESOURCE INNOVATIONS AFRICA (PTY) LTD Second Respondent

Coram: Acting Justice A Montzinger

Heard: 04 September 2024

Delivered electronically: 10 September 2024

JUDGEMENT

Montzinger AJ:

Summary Introduction

1. The applicant approached this court urgently, seeking interdictory relief to stop the first respondent ("the City") from implementing a tender it awarded to the second respondent, Resource Innovations Africa (Pty) Ltd ("Resource Innovations").

2. Both the applicant and Resource Innovations operate in the waste management industry, providing services related to the collection, transportation, and processing of waste, as well as managing waste facilities. The Kraaifontein Materials Recovery Facility ("Kraaifontein MRF"), under the control of the City, is currently managed by the applicant in terms of a written agreement due to terminate on 30 October 2024.
3. Anticipating the need for a service provider after 30 October 2024, the City published a call for tenders for the collection of co-mingled dry recyclables from the North-Eastern Metropolitan areas and the operation of the Kraaifontein MRF. Both the applicant and Resource Innovations submitted tenders. On 9 April 2024, Resource Innovations was appointed as the successful tenderer. The applicant's tender was disqualified as non-responsive early in the process. Consequently, Resource Innovations is set to begin its services at the Kraaifontein MRF on 1 November 2024.
4. Dissatisfied with its disqualification, the applicant lodged an internal appeal on 29 April 2024, which was dismissed on 11 June 2024. Subsequently, the applicant launched the present application on 23 July 2024, seeking, under Part A, an interim interdict restraining the City and Resource Innovations from implementing the awarded tender. Additionally, the applicant sought a declaratory order that the City's cancellation notice, issued on 5 July 2024, was unlawful and invalid as it failed to provide the required three months' notice per their existing contractual arrangement. The interim relief was sought pending the outcome of the administrative review proceedings in Part B of the notice of motion. In the anticipated review the applicant is asking for the review and setting aside of the City's decision to disqualify it and for a remittal of the tender for reconsideration by the City's Bid Evaluation Committee.
5. This application came before me on 8 August 2024 and was opposed by both respondents. I postponed the matter by agreement to 5 September 2024 to allow for supplementary affidavits and written submissions. Oral arguments were heard on the postponed date.

Procedural Issues

6. Two key procedural issues arose: urgency and the applicant's standing to seek an interdict.
7. Regarding urgency. While the parties agreed on urgency, it remains for the court to assess¹. The applicant's case for urgency is based on the upcoming handover to Resource Innovations on 1 November 2024. While the applicant's argument that this would lead to "entrenchment" was not convincing, the urgency lies in the need for certainty regarding whether the applicant should continue services at the Kraaifontein MRF. Moreover, the relief sought—suspending the tender's implementation—necessitated an immediate hearing and the applicant would not have been afforded substantial redress in due course².
8. Regarding standing³, Resource Innovations' counsel, Mr. Brink, argued that a tenderer whose bid was declared non-responsive lacks standing to challenge the tender. Although Mr. Brink could not refer me to case law at the time his submission is supported by a similar approach in *Rodpaul Construction*⁴, which concluded that a non-responsive tenderer no longer holds a legally protected interest in the tender. On the issue of standing I had to assume that the challenge a non-responsive tenderer wishes to bring is justified⁵.
9. Furthermore, I am bound by the Constitutional Court's decision in *Giant Concerts*⁶ and the subsequent ruling in *WDR Earthmoving*⁷. Both judgments

¹ Rule 6(12).

² *Mogalakwena Local Municipality v Provincial Executive Council, Limpopo and Others* [201] 4 All SA 67 (GP) at paragraphs 64 and 65

³ See Hoexter *Administrative Law in South Africa* 2 ed (Juta & Co, Cape Town 2012) at 488: The issue of standing is divorced from the substance of the case. It is therefore a question to be decided *in limine* [at the outset], before the merits are considered.

⁴ *Rodpaul Construction CC t/a Rods Construction v Ethekwini Municipality & others* [2014 JDR 1122 (KZD)] ("*Rodpaul Construction*")

⁵ Paras: 29, 30, 32 and 43 of *Giant Concerts* read with paras 15 and 16 of *WDR Earthmoving*

⁶ *Giant Concerts CC v Rinaldo Investments (Pty) Ltd and Others* (CCT 25/12) [2012] ZACC 28; 2013 (3) BCLR 251 (CC) (29 November 2012) ("*Giant Concerts*")

⁷ *WDR Earthmoving Enterprises and Another v Joe Gqabi District Municipality and Others* (392/2017)

confirmed that a non-responsive tenderer retains standing to challenge a tender if the award affects its personal interests. In my view this is the position irrespective whether an unsuccessful and/or non-responsive tenderer wishes to challenge the decision by way of an administrative review or launch interim interdictory proceedings. I cannot follow *Rodpaul Construction* as I am bound by the Constitutional Court decision of *Giant Concerts* and the Supreme Court of Appeal judgement of *WDR Earthmoving*.

