



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

Case no: 2025-139019

In the matter between:

CONTOUR TECHNOLOGY (PTY) LTD

Applicant

And

BERGRIVIER MUNICIPALITY

First Respondent

**THE MUNICIPAL MANAGER:
BERGRIVIER MUNICIPALITY**

Second Respondent

**THE EXECUTIVE MAYOR:
BERGRIVIER MUNICIPALITY**

Third Respondent

ONTEC (PTY) LTD

Fourth Respondent

Coram: JUSTICE J CLOETE

Heard: 10 September 2025

Delivered electronically: 15 September 2025

ORDER

1. The application for the relief sought in Part A of the applicant's notice of motion is dismissed;
2. The application for the relief sought in prayer 2 of the applicant's notice of motion is postponed for hearing simultaneously with Part B and the costs incurred in respect thereof shall be costs in the cause;
3. The parties are directed to approach the Judge President for an expedited date for the hearing of Part B (subject to her overriding discretion in this regard);
4. In respect of the applicant and the first to third respondents, each party shall bear their own costs in relation to Part A; and
5. The applicant shall pay the costs of the fourth respondent in relation to Part A, including the wasted costs of 2 September 2025, on scale C (party and party) and including the costs of counsel.

JUDGMENT

CLOETE J:

[1] The applicant ('Contour') has approached this court for urgent final declaratory relief, as well as interim interdictory relief (Part A) pending, essentially, the review of certain decisions taken by the first and/or second and/or third respondents (collectively, unless otherwise indicated, the 'municipality') in respect of a tender awarded to the fourth respondent ('Ontec') to supply the municipality with an integrated pre-paid electricity vending and management system for electricity consumers within its municipal area of jurisdiction (Part B). For convenience I refer to this as the 'new tender' or the 'new tender award'. Both the municipality and Ontec oppose.

[2] The application was launched on 15 August 2025 and enrolled for hearing of the declaratory relief and Part A in the 'fast lane' of motion court on 2 September 2025. It did not proceed on that day because the papers were not complete and their length warranted, in the opinion of the urgent duty judge concerned, a special allocation before a judge outside of the fast lane. The Deputy Judge President allocated the matter to me for hearing on 10 September 2025.

[3] The final relief sought is contained in prayer 2 of the notice of motion, for an order declaring that an agreement concluded between Contour and the municipality in respect of the same services (the '2021 agreement') did not terminate on 31 July 2025 and remains extant. The Part A relief is contained in prayer 3 thereof and is for the following orders: (a) prayer 3.1, that the municipality and Ontec are interdicted from taking any steps to implement the new tender; (b) prayer 3.2, that the municipality is interdicted from concluding any service level agreement with Ontec pursuant to the award of the new tender; (c) prayer 3.3, that in the event of them having already concluded a service level agreement, they are interdicted from giving effect to it; and (d) prayer 3.4, that the municipality is directed to permit Contour to continue rendering services in terms of the 2021 agreement.

[4] There has regrettably been a series of material administrative errors made by the municipality leading up to the launching of this application. It first awarded the new tender to Ontec on 7 January 2025. Contour, the only other successful bidder, timeously appealed against that award. However, before Contour could exhaust its internal remedies - and it was disputed by the municipality at that stage that it was entitled to do so in the manner adopted - the municipality gave notice to Contour on 30 January 2025 that it was cancelling the 2021 agreement as a result of the new tender to Ontec.

[5] On 6 February 2025 the municipality did an about turn and rescinded the cancellation notice to Contour because of concerns it had in respect of one of the Ontec tender supporting documents, and which had been brought to its attention by Contour (I will refer to this again later but for present purposes it is the 'Phoenix letter'). On 10 February 2025 the municipality cancelled the award to Ontec as a result of those concerns with immediate effect, and simultaneously informed it that Contour, as the next qualifying bidder, would be appointed instead (this much was procedurally correct in terms of the earlier Bid Adjudication Committee recommendation accepted by the Acting Municipal Manager). Ontec objected to the cancellation but was informed by the municipality on 14 February 2025, and again before Ontec could exhaust its internal remedies, that its new tender award was 'permanently cancelled'.

