REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

CASE NO: 11183/2024

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO THE JUDGES: ~~YES~~/NO

(3) REVISED: Yes

DATE: 23 July 2025

SIGNATURE:

In the matter between:

NGARAGA PROPERTIES (PTY) LTD	**APPLICANT**
AND	
MEC FOR EDUCATION, LIMPOPO PROVINCE	**FIRST RESPONDENT**
HEAD: LIMPOPO DEPRATMENT OF EDUCATION	**SECOND RESPONDENT**
NATIONAL PRIDE (PTY) LTD	**THIRD RESPONDENT**

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NATIONAL PRIDE (PTY) LTD	**THIRD RESPONDENT**

Delivered: This judgment is handed down electronically by circulation to the parties through their legal representatives' email addresses. The date for the hand-down is deemed to be **23 JULY 2025**.

JUDGMENT

MASHIFANE AJ:

INTRODUCTION

1. This is an application for an interim interdict pending the finalisation of the review application brought by the applicant against all respondents under the same case number. For purpose of this judgment the first and second respondent will be referred to as the department. The applicant seeks review of the department's decision to award a tender to the third respondent on two main grounds. Firstly, that the applicant was unfairly excluded during the functionality stage of evaluation and secondly that the hence the third respondent was a party to a joint venture known as **National Pride/Life Moments Holdings (Pty) Ltd JV** (Joint Venture) which was a competitor in the tender process then the third respondent should have discussed/consulted and made some agreements with the JV regarding the bid should have been disqualified from the tender process.

BACKGROUND

2. The department invited the interested parties to bid under bid number LDE/801/2024/25 for manufacturing, packing, warehousing and distribution of sanitary pads for girls in quintile 1-3 public schools and special schools in Limpopo Province for a period of three years.

3. The applicant and the third respondent were among other bidders who responded to the invitation and submitted their proposal. Unlike other companies, their bids together with that of **Fastol/Morgan Pillay Surgical Manufacturing JV (Fastol)** passed the preliminary stage and were subjected to evaluation on functionality.

4. During the adjudication process the BEC (Bid Evaluation Committee) disqualified the applicant and Fastol for inspection *in loco* for they were deemed nonresponsive in the functionality requirements. The third respondent as a successful bidder was eventually recommended to be awarded the tender.

5. On 26 August 2024 the third respondent and the department entered a written agreement in terms of which the third respondent was contracted to produce and supply sanitary pads to one hundred and ninety-six thousand girls in quantile one to three in public schools and special schools over a period of 36 months.

6. On 9 October 2024 the applicant instituted review proceedings in this Court seeking an order reviewing and setting aside the Department's impugned decision. The applicant requested the department in accordance with Rule 53 to dispatch a record of the decision sought to be impugned and the department failed to comply. The applicant then resorted to compel the department through an urgent application which was brought on 17 December 2024. The record was since received though the applicant avers that it is not a complete record.

7. On 15 January 2025 the applicant instituted this application on urgent basis seeking on order interdicting and restraining the respondents from taking further

steps to perform their respective obligations in terms of the service level agreement concluded on 26 August 2024 pending the review application.

8. At hearing of this application, I was informed that on 4 February 2025 the application was removed from the urgent roll due to fact that it consisted of more than 500 pages. The matter was brought before this Court as a special allocation on directive from the Judge President of this Division

FACTS

9. The tender document provided that for the bidder to qualify for inspection *in loco* it must demonstrate in the functionality criteria the existence of manufacturing plant and functional manufacturing equipment/machinery and failure to of the bidder comply with the bid requirements will result with the bidder not qualified for inspection *in loco*.

10. The terms of reference in these criteria read as follows:

> *"The bidder should submit coloured photos of the following:*
> *(a) "Existence of functional industrial equipment/ machinery (showing the serial numbers).*
> *(b) Proof of residence and/ existing signed lease (no intent lease will be considered)- (picture of the buildings showing the name of the tenderers company and physical address must be attached.) which must be the address on the S801 and must be the same as preferred address on CSD.*
> *(c) ....*
> *N.B all (a, band c) will be verified during inspection in loco to the address provided by the bidder as per item (b)"*

11. On 12 July 2024 the BEC concluded its first evaluation report and same was submitted to the BAC for adjudication. The report submitted to the BAC (Bid Adjudication Committee) indicated that the applicant could not qualify for inspection

in loco and was deemed nonresponsive. The grounds for exclusion were recorded as follows:

- *"Picture of the building does not show the physical address as per number (b) of functionality.*
- *Physical address on SBD1 does not correspond with the preferred address for an existing manufacturing plant on CSD printed by the Department."*

12. On 16/07/2024 the BAC referred the report back to BEC with instructions that the committee should include the inspection report.