10. The applicant therefore has standing to seek the review and setting aside of the decision to declare its tender offer as non-responsive, and also the award of the tender to Resource Innovations. It follows that it also has standing to pursue interim interdictory relief linked to its review right that it hopes to vindicate in the subsequent review.

Preliminary issues

11. Before addressing the legal principles regarding interdicts, I must resolve two preliminary issues raised on the papers and during argument.

Declaratory relief in respect of the defective notice

12. In its notice of motion, the applicant initially sought an order declaring that the early cancellation notice dated 5 July 2024, issued by the City, was unlawful and invalid. The applicant's issue with the notice was its non-compliance with the terms of the agreement between the parties. The notice provided only two months' notice for the termination of the agreement (i.e., the end of September 2024), whereas the parties had agreed to a three-month notice period (i.e., the end of October 2024) from the date a new contractor would be appointed.
13. By the time the interdict was argued, the applicant no longer pursued the declaratory relief regarding the notice with much vigour. However, the

applicant did not concede that the issue was moot, arguing that the 5 July 2024 notice, by reliance on *Oudekraal*⁸, remained valid until set aside by a court. I disagree with the applicant's categorisation of the letter and instead endorse the respondents' position that the 5 July 2024 notice does not constitute administrative action. The fact that the original contract between the parties stemmed from an administrative process does not transform the notice into administrative action or a decision. The relationship between the applicant and the City was governed by principles of contract law, and the notice was issued in accordance with that contractual relationship⁹.

14. Therefore, as the notice does not constitute administrative action or a decision, the City was entitled to withdraw the defective notice and issue a new compliant one, which it did. As a result, the relief sought concerning the defective notice is moot.

Applicant to continue to perform the work – par 3.2 of notice of motion

15. As mentioned, the applicant is the incumbent service provider under an agreement concluded with the City. That agreement is set to terminate on 30 October 2024, and the City has given the applicant three months' notice to vacate the Kraaifontein MRF.
16. During argument, I expressed the view that, in the context of this matter, I was not inclined to grant relief that would interfere with the City's functions. *Mr. De Waal* SC acknowledged that the relief was sought merely to give the City the option to continue using the applicant's services at the Kraaifontein MRF if the interdict was granted, pending the finalisation of the review. However, without conceding, the relief *Mr. De Waal* took the position that the applicant did not need this specific relief for the interdict to succeed, a stance with which I agreed.

⁸ *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA)

⁹ Based on the authority of *Government of the Republic of South Africa v Thabiso Chemicals (Pty) Ltd* 2009 (1) SA 163 (SCA); [2009] 1 All SA 349 (SCA) par 18 read with *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others* 2011 (3) SA 1013 (SCA) par 18 further read with para 9 – 10 of *Logbro Properties CC v Bedderson NO and Others* 2003 (2) SA 460 (SCA).

17. In my view, in a matter like this, a court should not interfere with the executive powers and duties of a state functionary or organ of state by selecting a contracting party to continue the work, even if an interdict preventing the implementation of the awarded tender is granted. The two scenarios can coexist: a court may issue an interdict halting the implementation of the tender without ordering that the incumbent continue. This approach allows the court to avoid overstepping into the functionary's domain while granting the functionary the discretion to either request the court to allow the incumbent to continue providing services to prevent a disruption or make other interim arrangements to ensure the continuity of service or of the project.
18. Furthermore, although rare, there may be instances where a court grants an interim interdict staying the implementation of a tender while simultaneously issuing an order that effectively selects a contracting party for the state functionary to continue the work pending the review. This might occur when the tender relates to a specific, time-limited project and there is a significant risk of irreparable harm to the public due to a potential service interruption. It could also apply where there is clear evidence of gross, obvious, and clear infringements of the incumbent's administrative rights, akin to the "clearest of cases" test endorsed by the Constitutional Court¹⁰.
19. In this matter, the City has not requested the applicant to continue rendering services if the interdict is granted. Instead, the City has indicated its preference for the successful tenderer to assume its duties. Additionally, the tender relates to an ongoing service and is not project-specific or time-limited. The record shows that the City has used external service providers for at least the past 14 years, and it will likely continue doing so unless it chooses to bring the service in-house.
20. Therefore, the fact that Resource Innovations will begin and continue providing services at the Kraaifontein MRF from 1 November 2024 should not

