

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NO: 2025-137848

CASE NO: 2025-142195

(1)	<u>REPORTABLE: YES/NO</u>
(2)	<u>OF INTEREST TO THE JUDGES: YES/NO</u>
(3)	<u>REVISED.</u>
.....	
DATE	SIGNATURE.....
12/1/25	[Redacted Signature]

In the matter between:

SMEC SOUTH AFRICA (PTY) LTD

APPLICANT

-and-

**MEC FOR DEPT OF PUBLIC WORKS,
ROADS AND INFRASTRUCTURE, LIMPOPO**

RESPONDENT

Delivered : 12 September 2025

This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand down of the judgment is deemed to be **12 September 2025 at 10:00 am.**

Date heard : 02 September 2025

Coram : Muller J

JUDGMENT

MULLER J:

[1] The applicant seeks an urgent interim order that pending the determination of the relief claimed in case no. 12844/2024 in Part B of the notice of motion that the respondent be interdicted from proceeding with or the implementation of the tender adjudication process relating to or making an award of Tender LDPWRI-PROF/20529 together with alternative relief.

[2] The application was served on the respondent and the state attorney on 14 August 2025 and enrolled for 2 September 2025. The respondent was required by the terms of the notice of motion to notify the applicant not later than 16h00 on 18 August 2025 of its intention to oppose Part A of the application. The required notice was only delivered by the respondent on 21 August 2025.

[3] The notice of motion also required that the answering affidavit be delivered not later than 16h00 on 21 August 2025. An unsigned affidavit commendably was delivered on 28 August 2025 with the signed affidavit that followed on 29 August 2025.

[4] The roll closed on Thursday 28 August at 12h00. Condonation for the non-compliance with the rules made by the applicant in the urgent application is dealt with in paragraph 82 to 87 of the answering affidavit.

[5] It is averred that the delay was occasioned by the process of procurement of counsel within the office of the state attorney for which the client cannot be held responsible. What is not explained is the delay from 14 August 2025 until 21 August 2025 when notice to oppose was delivered. That delay could not have been caused by the unexplained procurement process in the office of the state attorney. It is either because the respondent failed to instruct the state attorney timeously or because the state attorney failed to deliver the notice to oppose on or before 18 August 2025. It is not explained when process to procure the services of counsel commenced and why it took a week to instruct counsel. A first consultation with counsel was only arranged on 20 August 2025 for 22 August 2025 and a second consultation on 26 August 2025. The affidavit was drafted the next day and commissioned on 28 August 2025. It is clear that steps to oppose the application were not taken with the urgency expected from a litigant who is seriously trying to comply with the time limits, but it continued on a leisurely pace without much concern or effort to abide by the time limits, even after counsel was instructed.

[6] What the "cumbersome process" to procure counsel entails exactly is yet to be explained. Condonation is not merely for the asking. The reason proffered for the delay is inadequate and devoid of substance. This court is unpersuaded that there are valid and

acceptable reasons advanced by the respondent to condone the late filing of the answering affidavit. The facts of this matter show an unfortunate disrespect for the process of the court.

[7] It is the case of the applicant that the first tender was withdrawn to circumvent and render moot an interim interdict granted by Naude-Odendaal J. The suggestion is not denied. That contention raised another issue whether the respondent is at liberty to simply withdraw or cancel the tender which is the subject of pending litigation. Counsel for the applicant relied on the following statement in *Knoop NNO and Another v Gupta (Tayob Intervening)*:¹

"The impression given by these actions on the part of Mr Tayob was that they might have been directed at stultifying the appellants' appeals both against the execution order and against the removal order. That was of concern, because our law is clear that if that is done with dolus it may amount to contempt of court. As long ago as 1906, Mason J in *Li Kui Yu* said:

'... where a person knows or has reason to believe or ought to know that an application is being made to the Court for a certain purpose --- where he has that knowledge, or that suspicion, then, if he takes any action before the Court can be approached, the Court will regard that as an interference with the administration of justice, and will exercise its powers to prevent itself being defeated by anything of that kind.'

Subsequent cases have stressed the need for there to be an intention to defeat the ends of justice amounting to dolus. In *Yamamoto De Villiers JP* gave, as examples of such conduct, procuring the disappearance of a witness knowing that they had been subpoenaed to appear or removing goods with the object of defeating a possible order of court. The question is whether it is 'manifest that there was an ulterior object – namely to obstruct the due course of justice.'²

¹ 2021 (3) SA 135 (SCA).

² par 15.

[8] Counsel for the respondent argued that it is open to respondent have cancelled the tender since the respondent is duty bound to service delivery. It is clear that the respondent only cancelled the tender after the applicant has drawn attention in the founding affidavit that the new tender was published without cancellation of the first tender.

