



**In the High Court of South Africa
(Western Cape Division, Cape Town)**

CASE NO.: 2025-146673

In the matter between:

**PRIME AFRICAN SECURITY (PTY) LTD
TDP ENTERPRISE (PTY) LTD**

**First Applicant
Second Applicant**

And

**ESKOM HOLDINGS SOC LTD
EDEN SECURITY SERVICES CC
ENSEMBLE SECURITY SERVICES
INRANITE SECURITY (PTY) LTD
NGOVA TRADING (PTY) LTD
ARLENE MARTIN
KASE MAHLAKU
TDP ENTERPRISE (PTY) LTD
THORBURN SECURITY SOLUTIONS (PTY) LTD
WORLD CLASS PROTECTION (PTY) LTD
ALERT PATROL (PTY) LTD
SWIFT ELITE (PTY) LTD
AUDITOR-GENERAL OF SOUTH AFRICA**

**First Respondent
Second Respondent
Third Respondent
Fourth Respondent
Fifth Respondent
Sixth Respondent
Seventh Respondent
Eight Respondent
Ninth Respondent
Tenth Respondent
Eleventh Respondent
Twelfth Respondent
Thirteenth Respondent**

Neutral citation: *Prime African Security (Pty) Ltd and Another v Eskom Holdings Ltd and Others* (Case no 2025-146673) [2026] ZAWCHC... (23 January 2026)

Corum: LEKHULENI J

Heard: 17 September 2025

Delivered: Electronically on 23 January 2026

ORDER

1. The applicants' application is hereby dismissed.
2. The applicants are ordered to pay the costs of this application to the opposing respondents (first, second and fifth respondents) jointly and severally, the one paying the other to be absolved, on an attorney and client scale, including the costs of two counsels where so employed.

JUDGMENT

LEKHULENI J:

INTRODUCTION

[1] This is an application in which the first applicant, Prime African Security, seeks a declaratory order and a review in terms of section 6 of the Promotion of Administrative Justice Act 3 of 2000 (*'PAJA'*). The application is divided into two parts, Part A and Part B. In Part A, the applicants seek an order that the first respondent's failure to take a decision to approve the award of a contract to the applicants for the provision of physical security guarding and patrol services at Eskom Holdings, in the Cape Coastal Cluster, from 26 October 2024 until 26 October 2025 be reviewed and set aside.

[2] The applicants also seek an order that the first respondent's (Eskom) decision to appoint the opposing respondents namely: Eden Security Services (Pty) Ltd (second respondent), Thorburn Security Solutions (Pty) Ltd (ninth respondent), World Class Protection (Pty) Ltd (Tenth respondent), Ngova Trading (Pty) Ltd (Fifth respondent), Alert Patrol (Pty) Ltd (Eleventh respondent) and Swift Elite (Pty) Ltd (Twelfth Respondent) to provide security service to Eskom pursuant to an urgent procurement process authorised by an order granted by Thulare J on 29 September 2024 (*'the 2024 order'*) under case number 2024/11619 be reviewed and set aside.

[3] In addition, the applicants seek an order that in terms of section 172(1)(b) of the Constitution read with section 8(1) of PAJA, the applicants be appointed to provide physical security guarding and patrol services at Eskom Holdings, in the Cape Coastal Cluster for a period of twelve months with effect from the date on which this order is granted at the rate at which Eskom procures the same services in the Western Cape, which rates shall not be lower than the rates awarded to the opposing respondents.

[4] In the alternative, the applicants seek an order interdicting and restraining Eskom from preventing the applicants from rendering the services for which the applicants were appointed by Eskom pursuant to the tender award set aside by Thulare J in terms of the 2024 order. In particular, the applicants seek an order interdicting and restraining Eskom and any of the respondents appointed by Eskom from implementing and giving effect to Eskom's decision to appoint the opposing respondents pursuant to Eskom's urgent procurement process for the provision of physical security guarding and patrol services at Eskom Holdings, in the Cape Coastal Cluster. The applicants seek, in substance, the same orders in Part B of this application. This court is only enjoined to decide Part A of this application.

[5] I must indicate from the outset that only the first, second, fifth, sixth, and seventh respondents opposed the applicants' application and filed the necessary notices of opposition and answering affidavits. The eleventh respondent filed a notice to abide by any order that this court may grant. The remaining respondents did not oppose the application nor file any opposing papers. For clarity, any reference to the opposing respondents in this judgment pertains to those respondents mentioned in paragraph 2 of this judgment who submitted the necessary opposing papers.

PRELIMINARY POINT

[6] At the hearing of this application, the eighth respondent sought leave to intervene as a second applicant. The application was premised on the grounds that the second applicant has a direct and substantial interest in the matter. The second applicant sought the same relief as the first applicant in both Part A and Part B of this application. Mr Hilita, counsel for the second respondent, contended that, in terms of the urgent procurement process pursuant to the 2024 order, Eskom recommended second

applicant for appointment as a service provider for the provision of physical security guarding and patrol services at Eskom Holdings, in the Cape Coastal Cluster, together with the first applicant.

[7] Mr Hilita asserted that the appointment in terms of the recommendation would have been effective from 26 October 2024 to 26 October 2025. In counsel's view, this recommendation was never revoked and thereafter remained of full force and effect. The second applicant pointed out that Eskom intentionally and inexplicably withheld the effect of this recommendation from the second applicant and instead initiated an urgent procurement process in terms whereof it appointed the opposing respondents to the exclusion of the first and the second applicant. To this end, Mr Hilita implored the court to grant its application to intervene.

[8] The test for joinder in our law is well established. An applicant for intervention must meet the direct and substantial interest test to succeed. What constitutes a direct and substantial interest is the legal interest in the subject matter of the case, which could be prejudicially affected by the order of the court. In *SA Riding for the Disabled Association v Regional Land Claims Commissioner*,¹ the Constitutional Court stated that this means that the applicant must show that it has a right adversely affected, or likely to be affected, by the order sought. However, the applicant does not have to satisfy the court at the stage of intervention that it will succeed. It is sufficient for such an applicant to make allegations which, if proved, would entitle it to relief.

[9] As explained above, the second applicant seeks the same relief sought by the first applicant in Part A and Part B of this application. The relief sought by both applicants arises from the same set of facts. Both applicants challenge Eskom's appointment of the opposing respondents to provide security at Eskom Holdings, in the Cape Coastal Cluster despite Eskom's internal recommendation favouring the appointment of the applicants. In my view, the second applicant has a direct and substantial interest in the review and the interdict application brought by the first applicant and must be granted leave to intervene as a second applicant. Consequently, the second applicant's application for leave to intervene as a second applicant in this application must

¹ 2017 (5) SA 1 (CC) at 5A–D.

succeed. Before I can consider the application on the merits, here is the background to the matter.

BACKGROUND FACTS

[10] On 6 December 2023, Eskom published an invitation to tender for the '*Provision of Physical Security Guarding and Patrol Services at Eskom Holdings SOC Ltd, Distribution Division, in the Cape Coastal Cluster, Western Cape*', under tender reference number WC1159ZM (*'the tender'*). Eskom received a total of forty-three (43) bids in response to the tender advertisement. After evaluating these bids, four (4) bidders were selected as successful, namely: Prime African Security (the first applicant), TDP Enterprise (the second applicant), and the third and fourth respondents cited in this application. The first applicant was appointed to render security guarding and patrol services in the Helderberg and Overberg region in terms of the tender. The contracts commenced on 1 June 2024 and were intended to endure for a period of thirty-six (36) months.

The First Review Application and subsequent order: Eden Security Services CC v Eskom and Others - Case Number: 11619/2024 – 17 May 2024

[11] After the tender was granted in May 2024, the second respondent in this application, Eden Security Services CC (*'Eden'*), launched review proceedings to set aside tender WC1159ZM under case number 11619/2024 (*'the First Application'*) in this Court. In its application, Eden advanced several complaints regarding the bidders, including the first and second applicants. In particular, Eden alleged that the applicants had misrepresented their BEE status in their bid documents. Eden contended in this application that serious allegations of corruption, fraud, and other irregularities were levelled against both applicants in the First Application, which they did not deny. Both Eden and Eskom asserted in this application that the applicants did not oppose Eden's review application at the time and did not file any affidavits to disprove or contradict the damning allegations of misrepresentations against them relating to the manner in which they obtained the tender in question. Eskom further stated that such misrepresentations, if established, constituted a serious irregularity warranting judicial intervention.

[12] Eskom contended that the applicants did not take the Court into their confidence by explaining whether they had misrepresented their BEE status and, if so, why they had acted in that manner. In addition, Eskom contended that the applicants did not present any proof that the tender decision complied with legal requirements or that they had a legal right to be appointed as successful bidders. All the opposing respondents emphasised that the applicants did not contest the relief sought by Eden in any way in the First Application, namely, the setting aside of the tender. This was despite both applicants being expressly informed, by way of a letter dated 14 August 2024, from Eskom's attorneys to all respondents, including the applicants, that Eskom would no longer oppose the relief and intended to implement its urgent procurement process.