13. The BEC revised its report to include the inspection report and same was resubmitted on 18/07/2024. The revised report by the BEC recorded the reasons for disqualifying the applicant for inspection in loco as follows:

- *"The Coloured picture of the building does not show the physical address of the bidder as per number (b) of the functionality.*
- *Physical address (stand 1[…], Limeroc business park centurion) on SBD1 preference address on CSD and lease agreement attached to the bid document is the same but the business profile indicates that "physical address and access to manufacturing plant to be provided (on request) to stakeholders with vested interest".*
- *The department requested the physical address through the advertised terms of reference and the bidder failed to provide as per number (b) of functionality which states that "Proof of residence and I existing signed lease (no intent lease will be considered) - (picture showing the name of the tenderers company and physical address on the SBD1 and must be the same as the preferred address on CSD. Failure of the bidder to submit (a) and (b) with the bid document will not be qualified for inspection. In loco.*

14. The applicant attached to the bid documents the following in attempt to comply with the requirements on functionality:

14.1 colour picture depicting the manufacturing machinery called "full servo sanitary pad making machine".

14.2 A separate colour picture of the serial number of the Machinery plant.

14.3 SBD1 form reflecting the business address of the applicant as stand 1[…], Limerock Business Park, Knoppieslaagte, Centurion, 0157.

14.5 CSD registration report reflecting the address as "stand 1[…], Limerock Business Park, Knoppieslaagte AH, Centurion, City od Tshwane, Gauteng, 0157.

14.6 COR 14.3 registration certificate issued by the Commissioner of Companies and Intellectual Property Commission reflecting the address as "Stand 1[…] Umeroc Business Park, Knoppieslaagte, Centurion, Gauteng, 0157.

14.7 A rent to buy lease agreement concluded between Dexalinx Property Investment & Development (pty) Ltd and the applicant dated 14 June 2023. The address provided on the lease agreement as the leased premises is described as "A Portion of The remainder of Portion 331 of the Farm Knoppjeslagagte, 385 in the Township to be known as Peach Tree Extension 24, Registration Division J.R, Province Gauteng, In extend of 8742sqm on Ext 24 Square meters.

14.8 The colour picture of the applicant's factory bearing the trading name of the applicant Lindiwe Sanitary Pads Branding without physical address.

15. The score allocated for functional manufacturing plant was 65 points subdivided as follows:

(a) 25 points for existence of the functional industrial equipment/machinery showing serial number.

(b) 15 points for proof of residents and/existing signed lease agreement residents and/existing signed lease agreement.

(c) 25 points for the practical demonstration process of manufacturing process of sanitary pad.

16. When scoring the applicant on functionality the BEG members allocated zero points as global score for both (a) and (b).

17. The allocation of points to the third respondent was subdivided as follows: 25 points on (a) and 15 points on (b).

PREFERENTIAL PROCUREMENT POLICY[1]

18. The evaluation process of tenders on functionality is regulated by Regulation 5 which reads as follows:

> 5(1) An organ of stated must state in the tender documents if the tender will be evaluated on functionality
>
> (2) The evaluation criteria for measuring functionality must be objective.
>
> (3) The tender documents must specify-
>
> (a) The evaluation criteria for measuring functionality;
>
> (b) The points for each criteria and, if any, each sub-criterion; and
>
> (c) The minimum qualifying score for functionality.
>
> (4)…(7).

PFMA SCM INTSRUCTIOIN No 03 OF 2021/2022[2]

19. On 31/03/2022 the Treasury published a document instruction titled PFMA SCM Instruction No 03 of 2021/2022 the purpose of which was to enhance the compliance, transparency and accountability in the procurement of goods and services.

20. The applicant avers that when evaluating the tender process, the department is required to evaluate SBD4 information provided by the bidder which is declaration by the bidder to the effect that the information provided was arrived at independently and without collusion with the other competing bidders.