[6] On 17 February 2025 the municipality awarded the new tender to Contour, and requested that it consequently withdraw its earlier appeal (which, as mentioned, it had already told Contour was not competent in its view, and which was in turn disputed by Contour). Contour proceeded to withdraw its appeal in good faith. Ontec however nonetheless pursued its internal remedies against the cancellation of the new tender to it as it was entitled to do. This resulted in a referral of the dispute between Ontec and the municipality, by the municipality itself, to Brasika Consulting (Pty) Ltd ('Brasika') in the person of Adv Helen Venter ('Venter'). In the meantime, and despite a number of requests by Contour for the municipality to sign its service level agreement, a necessary pre-requisite for the new tender award to be completed, the municipality declined, informing Contour that it would respond 'pending the outcome of the aforesaid process and based on what is legally feasible'. Presumably the municipality intended to say it would respond once the dispute resolution process with Ontec was completed. That process dragged on from early March 2025 until Venter eventually responded to Contour on 12 June 2025. During this entire period Contour continued to perform in terms of the 2021 agreement which remained in force and the municipality voiced no objection.

[7] The upshot of Venter's response was that she had determined the difficulties with the Phoenix letter had not been proven as intentional on Ontec's part 'beyond a reasonable doubt'. Venter had further determined that: (a) the new tender earlier awarded to Ontec was 'functus officio in nature' and could not have been 'unilaterally cancelled by the Municipality without following due course and having such contract declared invalid and set aside by a court'; and (b) the municipality was not able to 'lawfully conclude a valid and enforceable contract with Contour [i.e. the new tender award] and that such award is regarded as invalid ab initio.'

[8] In her report dated 20 May 2025, which Venter declined to provide to Contour due to its confidentiality but which the municipality subsequently annexed to its answering affidavit, Venter explicitly advised the municipality that it could 'only undo its own administrative actions via a court of law' and as such its purported cancellation of the new tender with Ontec was irregular. She also advised that 'as the award decision was functus officio, i.e. rights have vested with Ontec, any

municipal administrative act does not detract from the legal consequences thereof and those rights remain binding until varied or set aside by a court.’

[9] In light of that advice, one would have thought that the municipality, whose Municipal Manager is also an Advocate and thus presumably versed in the law, would have realised that the same applied to the subsequent award of the new tender to Contour in light of the *Oudekraal* principle¹, and that such award, if the municipality believed its decision was defective, was likewise subject to self-review. As the majority of the Constitutional Court put it in *MEC for Health, EC v Kirland Investments* ²:

‘[64] Can a decision by a state official, communicated to the subject, and in reliance on which it acts, be set aside by a court even when government has not applied (or counter-applied) for the court to do so? ... Even where the decision is defective ... government should generally not be exempt from the forms and processes of review. It should be held to the pain and duty of proper process. It must apply formally for a court to set aside the defective decision, so that the court can properly consider its effects on those subject to it.

[65] The reasons spring from deep within the Constitution’s scrutiny of power. The Constitution regulates all public power. Perhaps the most important power it controls is the power the state exercises over its subjects. When government errs by issuing a defective decision, the subject affected by it is entitled to proper notice, and to be afforded a proper hearing, on whether the decision should be set aside. Government should not be allowed to take shortcuts ... Once the subject has relied on a decision, government cannot, barring specific statutory authority, simply ignore what it has done ...’

[10] However on 17 June 2025 the municipality, in the person of the Municipal Manager, informed Contour that the double award presented the municipality with ‘an unfortunate situation where we were exposed to the conundrum of having

¹ *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA)

² 2014 (3) SA 481 (CC)

awarded two contracts for the same tender ... because there was already a lawful contractual relationship between Ontec and the Municipality prior to the subsequent “award” to Contour the principles of legality dictate ...’ that the award to Contour was ‘unlawful’. The Municipal Manager proceeded to inform Contour that its ‘month-to-month contractual arrangement’ in terms of the 2021 agreement would expire on 31 July 2025. In response, Contour pointed out that the 2021 agreement was valid for a minimum period of 3 years, was still extant, and could only be terminated on 90 days notice; and further given that the municipality had awarded it the new tender, this could not simply be unilaterally revoked.