[9] The invitation to cancel the first invitation to tender was made with full knowledge and with the intention to defeat the purpose of the interim order and to render moot the review in Part B, under case 12844/2024. It has the hallmark of *mala fides*. In *Li Kui Yu supra*, Mason J concluded:

“...it is impossible for me to pass over without some notice what is, I consider, an offence of a serious kind, namely that of interfering with the administration of justice by taking an action which is bound to prevent the Court granting a remedy.”³

[10] The decision demonstrates lack of transparency since the invitation was withdrawn without any notification to the applicant.⁴ The conduct of the respondent attracts contempt of court proceedings and the possibility that that the responsible person(s) be mulcted with costs *de bonis propriis* on attorney and client scale and may even be ordered to pay a fine.⁵

[11] The respondent argued with reference to *City of Tshwane Metropolitan Municipality and Others v Nambiti Technologies (Pty) Ltd*⁶ that that the decision to cancel the first

³ p194.

⁴ *Steenkamp NO v Provincial Tender Board Eastern Cape* 2007 (3) SA 121 (CC) par 29 holds: “It goes without saying that every improper performance of an administrative function would implicate the Constitution and entitle the aggrieved party to appropriate relief.”

⁵ In *Li Kui Yu supra* a Superintendent arrested and removed a Chinese labourer from the Transvaal whilst he expected that the attorneys who acted for the Chinese person will approach the court to apply for his release. He was held in contempt because the necessary effect was to defeat any order the court may make. He was ordered to pay the costs of the application *de bonis propriis* on an attorney and client scale and he was fined £10.

⁶ 2016 (2) SA 494 (SCA) par 32.

invitation to tender is not administrative action and that it followed that the decision is not susceptible to review. It was held:

“A decision not to procure services does not have any direct, external effect. No rights are infringed thereby. Disappointment may be the sentiment of a tenderer, optimistic that its bid would be the successful one, but its rights are not affected. There can be no legal right to a contract...”

[12] The facts of that case are different. As matters stand at the moment, none of the tenderers, have any accrued or vested rights in relation thereto or arising from it.⁷ The applicant averred that the litigation is far from over. The record still has to be delivered by the respondent in terms of rule 53 (under case 12844/2024). It entitles the applicant, as procedural step in terms of rule 53(4), to amend the prayers to review the new invitation to tender. The court, however, has a discretion to hear and dispose of the merits when the matter comes before it notwithstanding the contention that the review is moot at this time.

[13] It bears mentioning that the withdrawal of the invitation to tender may also have considerable costs implications in case 12844/2024 for the respondent and certain individuals who might be liable for contempt of court. The parties will have to revisit the merits for that purpose, no doubt.

[14] The respondent, by way of background, published certain invitations to tender during 2024. The applicants instituted an application under case 12844/2024. By agreement between the parties an interim interdict under Part A was granted. Under Part B, the applicant seeks to review certain of the specifications or conditions contained in the tenders. It is, therefore, accepted for purposes of this judgment that the requirements had been met

⁷ par 33-34.

to interdict the respondent from proceeding or implementing or giving effect to the relevant adjudication processes, pending the review under Part B.

[15] At the end of July 2025, notwithstanding the pending review under Part B, the respondent invited new tenders for the same services without cancellation or withdrawal of the first invitation to tender. It caused the applicant to apply for an interim interdict to prevent the adjudication process pending the finalisation of the review under case 12844/2024. The first invitation suddenly withdrawn or cancelled by the respondent without notice to the applicant who has an interest in the tender process by virtue of the order.

[16] It is the applicant's case that some of the offending irregularities in the first invitation to tender are repeated in the second invitation to tender. When the applicant discovered that the new invitation to tender was published, it requested an undertaking from the respondent not to proceed with the procurement process. On 7 August 2025 the respondent replied that no such undertaking will be forthcoming. Similar undertakings were requested in respect of other invitations to tender with closing dates between 2nd and 4th September 2025 which were also refused.⁸ The battle lines were drawn and triggered the urgent application. It was held in *Smec South Africa (Pty) Ltd v the South African Road Agency*⁹ that:

"Should the Respondent continue to adjudicate and implement the tenders applicable in this application, and the relief in that review eventually be granted, then all of the steps taken in adjudicating and implementing such tenders would be void."

The application in my view, is urgent.

⁸ These invitations to tender are the subject of a second urgent application also before court. It was agreed at the commencement of the arguments that only one case will be argued.

⁹ [2023] ZAGPPHC 1108 (28/08/2023) par 7.

[17] It seems to me, that what was argued in *Smec South Africa (Pty) Ltd v the South African Road Agency supra* finds application in the present matter. The applicant is a competitor in the market who wishes to participate in the procurement process, but do not want to partake in an unlawful process. It cannot be expected from the applicant to partake in a tender process which is possibly unconstitutional and unlawful when an invitation to tender is suddenly without notice cancelled during pending litigation after an invitation to tender for the same services had been published. The inference is irresistible that the respondent realised that the first invitation suffered from serious shortcomings and irregularities and had it withdrawn. It is, furthermore, undesirable for a state organ to invite tenders for the very same services on similar specifications and conditions which do not appear to be constitutionally compliant.

