REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1)	**NOT** REPORTABLE
(2)	**NOT** OF INTEREST TO OTHER JUDGES

CASE NO: 2026-037477

DATE: 13 March 2026

In the matter between:

KOIKANYANG INCORPORATED Applicant

and

ESKOM HOLDINGS SOC LIMITED Respondent

Neutral Citation: *Koikanyang Incorporated v Eskom Holdings (2026-037477)* **[2026] ZAGPJHC ---** (13 March 2026)

Coram: Adams J

Heard: 10 March 2026

Delivered: 13 March 2026 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 14:30 on 13 March 2026.

Summary: Civil procedure – urgent application – for an interim interdict, pending review of award of tender by Eskom to other service providers –

Urgent application opposed on three main grounds – point *in limine* of non-joinder (upheld) – failure to join the successful bidders, who have a direct and substantial interest in the outcome of proceedings – no *prima facie* right for the purposes of interim relief (not accepted) - no irreparable harm and the balance of convenience (both upheld) –

Application for interim interdictory relief dismissed with costs.

ORDER

(1) The applicant's urgent application is dismissed with costs.

(2) The respondent shall pay the applicant's costs of this opposed urgent application, such costs to include the costs consequent upon the utilisation of two Counsel, one being Senior Counsel (where so employed), on scale 'C' of the applicable tariff provided for in the Uniform Rules of Court.

JUDGMENT

Adams J:

[1]. This is an opposed urgent application by the applicant for interim interdictory relief against the respondent ('Eskom'). Pending the final determination of an application to be instituted by the applicant for the review and the setting aside of the award of Tender Number MWP2663CX ('the tender') by the respondent to a panel of legal service providers, the applicant seeks to interdict and restrain the respondent from implementing or giving effect to the award of the tender. The applicant also applies to interdict and restrain the respondent from concluding any service level agreements pursuant to the award of the tender to the panel of legal service providers.

[2]. In sum, in this urgent application, the applicant applies for interim relief against the respondent pending the final determination of a review application to be instituted under Part B. The applicant was disqualified from participating in the tender for the appointment of a panel of attorneys for the provision of legal services published under the above Tender Number.

[3]. Eskom opposes the application on three main grounds. First, it raises a point *in limine*: the applicant has failed to join the successful bidders, who have

a direct and substantial interest in the outcome of these proceedings. Second, it contends that the applicant did not meet the minimum qualification criteria and therefore has no *prima facie* right for the purposes of interim relief. Third, it argues that the applicant has failed to satisfy the remaining requirements for an interim interdict, including irreparable harm and the balance of convenience.

[4]. Therefore, the first issue to be decided in this urgent application is whether the point *in limine* regarding non-joinder has merit and, if so, whether such point is dispositive of the matter. Secondly. whether the applicant has made out a case for the interim relief it seeks. These issues are to be decided against the facts in the matter as set out in the paragraphs which follow.

[5]. The applicant was one of 202 tenderers who responded to the Invitation to Tender ('ITT') dated 31 July 2024. The ITT stipulated, as a mandatory qualification criterion, that the Tender was targeted at enterprises with a B-BBEE contributor status of Level 1 to 3, and that tenderers were required to submit 'a valid B-BBEE certificate or sworn affidavit' as proof of their status. The ITT was unambiguous: failure to comply with this mandatory requirement would result in disqualification.

[6]. The applicant submitted a sworn affidavit dated 2 September 2024 as proof of its B-BBEE status. On the face of that affidavit, the commissioner of oaths did not state the date on which the declaration was taken. This is a requirement prescribed by Regulation 4(1) of the Regulations Governing the Administering of an Oath or Affirmation promulgated under the Justices of the Peace and Commissioners of Oaths Act 16 of 1963 ('the Regulations').

[7]. Following a reactive assurance review conducted by an independent auditor in October 2025, it was determined that the applicant's B-BBEE affidavit was invalid due to this omission. The auditor's report, dated 31 October 2025, recorded that the applicant was one of a number of bidders who had failed to comply with the B-BBEE documentation requirements. The respondent

accordingly disqualified the applicant and advised it of this decision by letter dated 29 January 2026.