¹⁰ *National Treasury*

affect the applicant's review rights or its ability to obtain an effective remedy should the review succeed. Lastly, even under a generous interpretation of the applicant's complaint regarding its treatment during the tender process, I cannot find any gross, obvious, or clear infringement of administrative rights that would meet the 'clearest of cases' standard.

21. I therefore find that granting the relief in paragraph 3.2 of the notice of motion would infringe upon the City's powers and violate the principle established in *National Treasury*¹¹.

The legal principles – interim interdicts

22. To determine whether the applicant has made out a case for an interim interdict, the well-established principles set out in *Setlogelo*¹² and later refined in *Webster*¹³ and *Gool*¹⁴ provide a useful framework. These principles have been consistently applied, even in the context of South Africa's changed constitutional dispensation, as confirmed in *National Treasury*¹⁵.
23. The applicant must demonstrate that it has a *prima facie* right. This right need not be established definitively, but there must be sufficient evidence of its existence to warrant protection, even if it is open to some doubt.
24. The next requirement is that the applicant must show a well-grounded apprehension of irreparable harm. This harm must be of a kind that cannot be adequately remedied by other means, such as monetary compensation, and must be likely to occur if the interdict is not granted. The test is objective, asking whether a reasonable person in the applicant's position, confronted with the same facts, would apprehend the probability of harm¹⁶. The harm

¹¹ *National Treasury and Others v Opposition to Urban Tolling and Others* 2012 (6) SA 223 (CC) par 64 ("*National Treasury*")

¹² *Setlogelo v Setlogelo* 1914 AD 221 ("*Setlogelo*")

¹³ *Webster v Mitchell* 1948 (1) SA 1186 (WLD) ("*Webster*")

¹⁴ *Gool v Minister of Justice and Another* 1955 (2) SA 682 (CPD) ("*Gool*")

¹⁵ *National Treasury*

¹⁶ *McIlongo v Minister of Law and Order* 1990 (4) SA 181 (E)

must also be of such a nature that waiting for final relief would render the applicant's position untenable.

25. Next, the balance of convenience must be weighed. This involves considering the prejudice the applicant will suffer if the interdict is not granted against the prejudice the respondent will suffer if it is granted. In addition to the parties' respective interests, the court must also consider any broader public interest, particularly when the respondent is a state functionary or organ. The stronger the applicant's prospects of success in the main application, the less the balance of convenience needs to favour the applicant. Conversely, if the applicant's case is weaker, a greater balance in favour of the applicant is necessary¹⁷.
26. Another important requirement is whether the applicant has an adequate alternative remedy. The interdict being an extraordinary remedy¹⁸, it should only be granted if no other effective remedy is available to the applicant. If another avenue of redress exists that would adequately protect the applicant's interests, the court should refuse the interdict.
27. In *National Treasury*, the court emphasised that the constitutional context adds an additional layer to the analysis. Where the right asserted is grounded in the Constitution, it may be redundant to question the existence of the right. Furthermore, when the respondent is a state organ, the balance of convenience must take into account the impact of the interdict on the constitutional and statutory powers of that organ, including any potential separation of powers issues. The court must carefully evaluate whether an interim order would unduly interfere with the functions of another branch of government and whether such an order is warranted in the circumstances.
28. Finally, even when all the requirements for an interim interdict are met, the court retains a discretion to grant or refuse the relief. This discretion must be exercised judicially, taking into account all relevant factors, such as the

¹⁷ *Olympic Passenger Service (Pty) Ltd v Ramlagan* 1957 (2) SA 382 (D)

¹⁸ *National Chemsearch (SA) (Pty) Ltd v Borrowman* 1979 (3) SA 1092 (T)

relative strength of the parties' cases, any undue delay in bringing the application, and the public interest. Importantly, if any one of the four requirements is not satisfied, the court has no discretion to grant the interdict¹⁹.

29. These considerations are not isolated; they are interrelated and must be considered holistically. For example, if the applicant's prospects of success are strong, less reliance may be placed on demonstrating the balance of convenience²⁰. Conversely, if there is uncertainty regarding the applicant's right, the need to demonstrate irreparable harm and a favourable balance of convenience becomes more significant. The court must assess the affidavits and evidence as a whole, considering all the factors in their proper context.
30. With these considerations in mind I now turn to the evaluation of the applicant's case for an interim interdict.

