IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, MAKHANDA)

Not reportable

CASE NO. 2026-013729

In the matter between:

PHATUXOLO SMAILE N.O.	First applicant
PETE BROWN N.O.	Second applicant
and	
MAKANA LOCAL MUNICIPALITY	First respondent
MUNICIPAL MANAGER OF THE MAKANA LOCAL MUNICIPALITY	Second respondent
MABONA CIVILS AND PLANT HIRE CC	Third respondent

JUDGMENT

LAING J

[1] This is an urgent application for an interdict, preventing the first respondent ('the municipality') from giving effect to the award of a tender, pending the outcome of a review application.

Background

[2] The applicants are trustees of the Makana Development Trust ('the trust'). In August 2025, the municipality advertised a tender for the rehabilitation of infrastructure damaged after heavy rains. It indicated that it would evaluate bids in two stages: a functionality assessment with a minimum score requirement of 70%, followed by an assessment of price and achievement of the specific goals contemplated under the Preferential Procurement Policy Framework Act 5 of 2000 ('PPPFA'). The trust submitted a bid, only to learn that the municipality had cancelled the tender. A fresh tender was advertised, with a closing date of 30 October 2025. Once again, the trust submitted a bid.

[3] The second respondent ('the municipal manager') informed the trust on 20 November 2025 that its bid had been unsuccessful. This was because 'it did not submit information of the foreman.'[1] The trust lodged a formal objection on 2 December 2025. The municipal manager responded the following day, saying that 'the site foreman did not meet the required experience for the project.' In a letter sent on 4 December 2025 to the municipality's Supply Chain Management ('SCM') Unit, the trust raised concerns about the evaluation process. The municipality, notwithstanding, awarded the tender to the third respondent ('Mabona Civils') on 15 December 2025 in the amount of R 25 574 655. On the same date, the SCM Unit explained to the trust how it had evaluated its bid. The trust instructed its attorneys to write to the municipality on 22 December 2025, demanding it to withdraw, alternatively suspend, the appointment of Mabona Civils and to deal with the trust's objection. The municipal manager replied on 23 December 2025, setting out the findings of the municipality's Legal Services Department. The trust consequently instituted proceedings on 23 January 2026.

[4] In its answering papers, the municipality explained that National Treasury previously provided grant funding in the amount of R 29 110 000 for the repair of roads in Makhanda. This was conditional upon the completion of the work by 31 August 2025. A delay in the implementation of the project resulted in the municipality's application for the 'roll over' of the funding; National Treasury

[1] Sic.

subsequently approved the request, but allocated a reduced amount of R 25 700 000 which was conditional upon completion of the work by 31 March 2026.

[5] The municipality went on to assert that the trust's bid had been entirely non-responsive. There was no basis upon which it could have been evaluated in relation to either functionality or price and specific goals. If the work was delayed, moreover, then the municipality would be unable to repair the roads; any further 'roll over' of funding was unlikely. The project has, in any event, already commenced. The municipality has handed over the site to Mabona Civils, which has engaged with local labourers and started acquiring the materials needed for the work.

Issues to be decided

[6] The first issue to be decided is whether the applicants have established a case for urgency. If the court is satisfied in that regard, then the second issue is whether the applicants have met the requirements for interim relief.

[7] A brief overview of the relevant principles follows.

Legal framework

[8] Regarding urgency, 6 (12) (*a*) of the Uniform Rules of Court ('URC') grants wide discretionary powers to a court when dealing with urgent matters. The court must, however, exercise such powers in accordance with well-established principles. In *Luna Meubel Vervaardigers (Edms) Bpk v Makin and Another (t/a Makin's Furniture Manufacturers)*,[2] the court stated that practitioners must carefully analyse the facts of each case to determine whether a greater or lesser degree of relaxation of the rules was required. The degree of relaxation should not be greater than the exigency that the case demanded. It must be commensurate therewith.[3] Subsequently, in *IL & B Marcow Caterers (Pty) Ltd v Greatermans SA Ltd and*

[2] 1977 (4) SA 135 (W).
[3] At 137E–F.

Another; Aroma Inn (Pty) Ltd v Hypermarkets (Pty) Ltd and Another,[4] the court held that its power to abridge the prescribed periods and to accelerate the hearing must be exercised with judicial discretion. The applicants were required to show 'sufficient and satisfactory grounds'. There were three major considerations: (*a*) the prejudice that the applicant might suffer by having to wait for a hearing in the ordinary course; (*b*) the prejudice that other litigants might suffer if the application was given preference; and (*c*) the prejudice that the respondent might suffer by the abridgment of the prescribed periods and an early hearing.[5]

[9] The provisions of rule 6 (12) (*b*) must not be overlooked. An applicant must demonstrate, explicitly, the circumstances that make the matter urgent. Furthermore, the applicant must give the reasons for why he or she would not obtain substantial redress at a hearing in due course.