[11] On 24 June 2025, Contour submitted its appeal against the decision to revoke the new tender award to it. It recorded that an appeal precluded the municipality from implementing its unilateral ‘cancellation’ or concluding a service level agreement with Ontec until finalisation of the appeal process. It sought an undertaking in these terms to be furnished by 27 June 2025, failing which it would approach court for urgent relief. On 30 June 2025 the Municipal Manager responded. She advised that because she had made the decision to revoke the new tender award to Contour, the appeal authority would be the Executive Mayor, but that ‘the Municipal Finance Management Act³, by implication prohibits councillors from making decisions regarding procurement contracts and tenders’. She stated that in the circumstances the municipality required time to obtain external legal advice and would respond to the request for an undertaking by 11 July 2025. The external advisor turned out to be Venter.

[12] On 15 July 2025 (4 days after her self-imposed deadline) the Municipal Manager reverted to Contour with the advice received. It was conceded that the municipality had made ‘certain administrative errors’ but the matter was nonetheless considered ‘as having been exhausted’ for two reasons. First, the internal appeal remedy in terms of s 62 of the Systems Act⁴ was not applicable since the Municipal Manager had not exercised a delegated power but an original one in revoking the new tender to Contour. Second, the 90-day termination notice period - although

³ Local Government: Municipal Finance Management Act 56 of 2003

⁴ Local Government: Municipal Systems Act 32 of 2000

entrenched in the 2021 agreement - was not applicable because that agreement was now on a month-to-month basis.

[13] As to the applicability or otherwise of s 62 of the Systems Act, this is not an issue before me for either the final declaratory relief or the Part A relief, and counsel for Contour confirmed this in argument. As to the alleged month-to-month contractual arrangement in respect of the 2021 agreement, the following. On 25 February 2025 the municipality wrote to Contour, apologising for the delay in finalising the award of the new tender to it, but confirming that the commencement date of the new tender would remain as 1 March 2025 with a termination date of 30 June 2027. Contour was clearly under the bona fide impression, created by the municipality itself, that the new tender was replacing the 2021 agreement, but could not yet be implemented per the new tender because of Ontec's objection process. Contour thus responded on 27 February 2025 that 'considering the circumstances which have presented themselves we shall continue to render services ... on a month-to-month basis under the [2021] agreement'. In other words, Contour had only offered to assist the municipality by continuing to provide the essential services in the interim in terms of the 2021 agreement on a month-to-month basis because otherwise it would be performing these services in a vacuum. The municipality must have understood it in the same way because as a fact Contour continued to perform those services.

[14] Reverting to the chronology of events, on 17 July 2025, Contour responded to the Municipal Manager's letter of 15 July 2025. It disputed that s 62 of the Systems Act was not applicable; reaffirmed its previous position; and urged the municipality to reconsider its stance and revert with an appropriate undertaking by 21 July 2025. That undertaking was not forthcoming. In addition, Contour wrote to the Western Cape Provincial Treasury on 25 July 2025, requesting that it exercise its constitutional and statutory oversight by issuing guidance to the municipality, but to which it appears no response was received. Instead, on 1 August 2025 the municipality informed Contour that it was to cease all services on that same day. On 5 August 2025 Contour advised the municipality that it would be approaching court for relief. The application was launched eight working days later.

