



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

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

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

(3) REVISED

DATE: 29 AUGUST 2025

SIGNATURE:

Case No. 135048/2025

In the matter between:

3F SCIENTIFIC (PTY) LTD

APPLICANT

And

NATIONAL HEALTH LABORATORY SERVICE

1ST RESPONDENT

SMM INSTRUMENTS (PTY) LTD

2ND RESPONDENT

Coram: Millar J

Heard on: 26 August 2025

Delivered: 29 August 2025 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 11H00 on 29 August 2025.

ORDER

It is Ordered:

- [1] The first and second respondents are interdicted from implementing or further implementing Tender RFP024/23/24: Placement/Outright Purchase of a Digital Pathology Scanning Solution at National Health Laboratory Services: George Mukhari Polokwane, Tshwane Academic Division, Charlotte Maxeke Johannesburg Academic Hospital, Chris Hani Baragwanath, Bloemfontein (Universitas), Nkosi Albert Lethuli, Matata, East London, Port Elizabeth, Tygerberg, Groote Schuur Hospital, Greenpoint Complex and Nioh (Braamfontein), including service and maintenance for a period of 5 years ("the Tender").

Pending the final determination of the pending review application under case number: 2024-149675.

- [2] The costs of this application are reserved for determination in the review application under case number: 2024-149675.

JUDGMENT

MILLAR J

- [1] The present application was brought by the applicant by way of urgency for an order interdicting the first and second respondents from proceeding with the implementation of a tender.
- [2] The tender concerned was for the *“Purchase and installation of a Digital Pathology Scanning Solution in fourteen laboratories”*. It was a proverbial two horse race, and it is the second respondent who won. The applicant, in the parlance of horseracing, lodged an objection – an application to review and set aside the tender.
- [3] The reasons upon which the applicant asserts the review will succeed are not germane to this application. This is something to be decided by another court. It suffices to say that on the allegations made by the applicant alone as to the irregularities with the award of the tender, these if established would be grounds for its review and setting aside. This is however not the only issue to be considered here. The right here is to have the extant review heard and determined.
- [4] The tender was awarded to the second respondent on 24 August 2024 and on 30 August 2024, the applicant informed that it had been unsuccessful. The applicant launched review proceedings, and these are extant.
- [5] It is common cause that when the review proceedings were launched, the tender had not been implemented. While it was initially launched by way of urgency, this

abated and was mitigated by the fact that that there was no imminent implementation.

- [6] The review followed its course. The applicants contend that the review was delayed in consequence of the first respondent failing to make the full record available timeously. It was only made available after an application was made to compel its delivery.
- [7] On the face of it, the review was proceeding in the ordinary course and no steps had or were being taken to implement the tender.
- [8] When the applicant launched the review application, the first and second respondents had not concluded a service level agreement, a necessary step for the implementation of the tender. This was only done after the applicant had delivered its supplementary affidavit in the review proceedings after the full record had been made available.
- [9] Inexplicably, even though the first respondent and the second respondent had concluded a service level agreement on 12 May 2025, this was not disclosed in the first respondent's answering affidavit in the review proceedings. That affidavit was deposed to on 18 June 2025. It was only in the first respondent's answering affidavit in these proceedings deposed to on 21 August 2025 that the fact that the service level agreement had already been concluded was disclosed.
- [10] Furthermore, it was only in the first respondent's answering affidavit in the present proceedings that it was disclosed that a meeting was to take place on 21 August 2025 to discuss the implementation schedule.
- [11] While the application was being argued, the Court requested from counsel for both the first and second respondent respectively, whether or not they had any

instructions as to when implementation was commenced. This question was directed primarily in considering urgency in view of the fact that the already extant review proceedings were all but ripe for hearing.

- [12] Both counsel disavowed any instructions in this regard and were unable to provide any clarity in this regard. It was only shortly before the conclusion of the proceedings that counsel for the first respondent placed on record from the bar, that he had been instructed to record (having just been given that instruction) that there was no agreed scheduled implementation date and that this would only be considered pending the outcome of the present application.
- [13] It was argued for the applicant that it was the present application that had galvanized the first respondent to implementation of the tender and that having regard to the failure to disclose the conclusion of the service level agreement, the ineluctable inference was that the respondents had by subterfuge conducted themselves in a manner which would have rendered the review proceedings all but nugatory.
- [14] In *Millenium Waste Management (Pty) Ltd v Chairperson, Tender Board Limpopo Province and Others*¹ it was stated that:

“ . . . It appears that in some cases applicants for review approach the High Court promptly for relief but their cases are not expeditiously heard and as a result by the time matter is finally determined, practical problems militating against the setting – aside of the challenged decision would have arisen. Consequently the scope of granting an effective relief to vindicate the infringed rights becomes drastically reduced. It may help if the High Court, to the extent possible, gives priority to these matters.”