[10] The requirements for an interim interdict were set out more than 100 years ago in *Setlegelo v Setlegelo*.[6] They remain relevant and comprise the following: (*a*) a prima facie right; (*b*) a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted; (*c*) a balance of convenience in favour of the granting of the interim relief; and (*d*) the absence of any other satisfactory remedy.[7] The test must, however, be interpreted within the context of our constitutional dispensation. This was addressed in *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* ('*OUTA*'),[8] where the applicant questioned its suitability, urging the Constitutional Court to resort to another standard or to adapt the test when the grant of an interim interdict trespassed on the exclusive domain of the executive or the legislature.[9] The court, per Moseneke DCJ, referred to *Gool v Minister of Justice and Another,*[10] where a full bench had been called upon to restrain the minister, *pendente lite*, from exercising certain statutory powers. In that case, Ogilvie-Thompson J found that the court had jurisdiction to entertain the application, but it would only be exercised in exceptional circumstances

[4] 1981 (4) SA 108 (C).
[5] At 112H–113A.
[6] 1914 AD 221.
[7] At 227.
[8] 2012 (6) SA 223 (CC).
[9] Para 42.
[10] 1955 (2) SA 682 (C).

and when a strong case had been made out for relief.[11] Moseneke DCJ went on to say that:

' . . . The common law annotation to the *Setlegelo* test is that courts grant temporary restraining orders against the exercise of statutory power only in exceptional cases and when a strong case for that relief has been made out. Beyond the common law, separation of powers is an even more vital tenet of our constitutional democracy. This means that the Constitution requires courts to ensure that all branches of government act within the law. However, courts in turn must refrain from entering the exclusive terrain of the executive and the legislative branches of government unless the intrusion is mandated by the Constitution itself.'[12]

[11] The learned judge continued:

' . . . It seems to me that it is unnecessary to fashion a new test for the grant of an interim interdict. The *Setlegelo* test, as adapted by case law, continues to be a handy and ready guide to the bench and practitioners alike in the grant of interdicts in busy magistrates' courts and high courts. However, now the test must be applied cognisant of the normative scheme and democratic principles that underpin our Constitution. This means that when a court considers whether to grant an interim interdict it must do so in a way that promotes the objects, spirit, and purport of the Constitution.'[13]

[12] The above principles are relevant to the respondents' argument in the present matter, as will be discussed further. The most immediate issue for determination is the question of urgency.

Urgency

[13] The municipality awarded the tender to Mabona Civils on 15 December 2025. A week later, on 22 December 2025, the applicants' attorneys requested an undertaking that the tender would not be implemented. The municipal manager

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[11] At 689B–C.
[12] *OUTA*, para 44.
[13] Para 45.

replied on 23 December 2025, explaining the municipality's position but refusing to provide any undertaking. The applicants launched their application on 23 January 2026, a month later. By that time, the municipality had already taken steps to implement the tender, spurred on, no doubt, by the concern that it would lose its grant funding if the project was stalled.

[14] Whereas the applicants can be criticized for a certain measure of delay, occasioned by the intervening year-end closure of businesses and professional practices, this was, realistically, no more than two to three weeks. The municipality was aware of the applicants' intentions but proceeded, nonetheless. As counsel for the applicants pointed out, the tender involves a time-bound project. Its implementation could advance to a stage where the practical consequences of the award cannot be meaningfully reversed. The court is satisfied that the applicants would not obtain substantial redress at a hearing in due course.

[15] The truncated timeframe for the filing of papers was, furthermore, not unreasonable. It was, with reference to *Luna Meubels*, appropriate for the exigency that the case demanded. Importantly, the respondents made no complaint that they had been prejudiced by the abridged periods and an early hearing. The matter was enrolled for the end of a normal motion court day, posing no prejudice to other litigants. The applicants cannot be faulted for a lack of urgency.

Prima facie right

[16] It is trite that, in tender disputes, private parties such as the applicants have an inherent right to public procurement decision-making that is lawful, reasonable, and procedurally fair.[14] For the right to attract the protection of an interim interdict, however, the applicants must demonstrate that there was no basis for the municipality's disqualification of their bid during the functionality stage and that it ought to have reached the assessment stage for evaluation on price and specific goals under the PPPFA. This would trigger an enquiry into the remaining

[14] The right is derived from section 33 (1) of the Constitution.

requirements for interim relief. The existence of a prima facie right serves as a gateway.