[15] Against this background I do not agree with the contentions of the municipality and Ontec that Contour's urgency is self-created. Given the particular factual matrix of this matter, it would be placing form above substance to find that Contour knew of the municipality's final position by 15 July 2025 (on the municipality's version) or even as early as 12 June 2025 (on Ontec's version). Had Contour rushed off to court shortly after 12 June 2025 without even attempting to exhaust what it believes to be its internal remedies, it risked being told by a court to first do so. Had Contour acted in similar vein shortly after 15 July 2025, without first requesting the municipality to reconsider its stance, and bearing in mind it was providing an essential service to it, it risked damaging that relationship. This was not a situation of equal bargaining power and in addition, the manner in which the municipality had flip-flopped about, not only with Contour but also Ontec, made it prudent, in my view, to first adopt a conciliatory and cautious approach. In addition, Contour needed to afford the municipality and Ontec a reasonable time to oppose and file answering papers.

[16] Returning again to the chronology of events, on 11 August 2025 the Municipal Manager wrote to Contour, demanding it refrain from continuing to provide services 'without any legal contract supporting such'. At that time the municipality was aware that Contour disputed: (a) the revocation of the award of the new tender to it; (b) the termination notice period given in respect of the 2021 agreement; and (c) that it was not entitled to an internal appeal. Contour was also informed the municipality would be publicly notifying its electricity consumers that only Ontec was authorised to supply the services in question. This the municipality proceeded to do. It thereafter forged ahead and actively engaged with Ontec in the transfer process, continuing to do so even while it knew this application was pending. On 1 September 2025, the day before the matter was initially enrolled for hearing, the municipality refused to renew Contour's key access to the Eskom system, thereby preventing it from performing.

[17] The Municipal Manager deposed to the municipality's answering affidavit on 1 September 2025. In paragraph 94.4 she alleged that the service level agreement with Ontec had not yet been signed since 'feedback from Ontec on changes is still outstanding'. This was demonstrated to be a blatant untruth, because it emerged in a supplementary affidavit deposed to by the self-same Municipal Manager, handed

up at the hearing, that Ontec had already signed the service level agreement on 20 August 2025 without any changes. The service level agreement was signed by the municipality, again without any changes, only on 8 September 2025, thus two days before the matter was argued.

[18] Counsel for Contour submitted that both the municipality and Ontec had acted in bad faith by pushing ahead with finalisation of the new tender award in the face of pending litigation. While the equities might lie in Contour's favour, the difficulty which Contour faced by the time the matter was heard was that, as a fact, the new tender award process with Ontec was complete, both in the contractual and practical sense, and Contour was thus constrained to seek, not a preservation of the status quo, but a reversal thereof, which is not the purpose of interim interdictory relief. Moreover, the law is not on Contour's side in respect of the steps taken to finalise the new tender award to Ontec in the face of pending litigation.

[19] As both counsel for the municipality and Ontec submitted, their clients were entitled at law to have done so. This is clear from the Constitutional Court decision in *Tshwane City v Afriforum and Another*⁵ where the court stated:

'[71] There is another issue of importance that requires attention. It is the notion that the mere launch of an application for a restraining order or the review proceedings had the legal effect of automatically restraining Council from erecting street signs or removing old street names ...

[74] ...It needs to be stated categorically, that no aspect of our law requires of any entity or person to desist from implementing an apparently lawful decision simply because an application, that might even be dismissed, has been launched to hopefully stall that implementation. Any decision [*ie. judgment in this context*] to that effect lacks a sound jurisprudential basis and is not part of our law. It is a restraining order itself, as opposed to the sheer hope of one being granted, that can in law restrain. To suggest otherwise reduces the actual grant of an interdict to a superfluity.

⁵ 2016 (6) SA 279 (CC)

[75] For these reasons there was no obligation on Council to desist from removing old street names upon becoming aware that an urgent application for a restraining order had been filed. Only sheer choice or discretion, but certainly not any obligation or legal barrier, would lead to action being desisted from in anticipation of a successful challenge or application for an interdict.'

[20] As I see it, there are potentially four reviewable decisions taken by the municipality, namely: (a) the initial award of the new tender to Ontec; (b) the award of the new tender thereafter to Contour; (c) the revocation of the award of the new tender to Contour; and (d) the award for the second time, or reinstatement, of the new tender to Ontec. Some or all of these will come under scrutiny in Part B, including no doubt the domino effect of the municipality's decisions. There was a voluntary and frank acknowledgement by counsel for Ontec that a determination, one way or the other, is required by way of Part B. Counsel for the municipality was more hesitant on this score, but accepted that a self-review by the municipality in respect of some of these decisions might be necessary.

