REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

CASE NO: 13927/2024

(1) REPORTABLE: YES/**NO**
(2) OF INTEREST TO THE JUDGES: YES/**NO**
(3) REVISED.
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……………………

DATE………… SIGNATURE…[redacted]

In the matter between:

MOTHOKWA TRADING ENTERPRICE	Applicant
And	
MEC FOR EDUCATION LIMPOPO PROVINCE	First Respondent
HEAD OF DEPARTMENT OF EDUCATION LIMPOPO PROVINCE	Second Respondent
MEC FOR FINANCE: LIMPOPO PROVINCE	Third Respondent
CHAIRPERSON OF THE BID SPECIFICATION COMMITTEE	Fourth Respondent

CHAIRPERSON OF THE BID ADJUDICATION COMMITTEE	Fifth Respondent
CHAIRPERSON OF THE BID EVALUATATION COMMITTEE	Sixth Respondent
REBONI PROPRIETARY LIMITED	Seventh Respondent
SPLINTECH PROPRIETARY LIMITED	Eighth Respondent
AMANTLE PROPRIETARY LIMITED	Ninth Respondent
BANKOT DISTRIBUTORS PROPRIETARY LIMITED	Tenth Respondent
INKABI HOLDINGS PROPRIETARY LIMITED	Eleventh Respondent
MPT MASHELE PROPRIETARY LIMITED	Twelfth 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 **31 JULY 2025**.

JUDGMENT

Makoti AJ

Introduction

[1] Makgoka JA recently had occasion in *Magudumana v Director of Public Prosecutions, Free State and Others*[1] to borrow from an excerpt in *Mohamed v President of the Republic of South Africa (Society for the Abolition of the*

[1] Magudumana v Director of Public Prosecutions, Free State and Others (1196/2023) [2025] ZASCA 62 (16 May 2025) at para [115].

Death Penalty in South Africa and Another Intervening)[2] (Mohamed) to reflect on established jurisprudence to reach a conclusion that the state cannot be allowed to act unlawfully. That much must be accepted as our constitutional imperative.

[2] Mohammed itself had taken a leaf from the writing of an American justice, Judge L D Brandeis, who held in a dissenting judgment in *Olmstead et al v United States*[3] that:

> **"Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the laws scrupulously. Our Government is the potent, the omnipresent teacher. For good of for ill, it teaches the whole people by its example. … If the Government becomes the lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. …"**

[3] Though the judgment in Olmstead was delivered many years ago, the principle espoused by Judge Brandeis and the ripples of his erudite written words have reached our shores as we can deduct from Mohamed and a plethora of constitutional decisions. Indeed, our constitutional democracy demands of government to act with fidelity to the people.[4] With that said, I will later in this judgment venture into the specifics of the case before me.

[4] Legality is at issue in this application, which is incident of the rule of law. The case involves public procurement. The Applicant, Mothokwa Trading Enterprise (Mothokwa), which was one of the bidders for a tender that was advertised and subsequently cancelled by the Department of Education (the

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2 Mohamed and Others v President of the Republic of South Africa (Society for the Abolition of the Death Penalty in South Africa and Another Intervening) 2001 (3) SA 893 (CC) at para 68.

3 Olmstead v. United States, 277 U.S. 438 (1928).

4 Du Bois, F. Developing Good Faith: Equality, Autonomy and Fidelity to the Bargain, Constitutional Court Review Vol. 12, 223-259, 2022.

Department) for the Limpopo Province, contends that the Department acted unlawfully in cancelling the tender, subsequently embarking in a process of deviation. The cancellation appears to have been formalized after the tender validity period had lapsed.