[13] According to Eskom, no response was received to this letter. On 15 August 2024, Eskom filed an explanatory answering affidavit confirming Eskom's withdrawal of opposition to Eden's review application, together with the reasons for such withdrawal.

[14] In the explanatory affidavit, Eskom invited both applicants and any of the other parties joined to the proceedings to make suggestions regarding appropriate timeframes within which decisions should be made following the remittal. Eskom indicated its willingness to engage in discussions and to agree to realistic, fair timeframes for all concerned. Despite this invitation, the applicants made no attempt to participate in the matter, whether by filing papers or, at the very least, appearing in court. Eskom stated that, had they done so, they could have presented evidence showing that, if the Court found the tender unlawful and set it aside, it would be just and equitable to suspend termination of its contract pending the finalisation of the urgent procurement process. Both applicants elected not to do so.

[15] The First Application was argued in open court on 12 September 2024. An order was granted on that date, and a written judgment was delivered by Thulare J on 7 October 2024 (*the 2024 order*). In terms of the 2024 order, Eskom was required to follow an 'urgent procurement process' for the interim rendering of security services in the Cape Coastal Region, which formed the subject of the tender. For completeness, the 2024 order read as follows:

1. The decision to award Tender No WC 1159ZM (the Tender) to the Second to Fifth Respondents is reviewed and set aside.
2. The award of the contracts concluded pursuant to the Tender between the First and Second Respondents is reviewed and set aside.
3. The provisions of paragraph 1–2 inclusive will be implemented and given effect to on or before 25 October 2024.
4. The matter of the Tender is remitted to the First Respondent for readvertisement for an open Tender.
5. The invitation to bid for the open Tender will be published within a period of 4 months from the date of the order.
6. The First Respondent shall, with effect from 25 October 2024 implement the outcome of an Urgent Procurement process for the interim rendering of the security services in the Cape Costa Region which formed the subject of the Tender.
7. The selection and appointment of any service providers, in terms of its Urgent Procurement and Supply Chain Management Procedure (“SCMP”). First Respondent will commence with this Urgent Procurement process immediately.’

[16] Eskom emphasised that both applicants made no attempt to resist this outcome and did not place any evidence before the Court to preserve their contracts. The opposing respondents averred that both applicants have to date furnished no explanation for their failure to oppose the relief sought in the First Application, or place before the court any facts which would have had a bearing on the relief granted by the court in the First Application.

The commencement of the urgent procurement process pursuant to the 2024 order

[17] Eskom explained that in implementing the 2024 order, it anticipated that delays might arise in the urgent procurement process due to the complexity of the requirements and the scale of the procurement exercise. To ensure legal certainty and the continuity of services, Eskom approached this Court urgently for an extension of the time period specified in the 2024 order. On 29 October 2024, Thulare J granted Eskom's application and extended the implementation deadline to 25 November 2024. Subsequent thereto, Eskom attended to and completed the urgent procurement process and implemented it. To this end, the opposing respondents, namely, Eden Security Services, Ngova Trading Pty Ltd, and Alert Patrol Pty Ltd, were appointed and commenced providing services on 1 August 2025. Eskom has awarded Eden contracts to render security services in its Table View/Khayelitsha and West Coast/Boland clusters, the areas in which the second applicant previously operated. Eskom has terminated its contracts with both applicants, pursuant to the 2024 order.

The Second Review Application: Prime African Security v Eskom & Others – Case Number: 2025-070166: 16 May 2025

[18] On 16 May 2025, the first applicant launched an urgent application, which has become the Second Application, which was divided into Part A and Part B. In Part A, the first applicant sought, amongst others, an order that Eskom be declared to be in contempt of the 2024 order granted by Thulare J on 29 September 2024 under case number 11619/24 to the extent that it failed to comply with paragraphs 3, 4, 5 and 6 of that order. The first applicant contends further that Eskom's failure to comply with the 2024 order is unconstitutional. The first applicant also sought an order amending the 2024 order to the effect that the provisions of paragraphs 1-2 which reviewed and set aside the tender be suspended pending the conclusion of a valid and lawful procurement process contemplated in paragraph 4 of that order and the coming into force and effect of a contract or contracts concluded between Eskom and the successful bidder or bidders in terms of that procurement process.

[19] In Part B of that application, the first applicant sought an order declaring unlawful and setting aside the decision by Eskom to initiate and implement an emergency procurement process for the appointment of security service providers in the Helderberg and Overberg sectors. The first applicant also sought an order that any

appointment or award made by Eskom pursuant to the aforesaid emergency procurement process be declared unlawful and be reviewed and set aside. In addition, the first applicant sought an order declaring that Eskom's decision to terminate its contracts for the provision of security services at Helderberg and Overberg sectors is unlawful and it be set aside.

[20] The first applicant's application was heard and dismissed with punitive costs by Nziweni J on 25 July 2025. In dismissing the application, Nziweni J found that the interdictory relief sought by the first applicant would, in fact, have the opposite effect of compliance with the 2024 order. The Court found that in seeking to restrain Eskom from implementing the urgent procurement process, the first applicant was effectively asking the Court to prevent Eskom from carrying out paragraph 3 of the court order. This, the Court warned, would effectively undermine a court order and amount to an attempt to nullify the 2024 order by a court of equal standing.

[21] An application for leave to appeal against that judgment was argued. During the hearing of this application, judgment was reserved. I have recently read the judgment of Nziweni J on the SAFLII portal and noted that the application for leave to appeal was dismissed on 20 October 2025.

The Third Review Application – the current application

[22] This is the Third Application brought by the first applicant on the same set of facts. In this application, the applicants again impugn both the 2024 and July 2025 orders. In the present application, the applicants seek to set aside contracts that Eskom awarded to the opposing respondents in terms of the urgent procurement process pursuant to the 2024 order. The applicants assert that the 2024 order did not automatically terminate their contracts; instead, it preserved them in paragraph 3 of that order until Eskom has conducted a lawful urgent procurement process by no later than 25 November 2024. The applicants further assert that the 2024 order placed Eskom under a legal obligation to conduct a valid and lawful urgent procurement process to appoint service providers to provide interim security services whilst it conducts an open tender process, which it had to commence within 4 months from the date of the 2024 order. Eskom did not do this. According to the applicants, its failure to do this within the period

prescribed by the 2024 order was unlawful and renders any steps taken by it after 25 November 2024 unlawful, including the appointment of the opposing respondents as urgent service providers.

[23] The applicants, particularly the first applicant, assert that, despite the express and clear obligations imposed upon it by the 2024 order, Eskom purported to terminate the applicants' contracts as contemplated by paragraphs 2 and 3 of that order. In the applicants' view, Eskom's decision to do this is unlawful because it did so on the basis that it was authorised to do so by the 2024 order, when that was not so. The applicants contend that Eskom seeks to suggest that it is terminating the applicants' contracts in light of the 2024 order. That order, in the applicants' view, does not authorise Eskom to terminate the applicants' contracts. Instead, it authorised Eskom to embark on an urgent procurement process and appoint successful bidders to commence rendering services to it with effect from 25 November 2024.

[24] The applicants also stated that this appointment would have automatically brought their contracts to an end. It is, therefore, unlawful for Eskom to terminate such contracts in circumstances where it has not yet lawfully appointed replacement service providers in terms of a lawful urgent procurement process authorised by the 2024 order. The applicants also asserted that the 2024 order contemplates that the applicants' contracts will continue until Eskom has lawfully appointed interim service providers pursuant to a lawful urgent procurement process authorised by that order, or an open tender process also authorised by that order.

[25] Both applicants emphasised that the 2024 order authorised Eskom to embark on an urgent procurement process to appoint interim security services providers within a specified time. According to the applicants, the 2024 order does not authorise Eskom to embark on an urgent procurement process outside the time prescribed therein. Despite this knowledge, Eskom proceeded with what purports to be an urgent procurement process long after the time specified in the 2024 order. The applicants believe that this was unlawful and rendered the appointment of the opposing respondents unlawful. In summary, the applicants asserted that Eskom did not conduct the urgent procurement process authorised by the 2024 order within the time prescribed in that order. Such failure, according to the respondent, renders the urgent procurement process irregular

because the prescribed time was not extended beyond 25 November 2024. This being the case, any decisions taken after 25 November 2024, including the appointment of the opposing respondents as urgent service providers, are unlawful and ought to be declared invalid and set aside.

[26] The applicants, particularly the first applicant asserts that the termination of the applicants' contracts on the basis that a lawful urgent procurement process had been concluded is also unlawful.

[27] Furthermore, the applicants stated that in October 2024 and acting in terms of the 2024 order, Eskom's relevant officials, duly authorised to do so, recommended that both applicants be awarded contracts for the provision of physical security guarding and patrol services at Eskom Holdings, in Cape Coastal Cluster. The applicants believe that, in terms of this recommendation, they were recommended for appointment to render the services referred to in the report for a period of 12 months, with effect from 26 October 2024 until 26 October 2025.

[28] The applicants contend that the recommendation was made pursuant to an urgent procurement process which Eskom embarked upon in terms of the 2024 order and within the time prescribed therein. The two applicants believe that if Eskom had decided on this recommendation, this litigation would have been avoided, and the May 2025 application before Nziweni J would have been brought on different grounds. According to the applicants, this is the only lawful and valid urgent procurement process upon which Eskom embarked in terms of the 2024 order and in terms of which it lawfully identified deserving bidders.