[21] In any event, as was also stated by the majority of the Constitutional Court *Kirland*:

'[67] In the face of government's attitude, Kirland succeeded in the high court and the Supreme Court of Appeal. The main [*ie the minority*] judgment would reverse this, on the basis that all the evidence about the controversial approval is before us, and it shows the approval was defective. This outcome, and the reasoning supporting it, would have untoward consequences for those subject to government decision-making. The evidence is not all before us. And it would be fundamentally unfair to Kirland to set aside that decision now, without requiring government to bring a proper application, in which it explains the history of the decision, its shifting attitudes towards it and its delay in dealing with it. In response, Kirland is entitled to be heard on whether it has been prejudiced and why it would be unfair to set the decision aside

now. This is a protection the Constitution itself affords Kirland. The main judgment would abrogate that protection. The court should not do so.’

[22] The main complaint of Contour in relation to the initial award of the new tender to Ontec pertains to the Phoenix letter. The tender specifications include that the supplier offers must ‘comprise a complete and fully functional integrated prepayment vending and management system including all the operating and database security needed to operate such a system’. Importantly, the supplier’s system must fully integrate with the Municipality’s Phoenix ERP system; and the failure to implement within the required timeline ‘will result in the cancellation of the tender’. There is no dispute that at all material times Contour has been able to fulfil these requirements and already had such a system in place.

[23] The new tender was initially awarded to Ontec subject to these requirements, failing which it would be cancelled and awarded to the tenderer with the second highest score, ie. Contour. When Contour’s appeal process commenced, the municipality provided it with a letter, purportedly from Phoenix, in which it was stated that Ontec’s system was not only compatible but was already successfully integrated. This letter was one of Ontec’s tender supporting documents. It turned out that neither of these representations were true at the time of the new tender award to Ontec, although it has by now apparently met these requirements. It is the stance of both the municipality and Ontec that this is good enough for the new tender to have been validly awarded, and it is Contour’s stance that it is not. Ontec disavows any fraudulent conduct on its part, whereas Contour maintains it acted fraudulently in relation to the Phoenix letter. These are issues for determination in Part B. I am of the view that were this not an application to temporarily restrain the exercise of a statutory power, Contour would have met the ordinary first requirement of a *prima facie* right even if open to doubt. However given this is indeed such an application, and having given this careful thought, I am unable to conclude that this is the ‘clearest of cases’ when regard is had to the *OUTA*⁶ test, or that the circumstances which present themselves are ‘exceptional’ when regard is had to the *Gordhan* test.⁷

⁶ National Treasury v Opposition to Urban Tolling Alliance 2012 (6) SA 223 (CC) at para 47

⁷ Economic Freedom Fighters v Gordhan and Others; Public Protector and Another v Gordhan and Others 2020 (6) SA 325 (CC) at para 42

Contour itself does not claim this to be the case either. Moreover, Contour also needs to satisfy the other requirements for interim interdictory relief, namely a well-grounded apprehension of irreparable harm; the balance of convenience in its favour; and the absence of any other satisfactory remedy.

[24] In this regard, the following. The municipality and Ontec have already fully implemented the new tender award. They have already concluded a service level agreement. The proverbial horse has now bolted and to grant the relief in prayers 3.1 to 3.3 of Part A will be to reverse the status quo. The only potential way to stymie the continued implementation of the new tender to Ontec is to grant the final declaratory relief which Contour seeks in prayer 2 of its notice of motion, namely that the 2021 agreement remains extant and did not terminate on 31 July 2025 as the municipality contends it did. Herein lies another fundamental difficulty for Contour. On its own version, the municipality is entitled to terminate that agreement on 90 days notice. Accordingly, and even assuming for present purposes that the notice previously given by the municipality was irregular, there is nothing to prevent the municipality from giving 90 days notice tomorrow, and given its past conduct, there is every reason to believe that is exactly what it will do. There was certainly no undertaking forthcoming during argument that it would not. I cannot bar the municipality, as Contour effectively seeks in prayer 3.4 of its Part A relief, from giving 90 days' notice of termination, since that would be making a contract for the parties, and this is legally impermissible. Linked to this is my concern that a decision on the final declaratory relief in prayer 2 is probably premature and is better dealt with in Part B when the court will have all the evidence before it.