REQUIREMENTS FOR AN INTERIM INTERDICT

[1] Preferential Procurement Policy Regulations, 2017
[2] Public Finance Management Act, 1 of 1999

21. It is trite law that in an interlocutory interdict the following requirements must be adhered to:

21.1 That the right subjected to the review in the main application and which it seeks to protect by means of the interim order is clear and if not clear, is prima facie established, though open to some doubt;

21.2 That if the right is only prima facie established, there is well grounded apprehension of an irreparable harm if the interim relief is not granted and it will ultimately succeed in establishing its right;

21.3 That the balance of convenience favours the granting of the interim relief, and

21.4 That the applicant has no other satisfactory remedy

22. In Setlogelo[3] the Court set the following as the classical requirements for an interlocutory interdict which were subsequently followed in many lines of cases:

(a) a *prima facie* right;

(b) a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted;

(c) a balance of convenience in favour of the granting of the interim relief; and

(d) the absence of any other satisfactory remedy.

23. Clayden J in ***Webster v Mitchell*** **1948 (1) SA 1186 (W)**, at 1189, stated as follows:

"... the right to be set up by an applicant for a temporary interdict need not be shown by a balance of probabilities. If it is "prima facie established though open to some doubt" that is enough ..."

24. The applicant's claim is that its prima facie right is founded in the provisions of Section 217 of the Constitution which requires that procurement legislation,

[3] Setlogelo v Setlogelo 1914 AD 221

regulations, and policies be implemented in accordance with a procurement system that is fair, equitable, transparent, competitive and cost effective.

25. The applicant asserts that there was substantial compliance with the functionality requirement and that the applicant should have been scored to the extent of its compliance. The documents submitted were enough to proof that there was a manufacturing plant in existence and the address would have been verified during the inspection in loco.

26. The department in its answering papers and during arguments before the court maintain that the process was fair and the applicants was excluded from functionality because it failed to comply with mandatory requirement with regards to coloured photo or picture of the manufacturing plant with the name and address of the applicant outside.

27. The department went further to aver that as on 12 of July 2024 there was no iota of evidence that the applicant if granted the bid was going to be able to provide and deliver the sanitary pads in respect of the bid. This averment is misplaced as it is based on the BEC's failure to allocate proportional score to the applicant.

28. If the applicant was not excluded at functionality stage, it would have participated in the whole process to the final decision. I have already indicated above that the first report by BEC date 12/07/2024 excluded the applicant at functionality stage and one of the reasons was that the applicant could not proof existence of the manufacturing equipment or machinery. This ground was excluded from the second report.

29. The BEC was fully aware or ought to have been aware of the requirements under Regulation 5 in relation to scoring or allocation of points, and it cannot be explained or understood why the criteria used to allocate points to the third respondent was not used in respect of the applicant. The failure by the department to fully comply with paragraph (b) of Regulation 5 (3) which is mandatory renders the evaluation process unfair and violated the applicant's right to fair and equal evaluation process.

30. The applicant as a tenderer has right to participate in a process that is fair transparent and above all lawful irrespective of whether it was ultimately going to be awarded the tender or not. In my opinion the fact that the applicant failed to attach a coloured photo depicting the address cannot be the only reason which on its own disqualified the applicant for the entire bid.

31.1 conquer with the applicant that the absence of the address on the coloured photo is something that could have been cured during the verification process when inspection in loco was conducted. The documents submitted by the applicant were enough to prove that there was a factory and manufacturing plant in existence. The applicant did not receive a fair, objective and equal treatment when points were allocated.

32. The second ground of review by the applicant is the failure of the department to disqualify the third respondent from the bid process when it became aware that on the information at its disposal there was a collusion between the third respondent and the Joint Venture. This argument rest of the fact that the third respondent and Life Moments Holding (pty) Ltd entered into a joint venture called National Pride/life moments Holdings (pty) Ltd JV. The bid documents of the third respondent and the JV were signed by the same person including the pricing.

33. The introduction of Instruction 03 of 2021/2022 was aimed at among others avoiding as situation where bidders would collude on the bid requirements giving the colluding parties unfair advantage to the detriment of others. Allowing bidders to participate both as individual entity and in a form of joint venture would amount to unfair dual advantage towards other bidders and defeat the purpose of the Instruction and contravenes Sections 217 of the Constitution. The third respondent's tender document and that of the JV were completed and signed by same person who is the manager of the third respondent. The third respondent failed to dispute this allegation serious as they are and the department is in no position to answer to these allegations.