[29] Considering that the applicants were supposed to start rendering the guarding and patrol services with effect from 26 October 2024, Eskom had to take a decision on the recommendation by no later than that date. The applicants assert that Eskom's failure to do so constitutes a reviewable administrative action because it is unlawful and was not authorised by the 2024 order, which is the only instrument that empowered Eskom to conduct an urgent procurement process to procure the relevant services at that time.

[30] The applicants stated that Eskom did not inform them of the recommendation during the litigation of Part A of the May 2025 application. The applicants only became aware of the recommendation in June 2025, when they received the Rule 53 record of the review application, instituted in May 2025. The applicants believe that the failure to take a decision on the recommendation is unlawful and was a deliberate attempt to exclude them from benefiting from the award of the contract for which they were recommended.

[31] Furthermore, the applicants contend that Eskom had no lawful reason not to approve the recommendation and to give effect to it by awarding the contract contemplated therein to the applicants. Eskom ought not to have embarked on the purported urgent procurement process pursuant to which it appointed the urgent services providers (the opposing respondents) without first taking a decision on the recommendation. The applicants further contended that Eskom's officials, particularly Mr Martin and Mahlaku, were aware of the recommendation but deliberately and dishonestly decided not to mention it in their affidavits filed on behalf of Eskom in the May 2025 application.

[32] The applicants assert that there is nothing in the Rule 53 record to show why Eskom failed to take a decision on the recommendation made in the report. The applicants further contended that Eskom's failure to take a decision is unlawful and reviewable in terms of s 6(2) of PAJA. Pursuant thereto, the applicants seek a review, and a declaratory relief on the basis that Eskom's conduct set out above is constitutionally invalid, unlawful and constitutes grounds of judicial review contemplated in section 6(2)(g) of PAJA.

[33] Eskom and the opposing respondents opposed the applicants' application. Eskom notes that in the Second Application, Nziweni J saw through the first applicant's attempts to circumvent the order granted by Thulare J, to secure for itself the continuation of a tender which had already been set aside. To this end, the Court refused to countenance this abuse. It dismissed the application with costs on a punitive scale of attorney and client. Eskom asserts that the costs order was a clear signal of the Court's displeasure at the first applicant's abuse of process to pursue a benefit to which it had no legal entitlement. Eskom further stated that nothing in the 2024 order

indicates that, if the urgent procurement process is not completed by the stipulated date, the contracts unlawfully granted under the unlawful tender process would revive. Eskom further asserted that this precise contention was raised and rejected by Nziweni J in the Second Application.

[34] Eskom and the other opposing respondents contended that the 2024 order decisively set aside the tender and all contracts arising from it. The applicants cannot lawfully be restored to a position as if their contracts had survived that order; any suggestion to the contrary directly contradicts a binding judicial determination. Eskom opined that an urgent replacement procurement process was therefore required and unavoidable.

[35] Furthermore, Eskom stated that the internal recommendation relied on by the applicants does not confer rights. Eskom contended that the applicants proceeded on the incorrect assumption that its internal recommendation, marked Annexure FA8 attached to the applicants' application, constituted a binding decision by Eskom that conferred enforceable, cognisable rights upon them. In Eskom's view, that assumption is wrong. Eskom emphasised that Annexure FA8 is, on its face, no more than a recommendation that the Delegated Approval Authority approve an urgent procurement submission recommending the appointment of the applicants to provide security services.

[36] According to Eskom, the document clearly provides for approval by signature of the Security Manager and the Business Enablement Manager. The recommendation was neither endorsed by the General Manager nor adopted by the Procurement Tender Committee, to whom it was directed for consideration. In other words, the recommendation was no more than a proposal within the internal Eskom process, not approved by the Eskom officials who grant approval before the recommendation became an actual decision of Eskom. Importantly, Eskom asserted that the recommendation itself was premised on a fundamental error: being the assumption that the contracts awarded under the previous tender remained in effect. This was not the case as the 2024 tender process and contracts granted thereunder were declared unlawful. Eskom stated that the recommendation was understandably not approved by Eskom.

[37] Eskom also averred that the interdictory relief that the applicant seeks, particularly the first applicant in paragraph 1.8 of the Notice of Motion, is aimed at conduct that has already taken place. By July 2025, the urgent procurement process had been completed and service providers lawfully appointed. This information was brought to the attention of the applicants. Correspondence was exchanged between the parties regarding the applicants' vacation from the Eskom premises. Amongst others, the applicants indicated their intention to appeal the Judgment of Nziweni J. They demanded that Eskom suspend its urgent procurement process and allow the applicants to continue rendering services until the appeal is concluded.

[38] Eskom stated that it proceeded with the urgent procurement process, and on 1 June 2025, Eden Security Services, one of the newly appointed service providers, moved onto certain Eskom sites. The following month, on 1 August 2025, Ngova and Alert Patrol also took occupation of the sites previously serviced by the applicants and commenced rendering security services. Eskom notes that since then, guards employed by the applicants have continued to present themselves at the sites. However, they have not performed any security services. Eskom has not made any payments to the applicants for services beyond 31 July 2025. Eskom and the opposing respondent applied for the dismissal of the applicants' application with costs. The second and the fifth respondents shared the sentiments echoed by Eskom.

[39] The fifth respondent specifically contended that the applicants are approbating and reprobating in that the applicants did not complain when Eskom did not appoint urgent service providers within the period ordered because the applicants were benefiting; now that it is no longer to their benefit, they are complaining that Eskom did not appoint emergency service providers within the period ordered. In addition, all the opposing respondents impugned the urgency with which the matter was brought. They argued that this matter was not urgent and that it had been dealt with by Nziweni J in the second application. Moreover, the opposing respondents raised preliminary points of *res judicata* and *lis pendens*. They contended that the relief the applicant seeks in this application is similar in substance to the relief sought by the applicants in Part B of the 2025 application.

PRINCIPAL SUBMISSIONS BY THE PARTIES

The Applicants' submissions

[40] Mr Tsatsawane SC, counsel for the first applicant, who appeared with Mr Williams, submitted that this application does not seek to relitigate the issues litigated in the May 2025 application, as suggested by the opposing respondents. According to counsel, the applicant's review relief is twofold. The first review relief is to review and set aside Eskom's failure to take a decision on its internal recommendation, and the second review relief is to review and set aside Eskom's decisions to appoint Eden, Ngova Trading and Alert Patrol as urgent procurement service providers.

[41] Counsel submitted that in the May 2025 application, the first applicant sought to enforce the 2024 order by holding Eskom in contempt of that order and by seeking consequential relief aimed at enforcing that order. At the time of that application, the first applicant did not know that Eskom had in fact already recommended that the applicants be appointed to render the services which are in dispute between the parties.

[42] Mr Tsatsawane argued that the first applicant's case is simply that once the recommendation was made to the relevant structures of Eskom, Eskom was in law obliged to take a decision on the recommendation, even if it was a decision to reject the recommendation because even a rejection would have had its legal consequences. Counsel asserted that the first applicant's case is that Eskom failed to take a decision on the recommendation. Such failure falls within s 6(2)(g) of PAJA which provides that the failure to take a decision constitutes a ground of review.

[43] In developing his argument, Mr Tsatsawane pointed out that when the May 2025 application was instituted, the applicants did not know that Eskom had in fact recommended that the applicants be appointed to render the services in issue. Eskom also did not disclose this issue in its answering affidavit in opposing that application. In counsel's view, Eskom should have made this disclosure because that application was about complying with the 2024 order which required Eskom to appoint security services providers by no later than 25 November 2024.

[44] Counsel pointed out that in terms of the 2024 order, Eskom had to implement the outcome of an urgent procurement process for the rendering of the security services in dispute with effect from 25 November 2024. In counsel 's view, on a proper reading of this order, it means that Eskom was authorised to conduct an urgent procurement process, complete and implement it with effect from 25 November 2024 and not later than that date. Mr Tsatsawane further contended that the reason Eskom had to be authorised to conduct an urgent procurement process is because an urgent procurement process is not a normal procurement process and it is not there for the taking. A normal procurement process requires Eskom to publicly invite interested parties to submit tenders for the provision of the required services. An urgent procurement process, on the other hand, dispenses with the obligation to publicly invite interested parties to submit tenders and bidders are selected and then invited to submit tenders by Eskom itself.

[45] Mr Tsatsawane argued that in terms of the 2024 order, the urgent procurement process had to be completed and implemented with effect from 25 November 2024. The effect of this was that if the urgent procurement process were not completed and the 'outcome' thereof not implemented with effect from 25 November 2024, Eskom could no longer rely on the 2024 order to conduct an urgent procurement process after 25 November 2024. In that event, after 25 November 2024, Eskom had to comply with its supply chain management procedure to conduct an urgent procurement process, and it did not because its Rule 53 record does not show that the jurisdictional prerequisites for it to conduct that kind of a procurement process existed.