[8]. The applicant contends that its affidavit was valid, that it substantially complied with the Regulations, and that Eskom's decision to disqualify it was unlawful. It seeks to preserve its position by way of an interim interdict pending a review application which it has undertaken to institute within 30 days of the grant of such interdict.

[9]. Section 1 of the ITT, under the heading 'Qualification Criteria', stated as follows: -

'This panel is targeted for enterprises that are between B-BBEE Level 1 and Level 3. Tenderers that fall outside of these BBEE levels will be disqualified and not be evaluated further. Tenderers are required to submit a valid B-BBEE certificate or sworn affidavit as proof of their B-BBEE status and level.'

[10]. The applicant submitted its tender response on 25 September 2024. Included in its response was a sworn affidavit dated 2 September 2024, deposed to by Mr Mabitsela Elijah Ikabod Ramonyai, a director of the applicant, before a Mr Jan Christopher Kruger, a commissioner of oaths. It is evident from the face of the affidavit that the commissioner of oaths did not state the date on which the oath was taken and the affidavit commissioned. The commissioner of oath's signature appears, and his full name and business address are printed below his signature, but the date is absent. This is confirmed by the applicant in its founding affidavit.

[11]. The Tender process proceeded through various stages. The applicant was initially permitted to participate in further stages, including price negotiations in August 2025. However, on 2 September 2025, Eskom engaged an external auditor, Nexia SAB&T, to perform a reactive assurance review of the evaluation process. The auditor's report, dated 31 October 2025, identified that 36 suppliers had failed to comply with the B-BBEE documentation requirements, including the applicant. The report recorded that the applicant's

B-BBEE affidavit was invalid because it was ‘unsigned or undated by the deponent and or commissioner of oath rendering them non-compliant with legal standards’.

[12]. On 16 January 2026, Eskom’s Executive Tender Committee considered the auditor’s findings and resolved to disqualify the non-compliant bidders. The applicant was advised of its disqualification by letter dated 29 January 2026. The letter stated that the disqualification was based on the finding that its B-BBEE affidavit was invalid.

[13]. Correspondence ensued between the parties. On 3 February 2026, the applicant objected to its disqualification. On 10 February 2026, Eskom responded, reiterating its position and explaining that the affidavit was invalid because the commissioner of oaths had not dated it. Eskom also referred to the B-BBEE Commission’s Practice Guide, which requires that the date on which the deponent signs and the date on which the commissioner of oaths signs must be the same.

[14]. The applicant launched this urgent application on 18 February 2026. The notice of motion seeks the relief set out above. The applicant has undertaken to institute review proceedings within 30 days of the grant of an interdict.

[15]. I am satisfied that the applicant’s application is urgent. The new panel of legal service providers is scheduled to become operational on 15 March 2026. If the interim relief is not granted before that date, the applicant will be unable to participate in the panel for a period of five years, and any subsequent success in the review application will be rendered moot or of academic interest only. In any event, Eskom does not seriously dispute the urgency of the application. Indeed, it accepts that the matter is urgent, albeit it contends that the application is manifestly ill-conceived and ought to be dismissed on the merits.

[16]. That brings me to the respondent's legal point *in limine*, that being non-joinder of the successful bidders. This point is, in my view, the first and most fundamental obstacle confronting the applicant.

[17]. It is well established that a party has a direct and substantial interest in any order which a court may make if that order would prejudicially affect that party's rights or interests. As Brand JA stated in *City of Johannesburg & Others v SA Local Authorities Pension Fund & Others*[1], at paragraph 9:

'[9] As to the relevant principles of law, it has by now become well established that, in the exercise of its inherent power, a court will refrain from deciding a dispute unless and until all persons who have a direct and substantial interest in both the subject-matter and the outcome of the litigation, have been joined as parties (see eg *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 657 and 659; *Gordon v Department of Health: KwaZulu-Natal* 2008 (6) SA 522 (SCA); (2008) 29 ILJ 2535 (SCA) para 9). A "direct and substantial interest" is more than a financial interest in the outcome of the litigation. A test often employed to determine whether a particular interest of a third party is the one or the other, is to examine whether a situation could arise in which, because the third party had not been joined, any order the court might make would not be *res judicata* against that party, entitling him or her to approach the court again concerning the same subject-matter and possibly obtain an order irreconcilable with the order made in the first place (see eg *Amalgamated Engineering Union* at 661; *Transvaal Agricultural Union v Minister of Agriculture & Land Affairs & others* 2005 (4) SA 212 (SCA) paras 64-66).'