The relief sought by the applicant

[5] The application is segregated into Part A and Part B. It came before me on urgent basis. Given the time lapse since I heard arguments, I do not concern myself with urgency in this judgment. I proceed to deal with its merits. In terms of Part A the Applicant seeks urgent interdict and the specific prayer reads in the following manner:

> **"2. That, pending the final determination of the applicant's review application pending in this court under case number 13927/2024 the Department and that seventh to the eleventh respondent be and are hereby interdicted and restrained from taking any further steps to perform their respective obligations in terms of the written contract concluded by them pursuant to the decisions sought to be reviewed."**

[6] Axiomatically, from the above extract, Mothokwa is seeking an interim interdict against to stop the continuation with the works under the tender or contract, as the case may be. Though the requirements of interim interdicts are well-known, I will take an opportunity to deal with them below, but after briefly discussing the facts.

The facts of the application

[7] On 20 and 23 October 2023 the Department published a tender on the website and government bulletin. The tender was published under bid numbers **LDE/B05/2023/24** for the manufacturing and delivery of school furniture for schools in the province.

[8] The tender was initially to lapse on 14 May 2024. Before it lapsed, on 13 May 2024 it was extended by the Department. The new date of lapsing was then set as 14 July 2024. The tender was not awarded at close of business on that date. Eventually, the Department cancelled the tender, according to it on 02 July 2024 citing reasons that the tender specifications included a specification that had been declared unconstitutional.

[9] The cancellation was formally published in the tender bulletin on 16 August 2024, which was published on 25 August 2024. I do not at this stage concern myself with the reasons for the cancellation of the tender.

[10] In the answering affidavit the Department accepts that the extension of the tender was not valid. That is not an issue that confronts me in this application. It also alluded to the fact that there were problems with the tender which were discovered during the evaluation processes. At paragraph 35 the answering affidavit states that:

> **"The Department had to urgently appoint a supplier for the manufacturing and delivery of school furniture for primary and secondary schools and teachers in the Limpopo Department of Education for a period of three years."**

[11] Presumably, because of the pressure under which the Department found itself in at the time, it resorted to participate in a tender or contract from a similar Department in a sister province, the Department of Education in the North West Province (NW Education). Such pressure arose from the purported need to repair a school that had a roof blown out by a storm. The Applicant argued that the allegation was patently untrue. I only limit myself by saying that the allegation was not substantiated. The tender from the North West Department was published under numbers EDU01/23 NORTH WEST.

[12] The Department addressed a letter to the North West Education on 04 September 2024 requesting permission to participate in its tender. This procedure was done, according to the Department, in line with the provisions of regulation 16A6.6 of the Treasury Regulations. In pith, the Department deviated from the mandatory procurement procedures. Permission to participate was granted on 17 October 2024.

[13] In the Department's view it was satisfied that the procurement processes that were followed by the NW Education were lawful and it then wrote to the service provider on 21 October 2024, also to request its consent. Consent was granted on 14 November 2024 upon which the Department appointed it to manufacture and supply it with school furniture. Yet, it only stated that it had acquired a number of documents which *inter alia* included reports from NW Education bid committee and the Service Level Agreement (SLA). Whether the documents were considered and in what way is not reflected in the answering affidavit.

[14] Then, because of that, the Department submitted in its papers that it had fulfilled the requirements in terms of regulation 16A6 to participate in the tender. There is no indication was provided as to whether by participating in the tender from the NW Education was cost effective, which is one of the requirements for participating in a tender from another organ of State.

Regulation 16A6.6 of the Treasury Regulations

[15] I thought it apposite to provide the details of the regulation verbatim, as follows:

> **"The accounting officer or accounting authority may, on behalf the department, constitutional institution or public entity, participate in any contract arranged by means of a competitive bidding process by**

any other organ of state, subject to the written approval of such organ of state and the relevant contractors."

[16] I have had regard to tow decisions, *Blue Nightingale Trading 397 (Pty) v Amathole District Municipality* and *Excellerate Services v Umgeni Water and Others* in which the courts emphasized that the constitutionality of the exemption is a fact based enquiry. The contract that was concluded between an organ of state and contractor must comply with all procurement legislation. That holds true to the contract in this application, in which participation was sought, by the Department. No just that, but the contract ought to have existed when the decision to participate was taken.