[46] Mr Tsatsawane submitted that Eskom was not in law authorised to conduct the urgent procurement process after 25 November 2024 because the jurisdictional prerequisites for it did not exist and were not met. Accordingly, counsel asserted that the consequence of this is that the appointment of Eden, Ngova Trading and Alert Patrol purportedly in terms of an urgent procurement process is unlawful and ought to be reviewed and set aside. Counsel implored the court to grant the relief sought in the notice of motion.

First, sixth and seventh respondents' submissions

[47] On the other hand, Mr Oosthuizen SC, counsel for Eskom who appeared with Ms Mokale, submitted that the applicants were some of the four successful bidders in a tender issued by Eskom for security services at various Eskom sites in the Cape Coastal Cluster area. The tender, under Tender Reference No WC1159ZM resulted in contracts being awarded to the four successful bidders, including the applicants, which were to commence on 1 June 2024. Counsel argued that in May 2024, one of the unsuccessful bidders, Eden Security Services CC launched urgent review proceedings to have the tender and the resultant contracts set aside.

[48] Mr Oosthuizen submitted that Eden Security alleged, amongst other things, that the bid submitted by the applicants was unlawful because the applicants had misrepresented their BEE status in the tender documentation which it furnished to Eskom. The applicants were joined as respondents in the first application. Notwithstanding, the applicants did not oppose the relief sought and filed no affidavits disputing the allegations that the contracts awarded to them was unlawful, due to them having misrepresented their BEE status. Pursuant thereto, Thulare J granted an order on 24 September 2024, in favour of Eden setting aside tender WC1159ZM. Mr Oosthuizen further submitted that a judgment of a court is final and binding in effect, unless and until it is overturned through a legally cognisable process such as an appeal, review or rescission.² Neither the applicants nor any other party has endeavoured to overturn the 2024 order.

[49] Mr Oosthuizen argued that the applicants did not dispute the allegations against them in the First Application. The applicants did not oppose the setting aside of the tender and the resultant contracts and made no submissions regarding the just and equitable relief which should be granted by the Court, if persuaded that the tender and resultant contracts fell to be set aside. In counsel opinion, it is beyond dispute that, as from the date on which Thulare J issued the order, the contract awarded to the applicants had no legal validity and is in law regarded as non-existent. Notwithstanding their unexplained failure to oppose the First Application, the first applicant, has in the

² *Provincial Government Northwest & Another v Tsoga Developers CC & Others* 2016 (5) BCLR 687 (CC), at para 52.

past five months, instituted two separate court applications aimed at reversing and undermining the 2024 order.

[50] Counsel raised a preliminary point of *lis pendens* and argued that the order granted in the Second Application, in which Nziweni J dismissed the first applicant's case, dealt only with the relief sought in Part A. The Part B relief in the Second Application is still pending before this Court. Mr Oosthuizen further argued that the first applicant now seeks an order setting aside Eskom's decision to terminate the unlawful contract previously awarded to it under the tender process that Thulare J set aside. Counsel notes that at paragraph 5.3 of the notice of motion of the Part B application now before the Court, the first applicant also seeks to set aside the decision to appoint service providers pursuant to Eskom's urgent procurement process.

[51] In addition, counsel submitted that the applicants also seek an order, in terms of s 172(1)(b) of the Constitution, that it be appointed to provide guarding services at various Eskom sites which the applicants serviced pursuant to the contract unlawfully granted to it. Mr Oosthuizen argued that the applicants seek to cloak this relief in Constitutional garb. However, the substance is no different from the previous attempt: an order allowing it to retain the benefit of the contracts unlawfully granted to it through the tender process. In substance, counsel argued that this Court is asked to grant the applicants relief that they will also obtain if successful in Part B of the Second Application. This, in counsel's view, is an impermissible duplication of legal proceedings.

[52] Mr Oosthuizen pointed out that the duplication of proceedings gives rise to the real risk of conflicting judgments. Mr Oosthuizen further emphasised that the first applicant cannot justify instituting two parallel applications, aimed at achieving the same outcome, merely because the applicants seek to cloak their relief in the Third Application in section 172(1)(b) of the Constitution. Counsel further asserted that the arguments raised by the applicants in this application were raised in the Second Application and dismissed by Nziweni J. Mr Oosthuizen implored the court to dismiss this application with costs.

The second respondent's submissions

[53] The submissions of the Mr Stelzner SC, counsel for the second respondent, who appeared with Mr Klue, was in substance aligned to that of Mr Oosthuizen and to that end, I will succinctly give a summary of his argument. Mr Stelzner submitted that the applicants' application is a duplication of the issues considered by Nziweni J. Counsel also pointed out that this is supported by the resolution FA1, which was attached to the founding affidavit and used in both the Second Application and the current application. Mr Stelzner contended that the applicants' application is a total abuse of process. Counsel contended that the matters addressed in this application are *res judicata*, having already been resolved by Nziweni J. Additionally, Mr Stelzner asserted that a Part B review application remains pending before this court. Nziweni J decided Part A of that application. Counsel submitted that the material issue underlying the current application have all been decided already in the 2024 and 2025 applications, in which final judgments have been given.

[54] In developing his argument, Mr Stelzner submitted that the serious allegations of fraud and corruption which were levelled against the applicants, inter alia, in those applications, and once again in this application, have never been refuted or even addressed by the applicants and the other beneficiaries of the original award. In counsel's view, this application is clearly another attempt to abuse the process of this Court to hold on to an ill-gotten gain worth some R1,5 million per month to the applicants. Mr Stelzner emphasised that this application is an abuse of process, as the same relief on the similar grounds is already being requested in Part B of the Second Application. Counsel contended that any new grounds relying on information from the Rule 53 record ought to be included as part of that application. Mr Stelzner prayed this Court to dismiss this application with costs on a punitive scale as a mark of this court's displeasure.

Fifth respondent's submissions

[55] Mr De Beer SC, who appeared with Ms Delport, counsels for the fifth respondent, aligned his argument with the submissions presented by the other counsels on behalf of the other opposing respondents. However, Mr De Beer emphatically impugned the urgency with which the application was brought as well as the applicants' alleged delay in bringing this application. Counsel argued that the applicants' application has no

modicum of urgency, constitutes an abuse of process, bad in law and fatally flawed. Mr De Beer argued that despite the lack of urgency, the matter is prima facie vexatious because substantially the same relief is already pending in the second application instituted in May 2025. Nor has the applicants been able to establish that they are entitled to a review in terms of the provisions of PAJA or for an interdict. According to Mr De Beer, this application attempts to legitimise an illegality, after Eskom terminated the applicants' services contracts which was duly set aside by the order granted by Thulare J in the First Application.

[56] Counsel submitted further that notwithstanding the applicant's attempts to prove otherwise, the relief they seek cannot and should not be granted in that the application is not urgent; the same relief is already pending in a different application before this court and that the grounds of review relied on by the applicants are wholly insufficient and do not support the relief sought. Mr De Beer also contended that any relief appointing the applicant to render services to Eskom would be contrary to the 2024 order, which specifically orders that the applicants' contract with Eskom is set aside; therefore, it is void and no longer enforceable. Accordingly, Mr De Beer implored the court to strike the application from the roll, alternatively, to dismiss the application with a punitive cost order including the costs of two counsels.

ISSUES TO BE DECIDED

[57] There are six critical questions that this court must consider in this application. The *first* question that this court is enjoined to consider is whether this matter is urgent as envisaged in Rule 6(12) of the Uniform Rules of Court. *Secondly*, this court is called upon to determine the respondents' points in limine of *Lis pendens* and *res judicata*. *Thirdly*, this Court must determine whether Eskom's alleged failure to take a decision on its internal recommendation to approve the award of contract to the applicants for the provisions of physical security services at Eskom premises in the Cape Coastal Cluster from 26 October 2024 until 26 October 2025 should be reviewed and set aside.

[58] *Fourth*, the court must determine whether Eskom's subsequent decision to appoint the opposing respondents pursuant to an urgent procurement process authorised by the 2024 order must be reviewed and set aside. *Fifth*, the court must determine

whether it should invoke section 8(1) of PAJA read with section 172 (1)(b) of the Constitution and appoint the applicants to provide the necessary security services to Eskom for 12 months with effect from the date the order is granted. *Sixth*, in the event the court dismisses the applicants' main relief, this court must determine the applicants' alternative relief, namely, whether Eskom must be interdicted from preventing the applicants from rendering the services for which the applicants were appointed by Eskom pursuant to the award of the tender as contemplated in the 2024 order.

APPLICABLE LEGAL PRINCIPLES AND DISCUSSION

[59] For completeness, I will discuss the disputed issues discussed above sequentially.

Urgency

[60] As previously stated, the opposing respondents impugned the urgency of this application. The first applicant brought this application on an urgent basis, premised on the nature of the relief sought, which, it is argued, must be sought on an urgent basis. Furthermore, the first applicant contended that decisions to award tenders must always be challenged urgently because they are immediately implemented. For this reason, and to avoid prejudice to the applicants and Eskom, the first applicant asserted that applications such as the present are entertained on an urgent basis. The applicants also asserted that Eskom has prevented them from rendering the services for which they were appointed under the tender, and for which they have been recommended for reappointment for a period of 12 months.