[18]. On the application of these principles of law to the facts *in casu*, it would appear on the face of it that the respondent's non-joinder objection is a valid one. The successful bidders have an undeniable direct and substantial interest in these proceedings. The applicant seeks an order interdicting Eskom from implementing the award of the tender and from concluding service level agreements with the successful bidders. Eskom has disclosed that 17 of the successful bidders have already concluded service level agreements. The

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[1] *City of Johannesburg & Others v SA Local Authorities Pension Fund & Others* (2015) 36 ILJ 1439 (SCA); (20045/2014) [2015] ZASCA 4 (9 March 2015).

remaining 24 stand to be precluded from concluding such agreements if the relief is granted.

[19]. The effect of the order sought would be to suspend the rights of the successful bidders to render legal services to Eskom and to receive the benefits of their appointment under the Tender for a period which, on the applicant's own version, could extend to two years. This is plainly prejudicial to their legal interests.

[20]. The applicant seeks to avoid this conclusion by advancing several arguments, none of which withstand scrutiny.

[21]. First, the applicant contends that the rights of the successful bidders will remain intact because the relief sought merely 'temporarily pauses' the execution of those rights. This is a distinction without a difference. A right that cannot be exercised for an extended period is, for all practical purposes, a right that has been suspended. The successful bidders are entitled to be heard before their rights are suspended in this manner.

[22]. Second, the applicant suggests that Eskom can simply continue to utilise its current panel of attorneys on a month-to-month basis, as it has done since April 2025. This misses the point entirely. The question is not whether Eskom can continue with the *status quo*, but whether the successful bidders have a right to participate in proceedings that directly affect their interests. They do.

[23]. Third, the applicant argues that if any party has an interest, it is the 27 bidders who were also disqualified on similar grounds. This is a non sequitur. The fact that other parties may also have an interest does not diminish the interest of the successful bidders. If anything, it underscores the complexity of the tender process and the need for all affected parties to be joined.

[24]. Fourth, the applicant contends that even if joinder is desirable, non-joinder is not automatically fatal, and the court may order joinder post facto,

particularly in Part B. This submission confuses the nature of the relief sought in Part A. The interim interdict, if granted, will take immediate effect. It will suspend the rights of the successful bidders pending the finalisation of the review application. They are entitled to be heard before such an order is made. Joinder after the fact would be an empty remedy.

[25]. In the present case, the successful bidders were identified by Eskom in its answering affidavit. The applicant was on notice of their identity and could have taken steps to join them. It chose not to do so. The matter cannot proceed in their absence.

[26]. Accordingly, the point *in limine* must be upheld. This alone is dispositive of the application. However, out of completeness, and because the matter was fully argued, I proceed to consider the merits of the application for interim relief.

[27]. The requirements for an interim interdict are well established. An applicant must show: (a) a *prima facie* right, even if open to some doubt; (b) a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted; (c) that the balance of convenience favours the granting of interim relief; and (d) that the applicant has no other satisfactory remedy. See *Setlogelo v Setlogelo*[2]; *Webster v Mitchell*[3]. The applicant bears the onus of satisfying all four requirements. Failure to establish any one of them is fatal to the application.

[28]. In *National Treasury and Others v Opposition to Urban Tolling Alliance and Others*[4], the Constitutional Court affirmed the continued applicability of the *Setlogelo* test, albeit with due regard to constitutional principles, including the separation of powers and the principle of legality.

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[2] See *Setlogelo v Setlogelo* 1914 AD 221.

[3] *Webster v Mitchell* 1948 (1) SA 1186 (W) at 1189.

[4] *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC).

[29]. As for the *prima facie* right requirement, the applicant's claimed right is to have its bid considered in accordance with a fair and lawful procurement process, and ultimately to be appointed to the panel if its bid is found to be compliant. In the context of an interim interdict pending review, a *prima facie* right may be established by demonstrating reasonable prospects of success in the review. See *South African Informal Traders Forum v City of Johannesburg; South African National Traders Retail Association v City of Johannesburg*[5].