34. For the applicant to succeed in an application for an interim relief, the applicant must show that the harm to be suffered if the order is not granted would be irreparable, the balance of inconvenience must favour the applicant and there is no alternative remedy, and the order granted should not result with separation of powers harm.

35. A reasonable apprehension of irreparable harm, which must be anticipated and ongoing, implies that if the relief is not granted the effects of the harm would be irreversible. The test for apprehension is an objective one requiring the applicant in the founding affidavit to show that objectively adjudicated, its assertion of apprehension is not just a fear, but well-grounded apprehension. The facts must be set out in such a way that the Court can determine by itself that there is a reasonable apprehension of injury. The question is would a reasonable man faced with the similar facts might consider it to be a reasonable apprehension of injury.

36. The applicant submitted that there is an injury committed or reasonably apprehended which commenced when the department unlawfully awarded the bid to the third respondent and perpetuated when the department concluded the contract with the third respondent giving effect to the award. The department did not specifically answer to this averment in its answering affidavit save to state that the awarding of the tender to the third respondent was done in compliance with section 217 of the Constitution, Supply chain Management Policy, PFMA, National Treasury Regulations and the Terms of Reference.

37. In **Webster v Mitchell** *supra*, it was sated that the balance of convenience goes as far as to state that if there is a greater possible prejudice to the respondent an interim interdict will be refused.

38. It was submitted on behalf of the department that the agreement was already implemented, and the interdict is likely to affect the young girls and may find themselves having to be absent from school due to lack of sanitary pads and that the order will amount to the separation of power harm. In essence the department's submission is that if the order is granted the harm to be suffered by the girls in the affected public and special schools would be irreparable.

39. The applicant submitted that given the fact that the delivery of the sanitary pads will occur as and when required or on quarterly basis, an order interdicting further performance under the contract will not bring the department's programme to a halt. The submission is that the department can procure the sanitary pads by means of obtaining lawful quotations or deviation basis.

40. In ***Maree Projects*** **(pty) Ltd and another v City of Johannesburg Metropolitan Municipality and Another (33992/2019) [2019] ZAGPJHC 540:[2020] 2 All SA157 (17 December 2019) paragrap79** Siwendu J said that "... the *court should be careful not to allow the organ of state to use the veil afforded to it by the doctrine of separation of powers to implement a decision it is alleged to have been taken unlawfully*." The matter at hand has nothing to do with separation of powers, the applicant's contention is that the bid was unlawfully awarded to the third respondent which is distinguishable from the facts in OUTA[4] which the department is basing its objection on.

41. The court has considered the impact the interim interdict would have on the department, but I'm not convinced that the department would not be able consider deviation given the fact that the production and delivery is done quarterly giving the department enough time to consider alternative method of service delivery. The applicant has put forward a compelling case for the relief sought and if the applicant latter succeed on review and by then the substantial part of the contract have been performed then the applicant's victory will be academic. The harm to be suffered by the applicant will then be irreparable. The department on the other hand has few options at its disposal which includes reconsidering its decision to award the tender to the third respondent.

42. I have carefully considered all submissions and legal authorities applicable to the facts before me find that the under the circumstance of this case the balance of convenience heavily favours the applicant. The interdict would not result with

[4] National Treasury and Others v Opposition to Urban Tolling Alliance and Others (CCT 38/12) [2012] ZACC 1; 2012(6) SA (CC) 2012 (11) BCLR 1148 (CC) (20 September 2012)

separation of powers harm and there is no alternative remedy available to the applicant. The application has to succeed with costs.

ORDER.

43. I therefore make following order:

a. The application for interim interdict succeeds

b. Pending the finalisation of the final determination of the applicant's review application pending before this Court under Case No 11183/2024 the respondents are hereby interdicted and restrained from taking any further steps to perform their respective obligations in terms of the written contract concluded between the Limpopo Department of Education and the third respondent on 26 August 2024 to wards Bid No: LDE/B01/2024/25.

c. The first respondent is ordered to pay the applicant costs as between party and party scale B.

RS Mashifane J
Acting Judge of the High Court,
Limpopo Division, Polokwane

APPEARANCES:

For the Applicant: Adv Maphutha instructed by Moeti Kanyane Inc

For the first and Second respondents: Adv Tshitereke instructed by the Office of State Attorney Polokwane

Judgment reserved: 26 March 2025

Judgment handed down: 23 JULY 2025