[61] The applicants contend that regarding the recommendation, the applicants' appointment was supposed to be effective from October 2024 to October 2025, but this was concealed from them until the Rule 53 record was delivered in June 2025. The applicants submitted that the application was therefore brought urgently due to the deceitful conduct of Eskom's officials in hiding this information from them. The applicants also pointed out that Eskom's conduct of acting in a manner which is not

transparent justifies the hearing of this application on an urgent basis because it is only then that Eskom would be forced to tell the Court, under oath, what it did or did not do and how it did what it did so that the applicants can have a full understanding of the extent to which Eskom violated their rights and then ask the Court for appropriate relief.

[62] I must mention that to demonstrate entitlement to urgent relief, an applicant must present certain evidence to the court. In *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others*,³ the court correctly set out what an applicant needs to show in this regard. The court stated that the correct and the crucial test is whether, if the matter were to follow its normal course as laid down by the rules, an applicant will be afforded substantial redress. If he cannot be afforded substantial redress at a hearing in due course, then the matter qualifies to be enrolled and heard as an urgent application. If, however, despite the anxiety of an applicant he can be afforded a substantial redress at a hearing in due course the application does not qualify to be enrolled and heard as an urgent application.

[63] As correctly pointed out by Mr De Beer, it was incumbent on the applicant to provide factual evidence to this Court as to why it will not be afforded substantial redress at the hearing in due course and what the nature of the prejudice is that it will suffer if it is not afforded an urgent hearing. The nature of the relief sought does not afford the litigant with the ground of urgency. Simply put, the applicant had to provide evidence that the nature of the prejudice it stands to suffer if the relief is not granted entitles it to an urgent hearing. For there to be any prejudice, the applicant must, at the very least, on the facts, have some entitlement, and the applicant must establish such entitlement.

[64] In this case, the applicants rely specifically on the internal recommendation for their entitlement. As I will demonstrate later in this judgment, the incomplete internal recommendation constitutes no entitlement at all, as it is nothing more than a suggestion, and Eskom had no obligation to follow it. The fact that Eskom decided to appoint the opposing respondents to provide security, rather than the applicants, does not cause the applicants to suffer prejudice. Importantly, the applicants did not provide

³ (11/33767) [2011] ZAGPJHC 196(23 September 2011) para 9.

any evidence that they will not be able to obtain substantial redress at the hearing in due course, particularly in Part B of the 2025 application, where the same relief as here is being sought.

[65] Furthermore, the relief sought by the applicants is not time-bound. The applicants seek to be appointed to render security services for a period of 12 months. The applicants did not allege that they could render these security services only during the period when the opposing respondents are rendering them. Evidently, it makes no difference when the appointment is made, only the period of appointment matters. They seek an order that they be appointed for a year on a date that must be determined by the court. Significantly, as articulated above, the applicants will obtain substantial redress at the hearing in due course when Part B of the Second Application is heard.

[66] The Rule 53 record has been made available to the applicants. The applicants can invoke Rule 53(4) and amplify their application in the Part B application. That is the proper forum in which any complaints about lawfulness or irregularity must be determined. This Court, in my view, cannot be asked, under the guise of urgency, to usurp that process or to decide Part B of that application in this matter.

[67] Clearly, this matter is not urgent. The applicants have failed to prove the basic foundational requirements for urgency. In my view, this application must ordinarily be struck from the roll for the lack of urgency.

[68] Generally, this finding would end the dispute. However, for the sake of completeness, I deem it prudent to briefly consider the remaining disputed questions, relating to the review of Eskom's alleged failure to give effect to its internal recommendation and the subsequent appointment of the opposing respondents in terms of the 2024 order. This approach, in my view, conforms with the Constitutional Court's guidance provided by Ngcobo J in *S v Jordan & Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae)*.⁴ To my mind, this approach ensures that all the disputed issues raised by the parties in this application are ventilated. I intend to follow it.

⁴ 2002 (6) SA 652 (CC) at para 21; See also *Minister of Justice and Another v SA Restructuring and Insolvency Practitioners Association and Others* 2017 (3) SA 95 (SCA) at para 38.

Lis pendens

[69] The opposing respondents raised a preliminary point of *lis pendens*. Mr Stelzner also raised the plea of *res judicata*. The plea of *lis pendens* bears an affinity to the plea of *res judicata* since both are directed at achieving the same policy goals. I will deal with the plea of *res judicata* jointly with the merits of the applicants' application. *Lis pendens* on the other hand, is a special plea open to a defendant who contends that a suit between the same parties concerning a like thing and founded upon the same cause of action is pending in some other court.⁵ In *Nestle (SA) (Pty) Ltd v Mars Incorporated*,⁶ the Supreme Court of Appeal (SCA) held that the defence of *lis alibi pendens* shares features in common with the defence of *res judicata* because they have a common underlying principle which is that there should be finality in litigation.

[70] Once a suit has been commenced before a tribunal that is competent to adjudicate upon it the suit must generally be brought to its conclusion before that tribunal and should not be replicated (*lis alibi pendens*). Similarly, the suit will not be permitted to be revived once it has been brought to its proper conclusion (*res judicata*). The same suit, between the same parties, should be brought only once and finally. A plea of *lis alibi pendens* does not have the effect of an absolute bar to the proceedings in which the defence is raised. The court intervenes to stay one or other of the proceedings, because it is prima facie vexatious to bring two actions in respect of the same subject matter.⁷ In other words, if *lis pendens* is proven, it is presumed that the second proceedings are prima facie vexatious and the party instituting those proceedings bears the onus of proving they are not.⁸

[71] In this case, the respondents contend that this application is a repeat of the Second Application that was heard in 2025. The prayers sought by the applicants are substantially the same as those sought in Part B of the Second Application. The applicants, on the other hand, asserted that, in accordance with Eskom's internal recommendation for the urgent procurement process, they were recommended. The

⁵ *H R Holfeld (Africa) Ltd v Karl Walter & Co GmbH* (1) 1987 (4) SA 850 (W).

⁶ [2001] 4 All SA 315 (SCA) at 319.

⁷ *Guthmann & Wittenauer GmbH v Continental Jewellery Manufacturers* 1993 (3) SA 76 (C) at 83B–C.

⁸ *Painter v Strauss* 1951 (3) SA 307 (O).

applicants' appointment was supposed to be effective from October 2024 to October 2025. However, this issue was hidden from the applicants until the Rule 53 record was delivered in June 2025. Pursuant thereto, they launched this application.

[72] I have considered the prayers the applicants seek in this case and in the relief sought in Part B of the Second Application, and I am of the view that the applicants are seeking the same relief in both cases. The applicants seek this court to grant the relief which they will also obtain if successful in Part B of the Second Application. This, in my view, is an impermissible duplication of proceedings.

[73] As discussed above, if the applicants indeed became aware of the recommendation upon receipt of the Rule 53 record, they should have invoked the provisions of Rule 53(4) of the Uniform Rules of Court. Rule 53(4) provides that 'an applicant may, within 10 days after the registrar has made the record available to the applicant, by delivery of a notice and accompanying affidavit, amend, add to or vary the terms of such applicant's notice of motion and supplement the supporting affidavit'. This subrule gives an applicant for review a clear right to amend, add to, or vary the notice of motion and to supplement the founding affidavit without the consent of the opposite party or the leave of the court.⁹

[74] The applicants, particularly the first applicant in this case, should have amended or varied their notice of motion and filed the relevant supplementary affidavit that encapsulated their complaint about the alleged failure to take a decision based on the internal recommendation. It is impermissible, in my view, for the first applicant to institute new proceedings seeking in substance the same relief that it seeks in Part B of Second Application. The first applicant cannot justify instituting two parallel applications, aimed at achieving the same outcome, merely because the Second Application seeks to cloak its relief in section 172(1)(b) of the Constitution. It must be stressed that the law 'requires a party with a single cause of action to claim in one and the same action whatever remedies the law accords him upon such cause'.¹⁰ In any event, as I will

⁹ *Fizik Investments (Pty) Ltd t/a Umkhombe Security Services v Nelson Mandela Metropolitan University* 2009 (5) SA 441 (SE) at 444F–445A.

¹⁰ *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 (3) SA 462 (A) at 472A-B.

demonstrate hereunder and consistent with Nziweni J's finding, s 172(1)(b) of the Constitution does not find application in this matter.

[75] The applicants cannot use this application to bypass the procedural requirements that have arisen in the Second Application. As correctly observed by Mr Oosthuizen, the duplication of proceedings gives rise to the real risk of conflicting judgments. For example, the Court seized with Part B of the Second Application might find that Eskom was entitled to invoke the urgent procurement process. In contrast, the Court in the present matter might reach the opposite conclusion. This would create uncertainty about which judgment binds the parties and would undermine the orderly administration of justice. The point in limine of *lis pendens* raised by the opposing respondents is well-founded and must ordinarily be upheld. Notwithstanding, I deem it proper to consider the other disputed issues.

Does Eskom's alleged failure to implement the urgent procurement process within the specified period invalidate the subsequent appointment of the opposing respondents?