¹ 2008 (2) SA 481 (SCA) at para [34].

- [15] In *Marcé Projects (Pty) Ltd and Another v City of Johannesburg Metropolitan Municipality and another*,² it was held that:

[85] *The harm to be prevented in the present circumstances is the continued implementation of a tender in the event that the review court finds it to have been unlawfully awarded and the risk it places on the integrity of the review process. If the interdict is not granted, the continued implementation of the tender will render the review academic as it will limit the just and equitable relief that the court may award . . .*

[86] *Awarding the interdict on the other hand, will prevent further implementation of the contract, thereby preserving the practical effect of the just and equitable relief that the reviewing court may award."*

- [16] In view of the fact that the tender was for the outright purchase of certain equipment and that the tender was issued for all fourteen laboratories, is a relevant factor for consideration in this matter. The tender is, for want of a better description, an "all or nothing" and thus any implementation will to my mind render the current review proceedings moot.

- [17] Turning now to the four requirements³ to be established for the granting of an interim interdict. These are (i) A *prima facie* right, (ii) Apprehension of irreparable harm, (iii) Balance of convenience, and (iiii) No other satisfactory remedy.

- [18] Firstly, the applicant has a *prima facie* right to fair and just administrative action. This right is guaranteed in terms of section 33 of the Constitution. The right is

² [2020] 2 ALL SA 157 (GJ) at paras [85]-[86].

³ *Setlogelo v Setlogelo* 1914 AD 221.

being asserted in the review proceedings⁴. The respondents are aware of the proceedings but have conducted themselves in a manner indicative of rendering the applicants right to have its review rendered irrelevant. What is noteworthy here is that although the review proceedings were underway, the respondents seemed to have taken a supine approach to those proceedings. It was not for them to ignore the proceedings and to carry on in a manner that would subvert the right of the applicant to have its review heard. Once part of the proceedings, they too had an obligation to bring those proceedings before the court expeditiously, if they were dissatisfied with the time it was taking to do so.

- [19] Secondly, in regard to irreparable harm to the applicant, it is self-evident from the facts set out above that if the tender, which is indivisible and so an "all or nothing" type tender, is implemented in whole or in part before the review application is decided, the applicant will suffer irreparable harm because no equitable relief would be able to restore the applicant to the position it would have been in had the review been successful and the whole of the tender subsequently awarded to it.
- [20] Thirdly, in regard to the balance of convenience, none of the parties will be prejudiced by the granting of an interim interdict. The tender has already been significantly delayed as far as implemented is concerned and a further delay of a few months will not be prejudicial to the parties. During the hearing, counsel for the applicant indicated that it would be approaching the office of the Deputy Judge President to request the allocation of a preferential date for the hearing of the review and counsel for the respondents both indicated that there was no objection to this.

⁴ *Moseme Road Construction CC and Others v King Civil Engineering Contractors (Pty) Ltd and Another* 2010 (4) SA 359 (SCA) at para [16].

- [21] Lastly, in the present matter the alternative remedy is the very review proceedings that will be subverted if the order sought is not granted. There is thus no alternative remedy.
- [22] In regard to costs, since the applicant only sought an order that the costs of this application be reserved for determination in the review application, that is the order for costs that I intend to make.
- [23] Had the applicant sought an order for costs, having regard to the way in which the respondents have conducted themselves, which conducted necessitated the bringing of this application, I would have awarded costs to the applicant. Had a punitive order for costs been sought by the applicant, I would have seriously considered this.
- [24] In the circumstances, it is ordered:

- [24.1] the first and second respondents are interdicted from implementing or further implementing Tender RFP024/23/24: Placement/Outright Purchase of a Digital Pathology Scanning Solution at National Health Laboratory Services: George Mukhari Polokwane, Tshwane Academic Division, Charlotte Maxeke Johannesburg Academic Hospital, Chris Hani Baragwanath, Bloemfontein (Universitas), Nkosi Albert Lethuli, Matata, East London, Port Elizabeth, Tygerberg, Groote Schuur Hospital, Greenpoint Complex and Nioh (Braamfontein), including service and maintenance for a period of 5 years ("the Tender").

Pending the final determination of the pending review application under case number: 2024-149675.

[24.2] The costs of this application are reserved for determination in the review application under case number: 2024-149675.


A MILLAR

JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

HEARD ON: 26 AUGUST 2025

JUDGMENT DELIVERED ON: 29 AUGUST 2025

COUNSEL FOR THE APPLICANT: ADV. A ELS SC
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