[30]. The correct approach to follow in determining whether a *prima facie* right is established was set out in *Webster v Mitchell*[6] as follows:

'[T]he right to be set up by an applicant for a temporary interdict need not be shown by a balance of probabilities. If it is "prima facie established though open to some doubt" that is enough. … …

… The proper manner of approach I consider is to take the facts as set out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute, and to consider whether, having regard to the inherent probabilities, the applicant could on those facts obtain final relief at the trial. The facts set up in contradiction by the respondent should then be considered. If serious doubt is thrown upon the case of the applicant, he could not succeed in obtaining temporary relief, for his right, *prima facie* established, may only be open to "some doubt". But if there is mere contradiction, or unconvincing explanation, the matter should be left to trial and the right be protected in the meanwhile, subject of course to the respective prejudice in the grant or refusal of interim relief.'

[31]. The Constitutional Court has also recently stated that it is sufficient for a party to assert a right adversely affected by the exercise of public power, which that applicant seeks to review. In *South African Informal Traders Forum v City of Johannesburg; South African National Traders Retail Association v City of Johannesburg*[7], the Constitutional Court held that 'a *prima facie* right may be established by demonstrating prospects of success on the review'.

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[5] *South African Informal Traders Forum v City of Johannesburg; South African National Traders Retail Association v City of Johannesburg* 2014 (4) SA 371 (CC) at paragraph 25.

[6] *Webster v Mitchell* 1948 (1) SA 1186 (W).

[7] *South African Informal Traders Forum v City of Johannesburg; South African National Traders Retail Association v City of Johannesburg* 2014 (4) SA 371 (CC) para 25.

[32]. The central question in the envisaged review is whether Eskom was entitled to disqualify the applicant's bid on the ground that its B-BBEE affidavit was invalid. This depends on whether the affidavit complied with the Regulations.

[33]. It is common cause that the commissioner of oaths did not state the date on which he commissioned the oath. He did however sign the affidavit and his signature was attached below that of the deponent. The date is also indicated (seemingly by the deponent) as 2 September 2024, immediately below the signature of the deponent. So, however one views the affidavit, it is clear that the objection by Eskom to the affidavit is of a highly technical nature. Although, I must hasten to add that the affidavit does appear to constitute a clear breach of the letter of the Regulations governing the administration of oaths.

[34]. The applicant contends that the Regulations do not require the commissioner of oaths to date his signature; they only require that the commissioner 'sign the declaration and print his full name and business address'. Importantly, the applicant contends that its affidavit substantially complied with the Regulations. It relies on the confirmatory affidavit of the commissioner of oaths, Mr Kruger, who confirms that the affidavit was signed in his presence on 2 September 2024.

[35]. The applicants lastly submits that substance should not be allowed to be trumped by form.

[36]. There may very well be merit in these contentions on behalf of the applicant. This translates into a *prima facie* right, which, in turn, satisfies the first requirement for the granting of the interim interdict. The simple point is that the applicant's claim for a review and a setting aside of the award of the tender – which claim has reasonable prospects of success, constitute the *prima facie* right required for purposes of the granting of an interim interdict.

[37]. The same cannot however be said of the second requirement that the applicant must demonstrate irreparable harm. In that regard, I am of the view that the applicant has failed to demonstrate a well-grounded apprehension of irreparable harm.

[38]. Eskom has stated in its answering affidavit that it intends to augment its panel of attorneys with additional law firms where necessary. The Tender was not issued on the basis of a closed panel, and there is no maximum number of firms that may be appointed. The applicant will accordingly have a further opportunity to tender for inclusion on Eskom's panel.

[39]. The applicant dismisses this as a 'mere possibility'. This is not a fair characterisation of Eskom's statement. Eskom has made a clear and unequivocal statement of its intention. There is no reason to doubt its *bona fides*.

[40]. The applicant also relies on the fact that the panel is for a period of five years, and that if it is not appointed now, it will miss out on opportunities during that period. This is the ordinary consequence of an unsuccessful tender. It does not constitute irreparable harm. Irreparable harm means harm that cannot be adequately remedied by an award of damages or by any other legal remedy. The loss of an opportunity to earn income is compensatable in damages. Moreover, the applicant will have further opportunities to tender.