[76] The applicants assert that the 2024 order required Eskom to implement the outcome of the urgent procurement process with effect from 25 November 2024. This placed an obligation upon Eskom to take a decision on the recommendation on or before that date. The applicants further contended that the urgent procurement process conducted by Eskom after 25 November 2024, without the extension of the 2024 order to authorise the process after that date, is unlawful and it is reviewable in terms of section 6(2) of PAJA. It was further argued on behalf of the applicants that the 2024 order did not automatically terminate the applicants' contracts; instead, it preserved them in paragraph 3 of the order until Eskom had conducted a lawful urgent procurement process by no later than 25 November 2024.

[77] The argument that the 2024 order did not automatically terminate the applicants' contracts is misplaced and fundamentally flawed. It must be stressed that there is nothing in the 2024 order authorising the applicants or any other parties to whom contracts had been unlawfully awarded, following the unlawful tender process, to continue performing and deriving benefit from those contracts until a new tender

process has run successfully and taken the place of the process which the 2024 order declared to be unlawful. The tender was cancelled because it was surrounded by misleading information and untruths. It is apposite to remind ourselves that the ordinary meaning of set aside is that the decision ceases to have effect and is treated as if it never existed.¹¹ Setting aside is simply a way of saying that the decision no longer stands – that it is null and void.¹² The effect of setting aside is, in the absence of an order to the contrary, retrospective.

[78] Therefore, suggesting that the applicants have any right to keep unlawfully providing security services to Eskom, despite a clear judicial ruling, is entirely unfounded. Moreover, it is trite that acts performed after a decision has been set aside and which can no longer depend upon the mere existence of that decision for their own validity, are invalid once the decision is set aside, irrespective of whether those acts were performed before or after the court order invalidating the decision. This principle was clearly articulated in *Seale v Van Rooyen* NO,¹³ where the SCA stated:

‘I think it is clear from *Oudekraal*, and it must in my view follow, that if the first act is set aside, a second act that depends for its validity on the first act must be invalid as the legal foundation for its performance was non-existent.’

[79] The same approach was adopted by the SCA in *City of Johannesburg v Ad Outpost (Pty) Ltd*,¹⁴ where the Court emphasised this principle as follows:

‘However, as this court has regularly stressed, an administrative decision declared to have been invalid is to be retrospectively regarded as if it had never been made.’

[80] With regard to the 2024 order, it cannot be disputed that the applicants’ contract and appointment were reviewed and set aside with effect from 25 October 2024. After the effective date, the applicant had no entitlement arising from any contract or award, particularly in relation to the urgent procurement process outlined in the 2024 order. As

¹¹ *Pikoli v President of the Republic of South Africa* 2010 (1) SA 400 (GNP) at 408-409; see also *National Energy Regulator of South Africa v PG Group (Pty) Ltd* 2020 (1) SA 450 (CC) para 59.

¹² Hoexter C and Penfold G *Administrative Law in South Africa* 3 ed (2021) at 757.

¹³ 2008 (4) SA 43 (SCA) at paras 13 – 14.

¹⁴ 2012 (4) SA 325 (SCA) at para 20.

correctly pointed out by Mr Oosthuizen, it is beyond dispute that, as from the date on which Thulare J issued the order setting aside the tender, the contract awarded to the applicants had no legal validity and is in law regarded as non-existent. Clearly, the argument that the 2024 order did not automatically terminate the applicant's contracts, but rather it preserved them until Eskom has conducted a lawful urgent procurement process by no later than 25 November 2024, is mistaken and must be rejected.

[81] What I find concerning is that the applicants did not dispute the allegations of impropriety against them when the First Application was heard. In the first review application, Eden Security Services accused the applicants of corruption, and these claims have been repeated in the current application. Those damning allegations led the Court to purge the tender and set it aside, together with the resultant contracts awarded to the applicants. Despite receipt of the application and knowledge of the serious allegations levelled against them, the applicants did not oppose the review application and the setting aside of the tender and resultant contracts. Despite being invited to provide comments, the applicants chose to remain silent regarding the serious allegations levelled against them that led to the tender being awarded in their favour.

[82] Notwithstanding, the applicants want to hold on to the unlawful benefits they obtained from that tender, which was set aside. It is my view that no one ought not to benefit from contracts found to be illegal or earn profits as a result of unlawful activities. The *Black Sash Trust v Minister of Social Development and Others*,¹⁵ matter that the applicant's counsel referred me to during argument is distinguishable from this case. That case arose from an imminent national social-grants crisis implicating s 27(1)(c) constitutional rights. The Court, already sitting post-invalidity, issued a just-and-equitable, supervisory order to keep grants flowing for millions of underprivileged citizens. The present matter concerns a commercial placement in a security guarding contract for Eskom sites. As the respondents notes it does not engage the same constitutional compulsion to maintain a specific contractor, nor does it pit the public's access to basic services against contractual inconvenience.

¹⁵ 2018 (12) BCLR 1472 (CC).

[83] It seems to me that the applicants' true objective is to negate the effect of the validly granted court order declaring the tender unlawful, and to secure for themselves the continued benefit of an unlawful contract, together with the considerable financial rewards they would have received under it. Clearly, the applicants' attempt to revive that contract, in circumstances where the tender award has been judicially nullified, is nothing more than an attempt to prolong their ill-gotten benefit derived from their impropriety and to subvert a binding court order.

[84] It is my firm view that this application is an overtly self-serving and an impermissible attempt by the applicants to continue receiving those substantial payments, despite having no lawful entitlement to do so. To this end, I agree with the views expressed by Nziweni J, in the Second Application where the learned justice stated:¹⁶

'It appears as though the applicant has brought this application for the purpose of self-preservation. I want to emphasise a point made by Mr Oosthuizen SC on behalf of the Eskom, *that this is an endeavour by the applicant to line their pockets*¹⁷ (emphasis added).'

[85] The applicants hinge their relief on one central issue: that the 2024 order required Eskom to complete the urgent procurement process by 25 November 2024, which it failed to do. Accordingly, the applicants contended that everything that followed the expiry of the specified period is irregular, specifically the appointment of the opposing respondents as urgent service providers. According to the applicants, such failure renders any steps taken by Eskom after 25 November 2024 unlawful and reviewable in terms of section 6(2)(g) of PAJA, including the appointment of the urgent service providers.

[86] It is common cause that in implementing the 2024 order, Eskom anticipated that delays might arise in the urgent procurement process due to the complexity of the requirements and the scale of the procurement exercise. To ensure legal certainty and the continuity of services, Eskom approached this court urgently for an extension of the

¹⁶ *Prime African (Pty) Ltd v Eskom Holding SOC Ltd and Others* (2025/070166) [2025] ZAWCHC 306 (25 July 2025).

¹⁷ At para 82.

order. It is also not in dispute that on 29 October 2024, Thulare J granted Eskom's application and extended the implementation deadline to 25 November 2024 (extension order). Thus, the effect of the extension order was twofold: the tender and the resulting contracts were set aside with effect from 25 November 2024. The deadline for the advertisement of the new open tender was extended to 25 February 2025.

[87] In the Second Application before Nziweni J and in the present application, Eskom explained that it thereafter took significant steps to give effect to the 2024 order. While delays occurred, they were not attributable to any wilful defiance or indifference on Eskom's part but rather arose from procedural and administrative complexities. I must mention that from the reading of the judgment of the Second Application, it seems to me that the argument that Eskom failed to comply with the 2024 order was argued before Nziweni J. Simply put, the argument that Eskom failed to comply with the 2024 order was considered and rejected by Nziweni J. This conclusion is underpinned by the following expression in Nziweni J's judgment in the Second Application:

'Gleaning from Eskom's papers and Mr Oosthuizen's submissions, it becomes evident that it is the stance of Eskom that they have substantially and meaningfully complied with the 2024 order...There is nothing in the papers to suggest that Eskom showed bad faith or flagrant disregard of the 2024 order'.¹⁸

[88] The Court went further to find that:

'Despite the failure to timely comply with the 2024 order in a timely manner, there was a substantial compliance [with the 2024 order]. *The upshot of this is that Eskom has offered proof in its papers that demonstrate facts, that indicate that compliance with the 2024 order was clearly impossible, regardless of the degree of care and diligence.*'¹⁹ (emphasis added)

[89] It is therefore opportunistic and impermissible for the applicants to repackage an argument in this application that was considered and rejected by the court in the Second Application. The applicants made this argument despite knowing that Nziweni J explicitly determined that Eskom had substantially complied with the 2024 order. In a

¹⁸ At par 62.

¹⁹ Para 63.

simplified manner, a judicial finding has been made in the Second Application that Eskom complied considerably with the court order. That finding also extends to the appointment of the opposing respondents. The finding of Nziweni J still stands and has not been set aside. Evidently, this application is an abuse of process and a blatant attempt to re-litigate findings made by Nziweni J, albeit under a different guise. Simply put, the issues raised by the applicants were decided and are *res judicata*.