Evaluation

31. Based on the submissions and the case presented in the papers, I will focus on three of the four requirements for an interim interdict: the applicant's *prima facie* right, irreparable harm, and the balance of convenience.

Prima Facie Right

32. In support of the *prima facie* right requirement the applicant asserts that its right is anchored on the allegation that the City's tender process was flawed and violated its right to a fair, transparent administrative action. The contention was that the interim relief is necessary to protect the applicant's rights under PAJA²¹ and section 217 of the Constitution. The argument went further that if the interdict is not granted the review may be rendered moot in the sense that the applicant may not be able to effective relief in the review.

¹⁹ *Knox D'Arcy Ltd v Jamieson* 1996 (4) SA 348 (A)

²⁰ *Olympic Passenger Service (Pty) Ltd v Ramlagan* 1957 (2) SA 382 (D)

²¹ Promotion of Administrative Justice Act 3 of 2000 ("PAJA")

33. Except referencing the rights under PAJA and s 217 of the Constitution nothing else is said to give substance to the *prima right* on which the applicant relies. The respondents' counsel therefore rightfully enacted reliance on the Constitutional Court dicta in *National Treasury* that a *prima facie* right in the context of an interim interdict must be more than just the right to approach a court for review; it must be a right that, if not protected by an interdict, would result in irreparable harm.
34. On closer scrutiny it appears as if the applicant's claim that it had established a *prima facie* right requires more focus. Firstly, the applicant contends that its review right will ring hollow as there is not a damages remedy²², whether for out-of-pocket expenses or lost profits, even if it should succeed with its review. So, the right the applicant is relying on is the potential of a future ineffective relief in the review. To bolster this argument the applicant relies on the allegation that the start-up costs for implementation of the tender will be in the region of R 15 million. The applicant extrapolates this investment to also apply to Resource Innovations and asserts this would make it difficult for Resource Innovations to recoup its investment should the tender be reviewed and set aside in a few months from now. This, the applicant asserts, would further complicate the prospect of effective relief if the review succeeded as Resource Innovations would argue at that stage that it should be allowed to continue to recuperate its investment. A similar basis is relied on in respect of the harm the applicant claims it will suffer.
35. It appeared to me that the applicant aimed at establishing a *prima facie* right similar to the approach adopted by Binns-Ward J (as he then was) in *City of Cape Town v SA National Road Agency*²³ (although the judgement was not relied on) where the learned judge said the following:

²² Unless there is fraud with the allocation of the tender as per *Minister of Finance v Gore* NO 2007 (1) SA 111 (SCA).

²³ *City of Cape Town v South African National Roads Agency Ltd and Others* (6165/2012) [2013] ZAWCHC 74 (21 May 2013) at para 78

*“71. Correctly identifying the right in issue as something distinct from the right to approach a court to vindicate it on judicial review is not to say that the right to an effective review remedy is not a relevant consideration. On the contrary, the Constitution contemplates that effective remedies should be available for breaches of constitutional rights, including, of course, the fundamental right to lawful, reasonable and procedurally fair administrative action. It is trite that the implementation of unlawful administrative decisions can sometimes lead to practical results that can render the remedy of judicial review so ineffectual that a court will decline to grant it; cf *Chairperson, Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others* 2008 (2) SA 638 (SCA). Thus evidence that the obtaining of an effective remedy will be thwarted if interim relief is not forthcoming is a relevant consideration under the concepts of irreparable harm and the *balance of convenience.*” [underlining added for emphases]*

36. A court should give due regard to an application for interim relief, barring that an applicant makes out a case for the other requirements as well, where reliance is placed on the review right premised on evidence that the remedy in the ultimate review will be rendered ineffectual. The court’s approach in *City of Cape Town v SA National Road Agency* is sensible, constitutionally infused, and is in my view in harmony with *National Treasury*.
37. Furthermore, the Constitutional Court in *Esorfranki*²⁴ has held that a tenderer in the position of the applicant is, in appropriate circumstances, entitled to claim for loss of profit under PAJA. Further, an order setting aside a decision and remitting it to the decision-maker for a fresh determination or, in exceptional circumstances, an order of substitution will suffice to vindicate the interests of both the public and the aggrieved tenderer. However, where the state’s misconduct is deliberate and dishonest and where substitution or remittal are not viable forms of relief, or where this relief will not suitably

²⁴ *Esorfranki Pipelines (Pty) Ltd v Mopani District Municipality* (CCT 222/21) [2022] ZACC 41; 2023 (2) BCLR 149 (CC); 2023 (2) SA 31 (CC)

remedy the loss sustained by a party, circumstances may require compensatory relief in order to ensure a just and equitable result.