[17] In the present matter, the sequence of the parties' correspondence is of some importance. The municipal manager initially informed the applicants that their bid had been unsuccessful because 'it did not submit information of the foreman.' In their formal objection, the applicants pointed out that the reason given was factually incorrect; the trust had set out details of the foreman to be allocated to the project, including information about her competency, and supporting documents. The municipal manager subsequently elaborated on the earlier reason, indicating that 'the site foreman did not meet the required experience for the project.' He enclosed a table that purported to explain how the municipality's bid evaluation committee ('BEC') had determined the extent of the foreman's experience; it depicted the projects with which she had been involved, the duration thereof, and the total number of months worked.[15] This resulted in a calculation of 84 months or seven years, which was less than the ten years required. To this, the applicants contended that the municipality had referred only to the number of months worked on specific projects, rather than the duration of the foreman's overall employment; the municipality had failed to consider the cumulative experience of the individual in question. The SCM Unit responded that the same method of calculation had been used for all the bids received. It went on to state that:

> 'The method looked at the number of months/years of experience in order to obtain a total number of years required for the project based on the relevant experience required in line with the requirements of this bid . . . It should be noted that a criterion is set for each project and is applied in line with the requirements of the bid. Where the personnel has not worked or there was a break in experience required, this cannot be accounted for as there was a break in service.'

[18] The response failed to clarify for the applicants how and why the BEC had determined the foreman's experience. They drew attention to the BEC's previous allocation of full points for the trust's key personnel, including the foreman, when the

[15] The table was based on the curriculum vitae supplied for the foreman, Ms Martha Makena. This accompanied the applicants' bid.

tender had originally been evaluated, prior to its cancellation. The applicants consequently repeated their earlier request for the BEC's scoresheets, recommendations, and related documents; they mentioned, too, that their formal objection had yet to be addressed. At this stage, however, the municipality adopted a different approach. Relying on what it termed a 'review' conducted by its Legal Services Department, it informed the applicants that the trust's bid was non-responsive. This was because only one of the trustees, ie the first applicant, had completed the Declaration of Interest -form ('MBD 4'); furthermore, neither the site agent nor the foreman was employed by the trust, contrary to the tender requirements. Consequently, said the municipal manager, the bid should never have been submitted for evaluation in relation to functionality.

[19] The tender data contained in the applicants' bid, attached to the founding papers, included a table with the criteria for the determination of functionality. The relevant item read as follows:

3. Experience of key staff: experience of site foreman in the current scope of work[16]			
Site foreman with Matric and minimum of 10 years of relevant experience	10	10	
Site foreman with no Matric but with minimum of 10 years of relevant experience		5	

[20] The first column represented the total number of points that could be allocated for the criterion in question, while the second column represented the difference between the possible allocations available, depending on secondary education and years of experience. There were no sub-criteria. Disappointingly, there was no indication of what would qualify as 'relevant experience' and how the duration thereof would be calculated. From the information enclosed for the trust's nominated foreman, it appears, on the face of it, that she had at least 22 years' experience in the construction sector. This must be contrasted with the BEC's determination of

[16] Sic.

seven years, based only on the duration of the projects stipulated in the foreman's curriculum vitae.

[21] The argument adopted by the respondents in their answering papers was that the trust could only have submitted a bid via its trustees, acting jointly. It failed to do so. Consequently, its bid was non-responsive, depriving the trust of any right to the evaluation or adjudication thereof. The difficulty with this, however, is that the argument does not coincide with the original reasons for the BEC's decision to disqualify the bid. From the municipal manager's correspondence, it is apparent that the bid was unsuccessful because '[the trust] did not submit information of the foreman.' The municipal manager later clarified this, saying that 'the site foreman did not meet the required experience for the project.' From the information supplied, it is evident that the BEC accepted the bid for evaluation of its functionality in terms of the first stage, but disqualified it for evaluation of price and specific goals in terms of the second stage based on the BEC's determination of the nominated foreman's experience. This is entirely different from the reasons set out in the answering papers.

[22] In *Jicama 17 (Pty) Ltd v West Coast District Municipality*,[17] Cleaver J held, within the context of a tender dispute, that the respondent should not be allowed to supplement the basis on which its previous decision was taken. The reasons were apparent from English case law.[18] Whereas a court can elucidate evidence or (in exceptional circumstances) correct or add to the reasons, it should be very cautious about doing so. This was because the purpose of reasons was to inform parties why they had won or lost, enabling them to assess whether they had any ground for challenging an adverse decision. To admit 'wholesale amendment or reversal' of the stated reasons was inimical to such purpose.[19] Cleaver J stated that another reason why not to allow the respondent to supplement its reasons was that, in otherwise doing so, it would convert the applicant's review application, brought on narrow

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[17] 2006 (1) SA 116 (C).