[25] Granting the prayer 2 relief at this stage may have the following further consequences. The municipality will have two service providers for the same essential services for a further 90 days. It will generate confusion for those whom the municipality is constitutionally bound to serve in an efficient manner, ie. the end consumers. It will also result in considerable additional expense to the fiscus for that period because the municipality will have to these two service providers. At the end of that notice period there will have to be a full transfer process back to Ontec at least until determination of Part B, again with the attendant cost, not only to the

municipality but also to Ontec. In these circumstances I am compelled to conclude that the balance of convenience is not in Contour's favour.

[26] Turning now to the requirements of a well-grounded apprehension of irreparable harm and the absence of any other satisfactory remedy. The services at issue are ongoing and will continue to be so, unlike, for example, the construction of a road network or a hospital. If Contour succeeds in Part B the court is at liberty to grant any order that is just and equitable under s 8 (1) of PAJA⁸, including a declaration of rights with regard to the 2021 agreement, the new tender, and such consequential relief as that court might deem appropriate. Any interim harm to Contour is thus not irreparable. Further, Contour retains the right to institute action for contractual damages if it so elects, and there is no serious suggestion that, given the nature of the services, those damages it alleges it has already sustained, and will continue to sustain, are not capable of quantification. Counsel for Contour, relying on *Edrei Investments* ⁹ submitted that the election whether to claim specific performance or damages was exclusively Contour's. That may be so, but in *Edrei Investments* the court was persuaded that the applicant's other operational requirements should prevail over an alternative claim for damages in granting an interim interdict. I do not understand the law to be that, as a general principle, the mere election to claim specific performance instead of damages means it follows that there is no alternative satisfactory remedy.

[27] For all these reasons the application before me must fail. As far as Ontec is concerned, costs must follow the result although I make it clear that in awarding Ontec its costs, I make no finding on the validity of its new tender award. Counsel were all in agreement that scale C is appropriate. As far as the municipality is concerned, despite its success in fending off the relief sought by Contour at this stage, I am of the firm view that it should not be entitled to its costs. Finally, it is in the interests of all the parties that Part B be heard and determined on an expedited basis and this is catered for in the order hereunder.

[28] **The following order is made :**

⁸ Promotion of Administrative Justice Act 3 of 2000

⁹ *Edrei Investments v Dis-Chem Pharmacies* 2012 (2) SA 553 (ECP)

1. The application for the relief sought in Part A of the applicant's notice of motion is dismissed;
2. The application for the relief sought in prayer 2 of the applicant's notice of motion is postponed for hearing simultaneously with Part B and the costs incurred in respect thereof shall be costs in the cause;
3. The parties are directed to approach the Judge President for an expedited date for the hearing of Part B (subject to her overriding discretion in this regard);
4. In respect of the applicant and the first to third respondents, each party shall bear their own costs in relation to Part A; and
5. The applicant shall pay the costs of the fourth respondent in relation to Part A, including the wasted costs of 2 September 2025, on scale C (party and party) and including the costs of counsel.

J I CLOETE

Judge of the High Court

Appearances

For applicant: **Adv Nick De Jager**

Adv Matt Williams

Instructed by: Dirk Kotze Attorneys

For 1st – 3rd respondents: **Adv Michael Bishop**

Adv Michael Tsele

Instructed by: Enderstein Malumbete Inc

For 4th respondent: **Adv Adiel Nacerodien**

Instructed by: Ward Brink Attorneys