38. However, in this matter the applicant has failed to present persuasive evidence to convince me that its review right will be rendered hollow and that it will not receive effective relief should it succeed with the review. The only facts alleged that addresses this consideration is the allegation that Resource Innovations would be so entrenched by the time the review is finalised and would not have recuperated its anticipated investment of R 15 million that a court will be reluctant to grant relief that would compensate the applicant for having lost out on the tender that was unlawfully awarded to Resource Innovation.
39. There are a few difficulties with this speculative proposition. Firstly, Resource Innovations denies that it will need or invest R 15 million as start-up costs. Apparently, it will require significantly less as it already has the resources to take over the role as service provider at the Kraaifontein MRF. Secondly, the applicant, on its own version, has been on this site managing the Kraaifontein MRF for approximately 18 - 24 months. It has not presented or made the case that it could not recuperate its investment of R 15 million over that period. The only conclusion I can draw from that is that either the R 15 million upfront investment claim is inflated or a party can in fact recuperate it in a shorter period than 3 years. Thirdly, the tender in this instance, although limited to 3 years, is not project specific similar to a construction project that has a start and an end and for which a new tender cannot be issued once the project is completed. In this instance the service is ongoing and will still be required by the time the review is finalised. It is also inconceivable that the City, if the review succeeds, would publish a tender for a shorter period of 3 years. Having regard to the nature of the services required at the Kraaifontein MRF it makes sense that a period of 3 years is appropriate. There is nothing to suggest that substitution or remittal will not be viable forms of relief by the time the review is heard. Having regard to the *Esofranki* decision the applicant, even in the absence of substitution or remittal being a viable option, should it succeed with the review, would not be out of a remedy.

40. Furthermore, in this division it is not an uncommon practice that the parties can expedite the review hearing to the extent possible by approaching the Acting Judge President for a preferent date. If appropriately motivated such a date can be provided which would limit an 'entrenchment' argument or a long delay in the finalisation of the review that would render effective relief nugatory.
41. I am therefore, not persuaded that the applicant's *prima facie* of the right to review a decision which is tied to the possibility of ineffective relief at the conclusion of the review, in this instance justify the grant of interim interdictory relief.
42. The other basis for establishing a *prima facie* right the applicant asserts that it has good prospects to succeed with the review. However, similar to the approach in *National Treasury*²⁵, although I heard full argument on the merits of the review grounds, I decline to be drawn into this analysis for three reasons. I have already found that the applicant has failed to establish a *prima facie* right that cannot be vindicated at the review. Secondly, it is not possible for me to make a finding on whether the review grounds will succeed at the review. Thirdly, as I am also of the view that the applicant has failed to make out a case on both harm and the balance of convenience it is not necessary to delve into the cogency of the review grounds. It is better left to the review court to decide.

Irreparable harm

43. For the reasons that follow I find that the applicant has failed to establish harm that requires protection pending the review. The case for harm on the papers unfortunately does not rise to a degree that requires protection pending the outcome of the eventual review.

²⁵ Par 48

44. In my attempt to assist the applicant to give better substance to its case to establish the requirement of a *prima facie* right by borrowing from the approach the court followed in *City of Cape Town v SA National Road Agency* I have dealt with the issue of the applicant's claims that it will not obtain effective relief when the review is eventually heard.
45. In my view the applicant's difficulty in this matter is that its harm is difficult to identify as a result of the nature of the tender. This is not a situation where the tender is of such a nature that it would run its course by the time the review is heard and decided on. This is also not analogous to a construction work whereby the time the review is adjudicated it would be impractical or pointless for a fresh contractor to take over the works. This tender is of ongoing nature, and should the applicant be vindicated in the review, the tender would be set aside and should it be able to then take part in the fresh tender proceedings.
46. The applicant has therefore failed to establish harm that is worthy of protection pending the finalisation of the review. Considering my finding, it is not necessary to consider or pronounce on the issue of separation of power harm.