[17] To the point made by the applicant, this is a special exemption to the procurement processes which must still follow the rules. What stands out is that the second organ of state, in this case the Department, must become a party to the same contract. This entails that the terms and conditions of the second contract must be the same as that of the first contract, by the NW Education, including in respect of the price and its duration.

[18] The purpose of this form of procurement, is to avoid *inter alia* duplication of costs by not initiating a new tender process, but without flouting the constitutional imperatives of procurement processes. It stands to reason therefore that if the terms and conditions are not the same, then the constitutional imperatives will not have been met. Such an exemption will be unlawful and liable to be set aside. These provisions are not discretionary but peremptorily talk to compliance requirements as set out in the relevant provisions of the law.

[19] Regulation 16A6.6 is always to be applied within the broad ambit of section 217(1) of the Constitution. It does not exist in a vacuum. In *Minister of Social Development v Phoenix Cash & Carry Pmb CC,* the court conducted a brief

survey of the circumstances which would offend against section 217(1) and arrived at the following conclusion:

> **"a process which lays undue emphasis on form at the expense of substance facilitates corrupt practice by providing an excuse for avoiding the consideration of substance; <u>it is inimical to fairness, competitiveness and cost effectiveness</u>."** [Emphasis added]

[20] In this case Mothokwa relied on *Allpay Consolidate Investment Holdings (Pty) Ltd & Other Chief Executive Officer of the South African Social Security Agency and Other (Corruption Watch and Centre for Child Law as Amici Curiae)*[5] it was affirmed that the entire procurement framework constitutes a full set of which are legally binding on the organs of state.

[21] The Department referred the court to form SBD7.2 to evidence the fact that the service provider has consented to its participation in the tender. The service provider in question is Reboni Furniture Factory (Pty) Ltd, the seventh Respondent. The SLA with the NW Education was signed on 01 October 2024. This is a point that the Applicant has raised, contending that participation cannot be in a tender but should be in a contract, with no straight answer from the Department.

[22] What kickstarted the participation in the NW education tender or contract was an internal memorandum that was dated 27 August 2024. The memorandum reached the Head of Department who approved it on 03 September 2024. Paragraph 2 of the memorandum reads thus:

> **"The LDoE school furniture tender expired on 03 November 2023, and it was further extended to 29 February 2024. The replacement contract was advertised in September 2023. The bidding process is cancelled. Currently there is no contract in place to purchase school furniture for Grade 1 to 12. The school furniture budget of 2024/25 financial**

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5 CCT 48 [2014] ZACC.

> **year is R50m. The funding is for two programmes which are supplying Grade "R" furniture and manufacturing Grade 1 to 12 school furniture."**

[23] Then, at paragraph 4 the memorandum provided an explanation for seeking to participate in a contract that was procure elsewhere. It reads in this fashion:

> **"The department is on the verge of losing the school furniture budget due to non-utilization if not underutilization of school furniture budget which is R50m in this current financial year."**

[24] The reason provided here is incongruent to the case made by the Department in the answering affidavit. In the affidavit a case is made that the participation was necessitated by an emergency which the Department found itself facing. The source document says nothing about an emergency. What the memorandum motivated for was that the Department should avoid losing its budget of R50m.

[25] A separate memorandum was submitted to the Head of Department by the Department SCM. In this memorandum the HOD is requested to consider and approve the earlier one. The memorandum was also signed for approval by the HOD on 03 September 2024. At no point did the two memoranda deal with the alleged situation of emergency. On these dates there was no SLA between the NW Education and Reboni, not even when the Procurement Director of the Department approved an internal memorandum on 29 August 2024. I am aware that the SLA backdated the effective date of the contract to 01 June 2024.

[26] The applicant is aggrieved by the cancellation of the tender after it had expired. It is common cause that the tender had an initial expiry date of 14 May 2024. On 13 May 2024 the Department extended the validity period by

a further three months. The new expiry date became 14 July 2024. It is the applicant's case that the tender was not validly extended as the Department had not obtained concurrence of all bidders.