[90] In any event, I agree with Mr Stelzner, counsel for Eden, that one must bear in mind that in the interpretation of court orders, the case law emphasises a practical, sensible, business-like approach that considers the order's purpose and wording in the context of the overall proceedings.²⁰ Time limitations or conditions in a court order are to be interpreted within this framework, ensuring a fair and just outcome, considering the context, background, and purpose of the court order, as well as its text. Against this backdrop, clearly, the Court order of 2024 is silent on the effect of non-compliance with the six weeks or the time limit therein. There is no penalty proposed in the order for not meeting the specified time limit.

[91] Additionally, one part of the order does not depend on strict compliance with the other. Importantly, enforcing the period specified in the order without flexibility could clearly result in significant injustice. A court has determined that Eskom has largely fulfilled the requirements of the order. In my view, the order is permissive and not peremptory. The fact that Eskom previously applied for the extension of the time period is inconsequential. Of importance, the court in the Second Application found that Eskom has offered proof in its papers that demonstrate facts, which indicate that compliance with the 2024 order was clearly impossible regardless of the degree of care and diligence. Eskom largely fulfilled the court's order.

Did Eskom neglect to make a decision following the internal recommendation?

[92] The applicants contend that shortly after the 2024 order was granted, and well within the time prescribed for the conduct of an urgent procurement process, Eskom invited the applicants to submit bids for the provision of the security services

²⁰ *Natal Joint Municipality Pension Fund v Endumeni Municipality* 2014 (2) SA 494 SCA para 18.

contemplated in that order. Both applicants submitted their bids. After considering both applicants' bids, Eskom's relevant internal structure recommended that the two applicants be appointed to provide the security services in issue for a period of 12 months from 26 October 2024 to 25 October 2025.

[93] Mr Tsatsawane submitted on behalf of the first applicant that the applicants, particularly the first applicant, readily accept that Eskom was not bound to accept the recommendation. Eskom was, however, bound by law to take a decision on the recommendation. It failed to do so. It is this failure which constitutes reviewable administrative action in terms of s 6(2)(g) of PAJA. Counsel further submitted that Eskom's failure to take a decision on the recommendation is reviewable in terms of s 6(2)(g) of PAJA. This is because there was an obligation on Eskom to decide whether to accept or reject the recommendation, as only then could the 'outcome' of the urgent procurement process authorised by the 2024 order be implemented with effect from 25 October 2024. The applicants also argued that the remedy is for the Court to give effect to the recommendation, which Eskom did not even consider, let alone give effect to, by appointing them in terms of section 8(1) of PAJA for the interim pending the tender process.

[94] With respect, I do not agree with the argument raised by the first applicant's counsel. For clarity, s 6(2)(g) of PAJA provides that a court or tribunal has the power to judicially review an administrative action if the action concerned consists of a failure to take a decision. Section 6(3) of PAJA, on the other hand, provides that:

'If any person relies on the ground of review referred to in subsection (2)(g), he or she may in respect of a failure to take a decision, where —

(a) (i) *an administrator has a duty to take a decision;*

. . .

(iii) the administrator has failed to take that decision,

institute proceedings in a court or tribunal for judicial review of the failure to take the decision on the ground that . . . ' (emphasis added)

While s 8(2) of PAJA provides:

'The court or tribunal, in proceedings for judicial review in terms of section 6(3), may grant any order that is just and equitable, including orders —

(a) directing the taking of the decision; . . . '

[95] Section 6(2)(g) is directed at inordinate delays and the absence of any decision at all. The remedy is to direct the party that has not made a decision to make a decision before a specific time. The section clearly does not envisage the absence of a favourable decision, or the failure to take a decision in favour of a party, as opposed to a decision which was taken in favour of someone else. In the latter case, other sections of PAJA and other review grounds come into play. In this case, the horse has bolted. Eskom has, in fact, decided not to appoint the applicants but to appoint the opposing respondents as urgent procurement service providers pending the outcome of the tender process. If there is to be an objection to this, it needs to be directed at the decision taken, not the failure to consider an earlier internal recommendation, which has no legal effect. It must be emphasised that where a review is based on a failure to take a decision, if the right to that relief falls away because the decision has been taken, then there is no longer a legal basis for other relief to be granted.²¹

[96] Moreover, it is common cause that the recommendation was an internal process of Eskom. It did not have an external legal effect. It was a recommendation that the Delegated Approval Authority approve an urgent procurement submission recommending the appointment of the applicants to provide security services. The internal recommendation relied upon by the applicants was an incomplete internal process. It cannot, in law, constitute a decision producing external legal effect. I share the views expressed by the opposing respondents, particularly Mr Stelzner, that there was no duty on Eskom to accept the recommendation and appoint the applicants. On the contrary, Eskom was under a duty not to consider the applicants for continued service. The tender process that resulted in the original contracts, as well as the contracts themselves, were reviewed and subsequently set aside in the 2024 review application due to findings of fraud and corruption by the applicants.

[97] Significantly, before a decision falls within the definition of administrative action, it must adversely affect the rights of any person and have a direct, external legal effect. A

²¹ *Thusi v Minister of Home Affairs & 71 Other Cases* 2011 (2) SA 561 (KZP) para 45.

decision has direct legal effect when it is a legally binding determination of someone's rights and possesses the quality of finality. The person affected by that decision must be someone other than a person in government.²²

[98] To this end, s 1 of the PAJA defines administrative action to mean a decision of an administrative nature which adversely affects rights and has a direct, external legal effect. A mere internal recommendation, never approved or acted upon, is plainly not such a decision as it does not have external legal effect. In *South African Police Union v The National Commissioner of South African Police Services*,²³ the Court stated:

‘A decision has direct legal effect when it is a legally binding determination of someone’s rights, possessed of the quality of finality. *In order to have an “external” effect it must affect outsiders and should not be a purely internal matter of departmental administration or organisation.*’ (emphasis added)

[99] Accordingly, the applicants’ reliance on the incomplete internal recommendation as the basis for a legally cognisable right is misplaced. The recommendation conferred no rights. The recommendation was simply an internal communication from two officials, which, in any event, was of no legal validity or external effect. In those circumstances, any failure to have regard thereto is irrelevant, particularly for purposes of s 6(2)(g) of PAJA. That section simply finds no application.

[100] Notably, the document clearly provides for approval in signature by the Security Manager and Business Enablement Manager. The recommendation was neither endorsed by the General Manager nor adopted by the Procurement Tender Committee, to whom it was directed for consideration. As noted by Mr Oosthuizen, the recommendation was no more than a proposal within the internal Eskom process, not approved by the Eskom officials who grant approval before the recommendation became an actual decision of Eskom.

[101] The opposing respondents pointed out that the recommendation itself was premised on a fundamental error: the assumption that the contracts awarded under the previous

²² *Greys Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2004 (3) All SA 446 (C) at 458.

²³ (2005) 26 ILJ 2403 (LC) at para 57.

tender remained in effect. This was clearly not the case as the 2024 order declared the tender process and contracts granted thereunder unlawful. On that incorrect footing, it suggested the continuity of services by the applicants to mitigate the risk of disruption. Furthermore, the fact that the recommendation was neither endorsed by the General Manager nor adopted by the Procurement Tender Committee, to whom it was directed for consideration, clearly indicates that Eskom decided not to accept it.

[102] Simply put, it is incorrect to suggest that Eskom did not decide whether to accept or reject the recommendation. Clearly, Eskom rejected the recommendation and proceeded with an urgent procurement process. The urgent procurement process eventually led to the appointment of the opposing respondents as interim service providers pending the outcome of the tendering process.

[103] Eskom explained that, in the context of the urgent procurement process, a potential supplier must be sourced from the National Treasury supplier database and/or Eskom's supplier database. The process was duly undertaken. It began with interrogating the Eskom Vendor Database for the Western Cape, which identified Eden Security. Given the size of the contract and the need for multiple providers, Eskom then accessed the National Treasury Central Supplier Database. This resulted in Ngova Trading and Alert Patrol being identified and lawfully appointed.

[104] Accordingly, the recommendation was neither a final decision nor one intended to operate externally; it was an unapproved recommendation within Eskom's internal processes. Put plainly: the recommendation conferred no rights on the applicants, created no obligation on Eskom, and cannot serve as the legal foundation for the far-reaching relief the applicants seek in this application.

Should the applicants be appointed by this court to provide security services to Eskom?

[105] The applicants sought an order that in terms of section 172(1)(b) of the Constitution read with section 8(1) of PAJA, the applicant be appointed to provide physical security guarding and patrol services at Eskom Holdings Division, in Cape Coastal Cluster for a period of twelve months with effect from the date on which this

order is granted. Section 172(1)(b) of the Constitution confers the court a broad remedial discretion to grant an order that is just and equitable.²⁴ While s 8(1) of PAJA grants this court a wide discretion to grant an order that is also just and equitable.

[106] In my view, s 8(1) of PAJA and s 172(1)(b) of the Constitution do not find application in this matter. The contract awarded to the applicants was set aside due to some fundamental irregularities committed by the applicants. The applicants did not oppose the review application. That order, setting aside the tender awarded to the applicants, is final and binding unless overturned on appeal or rescission. The applicants did not endeavour to overturn the 2024 court order. In my opinion, granting the applicants such a remedy would be subverting an order of the court which was granted after the court considered all the relevant facts placed before it.