Balance of Convenience

47. In respect of this requirement, the applicant submits that the balance of convenience favours the applicant, the public interest and the rights of its 283 employees, many of whom would face retrenchment if Resource Innovations would take over the Kraaifontein MRF on 1 November 2024. The applicant also relies on the claim that it would be unfair to expect Resource Innovations to start the tender and a few months from now have to lose its investment if the review succeeds.
48. The City and Resource Innovations argue that the balance of convenience rather favours the contract to proceed on 1 November 2024. They emphasise the public importance of the services covered by the tender and the potential financial implications for the City if the implementation of the tender is

delayed. The respondents also highlight that the applicant has the option to pursue a review on an expedited basis, which would mitigate any potential prejudice.

49. Having regard to what I have found that the applicant's review right is well protected and can be vindicated the balance of convenience weigh heavy against granting an interdict. The fact that 283 employees may lose their livelihoods is a relevant consideration, but the scale still tips in favour of the respondents. Resource Innovations will take over a significant amount of these employees as it is required by the tender, also, the applicant could not have expected to continue with the contract post November 2024. As soon as the call for tenders was published, the applicant should have been prudent and inform its employees that alternative measures had to be implemented to prevent large scale retrenchments.
50. The City also contended that granting the interdict would prevent Resource Innovations from performing its obligations under the validly awarded tender, which would also allow the City to achieve cost savings of approximately R 600,000 per month. Resource Innovations echoes these concerns, arguing that it would suffer significant financial harm if it is prevented from proceeding with the contract it has already begun preparing for. The parties are in different positions. The applicant should have and had months to prepare for the possibility that it may have to leave the site at Kraaifontein MRF. Resource Innovations only had a few months since the outcome of the appeal to prepare the take-over. It is now ready to do so, and it will be highly prejudicial to expect it to unwind that clock.
51. For all these reasons I am not persuaded that the balance of convenience favours the applicant for the granting of an interdict.

Costs

52. On costs Resource Innovations requests a punitive cost order, arguing that the applicant has attempted to mislead the court by selectively presenting

facts and omitting critical information that undermines its case. Resource Innovations also took issue that the applicant initially built its urgency on the basis of a cancellation letter, which the relief in respect thereof was no longer pursued by the time of the hearing.

53. The applicant relying on *Biowatch*²⁶ argues that no costs should be granted as it was asserting a constitutional right, while the respondents argue that the application, if dismissed, does not attract the protection of *Biowatch*. Some issue was raised about whether *Biowatch* applies at interim proceedings stage. In my view it is irrelevant whether a litigant applies for interim or final relief. The court should be guided by the principle in that *Biowatch* endorses. This will apply to any legal proceeding regardless of whether its interim or final.
54. Although the applicant's case was fundamentally aimed at obtaining an interim order to seize the implementation of the tender, the matter still turn on having regard to the constitutional issue relevant in a review application. The interim interdict was squarely premised on the basis of the applicant not being able to obtain an effective remedy in the review. I am thus satisfied that although the application had many difficulties to overcome it is directly associated with the main relief that is a constitutional issue. There is also no allegation that the applicant's conduct was of such a nature that it should be deprived of *Biowatch* protection²⁷.

Conclusion

55. In conclusion, I find that the applicant has not established a sufficient basis for the granting of interim relief. While the applicant has raised concerns about the fairness of the tender process, these concerns can be adequately addressed through the review process without the need for interim relief. The

²⁶ *Biowatch Trust v Registrar, Genetic Resource* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) ("*Biowatch*")

²⁷ *SMEC South Africa (Pty) Ltd v City of Cape Town and Others; SMEC South Africa (Pty) Ltd v City of Cape Town and Others* (8277/2021;14097/2021) [2022] ZAWCHC 131 (23 June 2022)

applicant is also protected from not being in a position at the end of the review that it will not have an effective remedy available to it.

56. Accordingly, I make the following order:

- 1. The applicant's non-compliance with the Uniform Rules of Court relating to forms, time periods and service is condoned and the applicant is granted leave to move this application on an urgent basis.**
- 2. The application for interim relief ('the Part A relief') is dismissed with the parties to bear their own costs.**
- 3. Part B of the application is postponed *sine die*.**

A MONTZINGER
Acting Judge of the High Court

Appearances:

Applicant's counsel:	Mr. De Waal SC
Applicant's attorney:	Rubenstein Attorneys
First Respondent's counsel:	Mr Rosenberg SC, Mr. Toefy
First Respondent's attorney:	Cluver Markotter Inc.
Second Respondent's counsel:	Mr. Adam Brink
Second Respondent's attorney:	Harmse Kriel Attorneys