[27] An answer that was offered for the allegation that the Department had failed to secure concurrence of the bidders before it extended the tender was that only a few bidders had responded to its notice encompassing the request. It is so that the request for bidders' concurrence was dated 13 May 2024, though it is not clear that it had reached the attention of all the bidders. I accept that the decision to extend the tender at that stage was not well conceived. Self-evidently, which is a matter of common cause, the tender lapsed even after it was so extended.

[28] In of *Telkom SA Limited v Merid Trading (Pty) Ltd*[6] where the following was said:

> **"As soon as the validity period of the proposals had expired without the applicant awarding a tender, the tender process was complete – albeit unsuccessfully – and the applicant was no longer free to negotiate with the respondents as if they were simply attempting to enter into a contract. The process was no longer transparent, equitable or competitive. <u>All the tenderers were entitled to expect the applicant to apply its own procedure and either award or not award a tender within the validity period of the proposals. If it failed to award a tender within the validity period of the proposals it received, it had to offer all interested parties a further opportunity to tender</u>. Negotiations with some tenderers to extend the period of validity lacked transparency and was not equitable or competitive. In my view the first and fifth respondent's reliance only on rules of contract is misplaced."** [Emphasis added]

[30] This was further expounded in of *City of Ekurhuleni Metropolitan*

6 2011 JRD 0004 (GNP).

Municipality v Takubiza Trading & Projects CC and Others[7] and where the court said the following:

> **"the validity period is indeed one of the fundamental 'rules of the game', being the period within which the process should be finalised. To extend the tender validity period, <u>the consent of all the participants to the tender process is required</u>. Unless there is a timeous request and favourable response from all the tenderers prior to the expiry of the tender, the tender comes to an end."** [Emphasis added]

[31] It is glaring that there was no timeous request for bidders to concur to the extension. I am not called to determine the legality or validity of the extension and I do not attempt to do so.

[32] There is an additional point to observe in this application. That is that the internal memoranda within the Department labelled the contract or tender from the NW Education as transversal. The applicant contended that this was incorrect. I agree. The tender and contract from the NW Education were not transversal.

[33] Nothing turns on the labelling of the nature of the contract. But there might be a greater point which requires scrutiny. The question concerns the issue of how did the Department identify all the five service providers to contract with. I am aware about one of the service providers whose SLA with the NW Education I have been referred to. As to how did the others parties come into play is a mystery. The Department has not said much as to how it contracted with the other service provider, numbering in full, five (5) when counted together with Reboni. This speaks to the extension of the scope of the contract, the legality of which question I do not decide. However, it has implications for the relief in this Part A application. Should they all be allowed to continue rendering services? I hold not.

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7 2023 (1) SA 44 (SCA).

Whether the applicant has satisfied the requirements for interim interdicts

[34] The requirements are well-known. An applicant requiring an interim interdict must show that it has prima facie right, which may be open to doubt; reasonable apprehension of irreparable harm; that balance of convenience favours the granting of the order; and that it has no suitable alternative remedy. An interdict is used to either prohibit or to compel the doing of something.[8] The SCA held in *Memory Institute SA CC t/a SA Memory Institute v Hansen and Others*[9] that:

> **"[I]nterim orders and rule nisi are not to be had simply for the asking. Courts should satisfy themselves that a proper case has been made out, more so if the subject is technical. The fact that a respondent may approach the Court for reconsideration of the Rule … and that it may be set aside on the return day should serve neither as a sop nor a soporific."**

[35] Regarding prima facie right it has been established in this application that the Applicant was one of the bidders that had tendered as service provider for the manufacturing and supply of school furniture. The relevant allegation was not denied. Thus, it is my finding that the Applicant has managed to prove the existence of a prima facie right to just administrative action by an organ of the state. More so where a tender that it had hopes of fairly competing in was cancelled.

[36] The next question relates to harm reasonably apprehended. The test for harm stands on both substantive and objective considerations. In light of authorities on this point, the harm that is apprehended on reasonable grounds must be irreparable. The concept of irreparable harm was lucidly

[8] United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others 2023 (1) SA 353 (CC) at para 47.