[41]. I therefore conclude that the applicant has failed to establish irreparable harm.

[42]. As for the balance of convenience, in *Olympic Passenger Service (Pty) Ltd v Ramlagan*[8], the Court held as follows:

'In such cases, upon proof of a well-grounded apprehension of irreparable harm, and there being no adequate ordinary remedy the court may grant an interdict – it has a discretion, to be exercised judicially upon a consideration of all the facts. Usually this will resolve itself into a nice

[8] *Olympic Passenger Service (Pty) Ltd v Ramlagan* 1957 (2) SA 382 (D) at 383E–F.

consideration of the prospects of success and the balance of convenience – the stronger the prospects of success, the less need for such balance to favour the applicant: the weaker the prospects of success, the greater the need for the balance of convenience to favour him.'

[43]. In *Moyane v Ramaphosa and Others*[9], it was held that when considering the balance of convenience it is appropriate to take the national interest into account where that is applicable.

[44]. Eskom has adduced undisputed evidence of the prejudice it would suffer if the interdict were granted. It currently has 381 active litigious files. Its current panel of attorneys expires on 15 March 2026. If the interdict is granted, Eskom will be unable to appoint any new attorneys to handle these matters. It will be forced to continue with its existing panel on a month-to-month basis, a panel that has been in place since April 2019 and which Eskom has determined should be replaced through a competitive process.

[45]. The prejudice to Eskom is not merely financial. It goes to the core of its ability to exercise and pursue its legal rights, to defend litigation, and to ensure compliance with its statutory obligations. The knock-on effect for Eskom's operations, and for those who rely on its services, would be significant.

[46]. I conclude that, in my view, the balance of convenience favours the refusal of the interdict.

[47]. As regards the requirement that there are no alternative remedies available, the applicant contends that it has no other satisfactory remedy because it cannot obtain substantial redress in the ordinary course. This argument is essentially a restatement of its urgency argument. It does not address the availability of alternative remedies, such as a damages claim, should it ultimately succeed in the review.

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[9] *Moyane v Ramaphosa and Others* [2019] 1 All SA 718 (GP) at para 29.

[48]. In sum, I come to the conclusion that the applicant has failed to join parties with a direct and substantial interest in these proceedings. This is fatal to the application. Even if non-joinder were not dispositive, the applicant has failed to establish irreparable harm or that the balance of convenience favours the grant of interim relief. The application therefore falls to be dismissed.

[49]. Accordingly, I conclude that the applicant has failed to make out a case for the interim relief sought. The applicant's urgent application for interim interdictory falls to be dismissed.

Costs

[50]. The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so, such as misconduct on the part of the successful party or other exceptional circumstances. See: *Myers v Abramson*[10].

[51]. I can think of no reason why I should deviate from this general rule. The applicant should therefore be ordered to pay the respondent's costs of the opposed urgent application.

Order

[52]. In the result, I make the following order:

(1) The applicant's urgent application is dismissed with costs.

(2) The respondent shall pay the applicant's costs of this opposed urgent application, such costs to include the costs consequent upon the utilisation of two Counsel, one being Senior Counsel (where so employed), on scale 'C' of the applicable tariff provided for in the Uniform Rules of Court.

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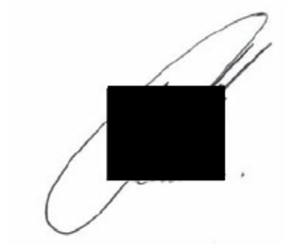
[10] *Myers v Abrahamson* 1951(3) SA 438 (C) at 455



L R ADAMS
Judge of the High Court
Gauteng Division, Johannesburg

HEARD ON:	10 March 2026
JUDGMENT DATE:	13 March 2026 – Judgment handed down electronically
FOR THE APPLICANT:	T Makgate, with P Sekati
INSTRUCTED BY:	Koikanyang Incorporated, Houghton Estate, Johannesburg
FOR THE RESPONDENT:	A E Franklin SC, with N Stein
INSTRUCTED BY:	Tembe Kheswa Nxumalo Inc, Sandown, Sandton