[18] The remaining issue of substance raised by the applicant is that the new invitation to tender is not constitutionally compliant and contain slightly different specifications and conditions from the first.

[19] Section 217 of the Constitution provides for a procurement system for goods and services which is fair, equitable transparent, competitive and cost effective. National Framework Legislation and Preferential Procurement Regulations are applicable. The tender contains a provision for "Specific Goals" which include "Small, medium and Micro Enterprises" and "Enterprises located in Limpopo." None of the "Enterprises" are natural disadvantaged persons discriminated against on the basis of race, gender and disability, as envisaged by section 217(2)(b) of the Constitution. In addition, 4 of the available 20 points are allocated to "Enterprises located in Limpopo" This allocation is contrary to a tender

process that is open, transparent and procedurally fair and breach the fundamental principles of competitiveness.

[20] These allegations are met with bald denials. It is trite that a court must assess whether a real and genuine dispute of facts exists. In *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd*¹⁰ Murray AJP stated:

"While it may well be, once a genuine dispute of fact has been shown to exist, that a respondent should not be compelled to set out his full evidence in his replying affidavits, a bare denial of the applicant's material averments cannot be regarded as sufficient to defeat the applicant's right to secure relief by motion proceedings in appropriate cases"

[21] A respondent must proffer evidence sufficient to constitute an answer to the evidence adduced by the bank. In *Soffiantini v Mould*,¹¹ the court stated:

"If by a mere denial in general terms a respondent can defeat or delay an applicant who comes to Court on motion, then motion proceedings are worthless, for a respondent can always defeat or delay a petitioner by such device. It is necessary to make a robust, common-sense approach to a dispute on motion as otherwise the effective functioning of the Court can be hamstrung and circumvented by the most simple and blatant stratagem. The Court must not hesitate to decide an issue of fact on affidavit merely because it may be difficult to do so. Justice can be defeated or seriously impeded and delayed by an over-fastidious approach to a dispute raised in affidavits."

[22] It was noted, more recently, in *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another*¹² that:

¹⁰ 1949 (3) SA 1155 (T) 1165.

¹¹ 1956 (4) SA 150 (E) 154F-H.

¹² 2008 (3) SA 371 (SCA) par13.

"A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed."

[23] This court is satisfied that a *prima facie* right has been established by the applicant that it is entitled to a procedurally fair, transparent and fair tender process. The applicant obtained rights in terms of the order granted by Naude-Odendaal J, to embark on the process envisaged by the order. The respondent cannot be allowed to capitalize by the withdrawal of the invitation of the tender when the shoe pinches and then claim that the horse has bolted. The balance of convenience favours the applicant. Irreparable harm will be caused if the new tender is allowed to be awarded and the works would commence. There is no alternative remedy other than an interdict.

[24] This court has the inherent power, in terms of section 173 of the Constitution, to protect and regulate its process. This court will exercise that power to regulate and to protect the integrity of court processes and the sanctity of orders of court when there is an attempt to subvert its processes or orders.

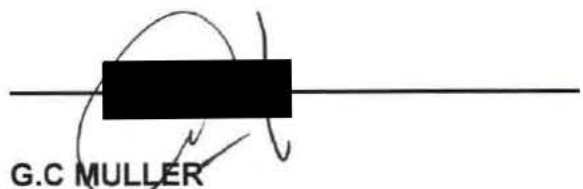
ORDER

1. This application is urgent;
2. Pending the finalization of Part B of the application issued under case number 12844/2024, in the alternative, pending the finalization of Part B of this application, the Respondent is hereby interdicted and restrained from proceeding with or implementing and or giving effect to the Tender adjudicating process relating to and/or making an award in respect of Tenders LDPWRI-PROF/20536, LDPWRI-PROF/20537 and LDPWRI-PROF/20538

2.2 the Respondent is directed to provide to the Applicant the names, registration numbers and business addresses of all persons, and entities who submitted Tender Offers in regard to Tender: LDPWRI-PROF/20536, LDPWRI-PROF/20537 and LDPWRI-PROF/20538 within fifteen (15) court days of this order being granted, to enable the Applicant to join the persons/entities concerned in the application.

2.3 The Applicant is granted leave to join the person/entities mentioned under the preceding paragraph in Part B of this application by serving a copy of this application, together with its Notice of motion and/or Founding Affidavit as amended in terms of High Court Rules 53 (4), on such persons/entities.

3. The costs of Part A of this application are costs in Part B of the application.


G.C MULLER

JUDGE OF THE HIGH COURT

LIMPOPO DIVISION, POLOKWANE

APPEARANCES:

COUNSEL FOR THE APPLICANT : ADV A VENTER

INSTRUCTED BY : DDKK ATTORNEYS

FOR THE RESPONDENT : ADV W MOKHARI SC

ADV L MAPHELELE

INSTRUCTED BY : STATE ATTORNEY, POLOKWANE