[9] 2004 SA (2) 630 (SCA) at 635G-H.

explained by Mogoeng CJ in *City of Tshwane Metropolitan Municipality v Afriform and Another*[10] (*Afriforum*) in the following manner:

> **"[59] Irreparable implies that the effects or consequences cannot be reversed or undone. Irreparable therefore highlights the irreversibility or permanency of the injury or harm. That would mean that a favourable outcome by the court reviewing allegedly objectionable conduct cannot make an order that would effectively undo the harm that would ensue should the interim order not be granted."**

[37] It is so that the Department appointed the service providers for a period of three years. The appointment, I have been told, was done because of an emergency that had arisen. If I were to accept the explanation that the Department was exposed to an emergency, which the pleaded facts have not revealed, it is curious whether the emergency will sustain for the entire period of three years.

[38] Meanwhile, the Applicant as a bidder which had hoped that it would be fairly considered for the tender, does not have another opportunity, for that period of three years, to compete to become a manufacturer and supplier of furniture for the Department. On that basis I am satisfied that the harm apprehended is not reversible.

[39] Making reference to *National Treasury and Others v Opposition to Urban Tolling Alliance and Others*,[11] the Department contends that the Applicant will not suffer irreparable harm. The stanzas referenced do not abet the case sought to be made by the Department. Here the Applicant is facing not just an inconvenience, but has lost an opportunity to tender as a service and goods supplier to the Department. And that chance cannot be reversed

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[10] City of Tshwane Metropolitan Municipality v Afriforum and Another (157/15) [2016] ZACC 19; 2016 (9) BCLR 1133 (CC); 2016 (6) SA 279 (CC) (21 July 2016).

[11] 2012 (6) SA 223 (CC) at paras 53 and 67.

within the period of three years. Harm is palpable. In any case the Department conceded to the fact that the harms to be suffered by the Applicant is financial. Financial harm is still harm.

[40] I turn to the question of balance of convenience. There are two considerations. The first is whether the court can sit idle or countenance an unlawful government procurement continuing. The second is whether the Department will be exposed to undue hardship if the temporary injunction was granted. With regard to the first the answer is simply that the court has a duty to ensure that the doctrine of legality is upheld,[12] including by, in my view, stopping a process that appear to be perpetuating a breach of the doctrine.

[42] The Department has not covered itself in glory when trying to explain why it took the decision. What made the decision pressing was instead merely thrown in there, opaquely so. Although it suggested that there was an emergency, the point that I referenced above in this judgement, it has not taken the opportunity to show the court what that situation of emergency was that confronted it.

[43] Worse, when the Department requested to participate in the contract in terms of regulation 16A.6.6 the contract was not yet in existence.

[44] A claim for damages is not available for the applicant in this matter. Sight should also not be lost to the meaning of harm according to *Afriforum* in which the following was said:

[12] Lester v Ndlambe Municipality and Another 2015 (6) SA 283 (SCA) at para [24].

> **"[56] Within the context of a restraining order, <u>harm connotes a common-sensical, discernible or intelligible disadvantage or peril that is capable of legal protection</u>. It is the tangible or intangible effect of deprivation or adverse action taken against someone. And that disadvantage is capable of being objectively and universally appreciated as a loss worthy of some legal protection, however much others might doubt its existence, relevance or significance. Ordinarily, the harm sought to be prevented through interim relief <u>must be connected to the grounds in the main application</u>."** (Emphasis added)

[45] I am satisfied with the case made by the Applicant on this point. The loss of an opportunity to tender, following a decision that is not quite clear, is palpable.

[46] The requirement of balance of convenience requires the balancing of the interests of the affected parties, to determine the harm that the Applicant will suffer if interim relief is not granted, against the harm likely to be suffered by the Respondent if the interim order is granted. About this the Applicant has asserted that given the three year lifespan of the tender and the normal time it takes for a review application to be finally prosecuted, the relief it seeks in the review application will be rendered moot when the case is finally determined. It will be left with no remedy as a result.