[107] Moreover, the opposing respondents are, in my view, lawfully rendering security services to Eskom pursuant to the urgent procurement process. The appointment of the applicants would clearly cause severe disruption and unwarranted financial expenses, as it would entail that all the newly appointed service providers would have to wind down operations and vacate premises for the applicants to restart services. Such an order would impose obligations on the parties which the 2024 order has already terminated by way of court proceedings in which the applicants elected not to participate.

[108] As foreshadowed above, the applicants rely on section 172(1)(b) of the Constitution. The court's authority under section 172(1)(b) has its limits and is not without restriction. In the circumstances of this case, section 172(1)(b) does not find application. It will not be just and equitable to cancel the contracts of the opposing respondents and to grant an order appointing the applicants to provide security services, where the applicants' contract was set aside on the grounds of misrepresentation. It is my firm view that appointing the applicants to provide security, as suggested by Mr Tsatsawane, would subvert the 2024 order.

²⁴ *Electoral Commission v Mhlope and Others* 2016 (5) SA 1 (CC) para 132.

[109] A just and equitable remedy essentially requires the outcome to be inherently fair and must balance the interests of the competing parties. It will be a gross injustice, in my view, to allow the applicants to benefit unlawfully at the expense of the opposing respondents with the court's approval. Section 172(1)(b) must be exercised consistently with legality, finality, and procedural fairness in appropriate and relevant cases. As correctly observed by Mr Oosthuizen, granting the applicants the relief they seek in this case would distort the objective of s 172(1)(b), turning it into a vehicle for relitigating settled disputes and for judicial unravelling of final orders. That would be like trying to unscramble a scrambled egg.

Should the alternative interdictory remedy be granted?

[110] In the alternative, the applicants seek an order interdicting and restraining Eskom from preventing the applicants from rendering the services for which the applicants were appointed by Eskom pursuant to the tender award contemplated in the 2024 order. The applicants also seek an order suspending the implementation of Eskom's decision to terminate the applicant's contracts in terms of which Eskom appointed the applicants to render the services which are the subject of the tender and the 2024 order.

[111] Pursuant to the findings I have made above, I deem it unnecessary to deal with this alternative relief in detail. However, I must indicate that the traditional formulation of the requirements for an interim interdict is that the applicant must establish (a) a *prima facie* right (b) a reasonable apprehension of irreparable harm and imminent harm to the right if the interdict is not granted, (c) the balance of convenience must favour the grant of the interdict; and (d) the applicant must have no other remedy.²⁵ In this case, I am of the view that the applicants have not established a *prima facie* right to have their tender extended. An order of court set aside that tender, and the applicants have shown no grounds on which that order can be set aside, nor did the applicant appeal that judgment. As discussed above, the internal recommendation does not create a *prima*

²⁵ See *Olympic Passenger Service (Pty) Ltd v Ramlagan* 1957 (2) SA 382 (D) at 383A-C; *Pietermaritzburg City Council v Local Road Transportation Board* 1959 (2) SA 758 (N) at 772C-E.

facie right in favour of the applicants. In the absence of a *prima facie* right, there can be no irreparable harm.

[112] Most importantly, in *National Treasury and Others v Opposition to Urban Tolling Alliance and Others (Outa)*,²⁶ the Constitutional Court emphasised that an interdict is meant to prevent future conduct and not decisions already made. The court emphasised that ‘a court must carefully consider whether the grant of the temporary restraining order pending a review will cut across or prevent the proper exercise of a power or duty that the law has vested in the authority to be interdicted, and must assess the real-world impact of the interdict on the application and dissemination of public resources’.²⁷ Our courts have repeatedly cautioned against granting interim relief in procurement disputes where the core dispute is the review of the award itself. In *Air France-KLM SA and Another v SAA Technical SOC Ltd*,²⁸ the Court stressed that, when restraining the implementation of an administrative decision, a court interferes ‘*only in the clearest of cases*’ (and then typically only where exceptional circumstances exist), particularly where the power being exercised is a public-procurement power of a statutory board.

[113] Against such a framework, interim relief against Eskom, an organ of state, should be withheld unless the applicants make out a truly compelling case, the clearest of cases, which justifies judicial intrusion before the review is finally decided. Anything less would offend both the separation-of-powers doctrine, as cautioned in *OUTA*. In my view, the applicants have not made out a clearest case for the granting of an order against Eskom, an organ of state, pending review, or against any of the opposing respondents.

[114] Furthermore, an interdict is meant to prevent future conduct and not decisions already made. Eskom has already made a decision to appoint the opposing respondents, and those respondents have already commenced rendering services. Premised on the *OUTA* decision above, an interdict is ill-suited in these circumstances.

²⁶ 2012 (6) SA 223 (CC) para 50

²⁷ At para 66.

²⁸ (52406/2016) [2016] ZAGPPHC 877 (23 September 2016) paras 15 – 22.

[115] The balance of convenience, on the other hand, overwhelmingly favours the respondents. If the court imposes a contract on Eskom or reinstates a contract in favour of the applicants that Thulare J has already reviewed and set aside, this will prevent Eskom from continuing with the process it initiated based on the previous court order. Such actions would seriously violate the doctrine of separation of powers. The applicants' appointments were set aside and their contract lawfully terminated. In addition, it is not in dispute that the opposing respondents have incurred significant expenses since being awarded the urgent interim tender and have already commenced performing in terms of that tender. The appointment of the applicants would lead to considerable disruption and unnecessary financial costs, which would undoubtedly impact Eskom, the opposing respondents, and the country at large.

[116] Moreover, the opposing respondents are innocent parties who responded to a valid request from Eskom pursuant to an urgent procurement process. They have commenced providing services to Eskom in terms of the urgent procurement process. The balance of convenience in this case clearly favours denying the interdict.

[117] Finally, the applicant must show the absence of a suitable alternative remedy. The applicants have equally failed to do so. As correctly pointed out by the respondents, Part B of the May 2025 application remains pending, and the relief sought therein is substantially similar to that sought in this application. The correct and apposite procedure for the applicants to have followed would have been to invoke Rule 53(4) of the Uniform Rules, supplement the May 2025 application, and request that the matter be heard on an expedited basis. In the premises, the applicants are not entitled to any interdictory relief.

[118] Given all these considerations, I am of the view that the applicants' application must be dismissed.

COSTS

[119] The opposing respondents sought costs against the applicants on a punitive scale. It is a trite principle of our law that a court considering an order of costs exercises

a discretion.²⁹ The court's discretion must be exercised judicially.³⁰ The decision a court takes is a matter of fairness to both sides.³¹ The Court is expected to take into consideration the circumstances of each case, carefully weighing the issues in each case, the conduct of the parties, as well as any other circumstances which may have a bearing on the issue of costs and then make such an order as would be fair in the discretion of the Court.

[120] In the present matter, the applicants called Eskom and the opposing respondents to file affidavits dealing with documents that will also feature in the later proceedings relating to Part B of the Second Application. The opposing respondents' observations, in my view, are spot on. The applicants' motives are clear and must be deprecated. They are endeavouring, by abusing the court process, to have a second court revisit the fact that it was unsuccessful in obtaining interim relief in the Second Application.

[121] I repeat: the applicants wish this Court to consider certain portions of the record pending in the Part B relief in the Second Application and to have certain conclusions based on that record, even though precisely the same task will be undertaken by a later court when hearing the Part B relief. By pursuing this improper course, the applicants are misusing judicial resources and placing a considerable financial burden on the opposing parties by opposing the relief sought under truncated time periods. The applicants should not be allowed to relitigate a legal issue that has already been decided against them by a court. On a conspectus of all the facts discussed above, the application must be dismissed with a punitive cost order.

ORDER

[122] In the result, the following order is granted:

122.1 The applicants' application is hereby dismissed.

²⁹ *Ferreira v Levin NO and Others; Vreyenhoek and Others v Powell NO and Others* 1996 (2) SA 621 (CC).

³⁰ *Motaung v Makubela and Another, NNO; Motaung v Mothiba NO* 1975 (1) SA 618 (O) at 631A.

³¹ *Intercontinental Exports (Pty) Ltd v Fowles* 1999 (2) SA 1045 (SCA) at 1055F- G.

122.2 The applicants are ordered to pay the costs of this application to the opposing respondent (first, second and fifth respondents) jointly and severally, the one paying the other to be absolved, on an attorney and client scale, including the costs of two counsels where so employed.

LEKHULENI J
JUDGE OF THE HIGH COURT

APPEARANCES

For the First Applicant: Adv. Tsatsawane SC
 Adv. Williams

Instructed by: Dirk Kotze Attorneys

For the Second Applicant: Adv. Hilita
Instructed by: Motlanthe Incorporated Attorneys

For the First Respondent: Adv. Oosthuizen SC
 Adv. Mokale
Instructed by: Rahman Inc

For the Second Respondent: Adv. Stelzner SC
Instructed by: Eben Klue Attorneys

For the Fifth Respondent: Adv. De Beer SC
 Adv. Delport
Instructed by: Barnard Attorneys