[47] The last ground that the Applicant has to satisfy is that it does not have a suitable alternative remedy. It contends so because, on its papers, once implemented the Court dealing with the review application may be persuaded to ratify the tender. This is short of what the requirement demands.

[48] The public interest lies in the protection of the scarce public resources, and this is undermined whenever state tenders are awarded unlawfully, so said

the Court in *Marcé Projects (Pty) Ltd and Another v City of Johannesburg Metropolitan Municipality and Another*.[13] This tender is for a period of three years. Strangely, the Department says that the Applicant can apply for the tender at a later date. A suitable alternative remedy is one which can allow the Applicant an opportunity to participate or compete fairly for government work.

[49] In its written argument the Department tersely contended that:

> **"If the applicant's intimations of impropriety on the part of the respondents in the awarding of the tender, on review, are proven to substantiate fraud or corruption and it is proven that the applicant should have been awarded the tender, it would be entitled to claim for damages."**

[50] I do not see how the Applicant has a claim for damages in the circumstances of this case. Also, I am alive to the fact that an entitlement to review an impugned decision does not on its own require for protection *pendente lite*. While that is so, it is apt to revisit what the SCA stated in *Steenkamp NO v Provicnial Tender Board of the Eastern Cape*[14] where it was held as follows:

> **"[43] The 'alternative remedy' argument has some validity but the point must not be stretched to breaking point. <u>Availability of review to an unsuccessful tenderer can hardly be an argument for conferring a damages claim on the successful tenderer</u>. All that can happen on review is that the award may be set aside. The successful litigant does not acquire the benefits (or burdens) of the successful tenderer. Recently a disappointed tenderer, who was able to show that the award was seriously tainted, was vindicated on review, though only**

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13 Marcé Projects (Pty) Ltd and Another v City of Johannesburg Metropolitan Municipality and Another: Unreported Case No: 33992/2019, Gauteng Local Division, Johannesburg. at par 82.

14 Steenkamp v Provincial Tender Board of the Eastern Cape (528/2004) [2005] ZASCA 120; [2006] 1 All SA 478 (SCA) (30 November 2005).

> **by an award of costs since setting aside the award was impractical as the contract work had already been performed. In other words, the suggestion that review is an adequate alternative remedy is a misconception."** (Emphasis added)

[51] This is one of those instances where the Court has to intervene and grant interim relief.

Consideration of costs

[52] Costs are in the discretion of the Court, which discretion is to be exercised judiciously.[15] The default position adopted by our Court is that costs follow the course as they are awarded to a successful party.

[53] The purpose of an award of costs to a successful litigant is to indemnify him for the expense to which he has been put through having been unjustly compelled to initiate or defend litigation. This is a general principle. Long ago the Court dealt with the question of costs in *Kruger Bros & Wasserman v Ruskin*[16] and held that:

> **"The rule of our law is that all costs –unless expressly otherwise enacted – are in the discretion of the Judge. His discretion must be judicially exercised but it cannot be challenged, taken alone and apart from the main order without his permission".**

[54] The Applicant has succeeded and I do not see any reason why it should not be awarded costs.

Order

15 Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and another 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) para 88.

16 1918 AD 63 at 69.

[55] I make the following order:

[i] Pending final determination of the review application in Part B of this application the Department of Education, Limpopo Province, together with the Seventh to the Eleventh Respondents are interdicted and restrained from continuing with the services in terms of the contract concluded by them in terms of Regulation 16A6.6 of the National Treasury Regulations.

[ii] The Department of Education, Limpopo Province shall bear the costs of this application, which costs shall be on party and party scale A.

[redacted]

M. Z. MAKOTI

ACTING JUDGE OF THE HIGH COURT

LIMPOPO DIVISION

APPEARANCES:

FOR APPLICANT	:	**ADV M R MAPHUTHA**
		ADV T MOYO
		Kovani Attorneys
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		Polokwane
Date of hearing:		11 February 2025
Date delivered:		31 July 2025