[18] *R v Westminster City Council, Ex parte Ermakov* [1996] 2 All ER 302 (CA),

[19] At 315*h*–316*d*.

grounds, into a full-blown review of the respondent's decision. This would be 'palpably unfair.'[20]

[23] The Supreme Court of Appeal applied the *dictum* in *Jicama* in *Van Zyl and Others v Government of the Republic of South Africa and Others*.[21] It also referred thereto in *National Lotteries Board and Others v South African Education and Environment Project*,[22] where Cachalia JA noted that the position in English case law was to the effect that the failure to give proper or adequate reasons for a decision would ordinarily render it void. It could not be validated by different reasons given afterwards, even if they showed that the original decision may have been justified; the later reasons were not the true reasons for the decision but rather an '*ex post facto* rationalization of a bad decision'.[23] The court did not decide whether the position was the same in South African law. It found, nevertheless, that the appellant's failure to have exercised its discretion properly or at all could not be remedied 'by giving different reasons after the fact.'[24] This seems, subsequently, to have become the accepted principle.[25]

[24] On the face of it, the applicants' bid should not have been disqualified. It ought to have proceeded for further evaluation. Consequently, the court is satisfied that the applicants have established the necessary gateway for an enquiry into the remaining requirements, viz a well-grounded apprehension of irreparable harm, a favourable balance of convenience, and the absence of any other satisfactory remedy.

The remaining requirements

[20] *Jicama*, paras 11 and 12.
[21] 2008 (3) SA 294 (SCA), para 55.
[22] 2012 (4) SA 504 (SCA).
[23] Para 27.
[24] Para 28. See, too, the discussion in C Hoexter and G Penfold *Administrative Law in South Africa* 3 ed (2021) at 652–3.
[25] In this regard, see *Zuma v Democratic Alliance and Others* 2018 (1) SA 200 (SCA), para 24; *Umgeni Water v Sembcorp Siza Water (Pty) Ltd* 2020 (2) SA 450 (SCA), para 52. The High Court adopted a different approach (incorrectly, with respect) in *Zweni v Road Accident Fund and Others* 2022 (6) SA 639 (WCC), paras 26–7.

[25] The time-bound nature of the project was highlighted in the discussion pertaining to urgency. There is every indication, on the papers, that the respondents have commenced with the implementation of the project and will continue until completion for fear of losing their grant funding. In *City of Cape Town v South African National Roads Agency and Others*,[26] Binns-Ward J stated that effective remedies should be available for the breach of a constitutional right. Evidence that this would be thwarted if interim relief was not forthcoming was a relevant consideration under the concepts of irreparable harm and the balance of convenience.[27] In this division, Eksteen J observed recently, in *SNR Electrical CC v George Local Municipality*,[28] that the refusal of an interim interdict may result in an applicant's being unable, on review, to obtain the relief that he or she seeks. This would be so in a tender dispute, where the delivery of goods or the construction of works during review proceedings would mean that a significant part of the tender would no longer be available. The failure to issue an interdict in such circumstances would give rise to harm.[29] The same principles apply in the present matter. There is a real risk, on the papers, that the continued implementation of the tender will render any final relief entirely hollow if interim relief is not granted.

[26] Turning to the balance of convenience, the respondents argued that the matter entailed the potential restraint of the exercise of statutory powers in relation to the provision of municipal services. With reference to *Gool*, they pointed out that the court could only grant interim relief when there were exceptional circumstances and when a strong case had been made out for the relief sought.[30] The Constitutional Court held in *OUTA*, moreover, that when a court weighs up the balance of convenience, it may not fail to consider the probable impact of the restraining order on the constitutional and statutory powers and duties of the organ of state. Such an enquiry must have proper regard to 'separation of powers harm.' A temporary restraint in such circumstances may be granted 'only in the clearest of cases.'[31] The

[26] 2013 JDR 1022 (WCC).
[27] Para 78.
[28] 2025 JDR 4426 (ECMk).
[29] Para 16.
[30] At 689C.
[31] *OUTA*, paras 46 and 47.

court subsequently found, in *Economic Freedom Fighters v Gordhan and Others*,[32] that the above test made it necessary to 'peek into the grounds of review' in the main application and to assess their strength. The granting of interim relief which prevented the exercise of a statutory power could only be done in exceptional circumstances.[33]

[27] The decision in *OUTA* has attracted considerable academic attention. Hoexter and Penfold suggest that the 'clearest of cases' test should not apply to all cases involving the possible granting of interim relief to restrain the exercise of statutory power but only to those that raise special separation-of-powers concerns, such as would be encountered within the context of executive policymaking.[34] Similarly, Van Loggerenberg comments that *OUTA* is not authority for the proposition that interim interdicts against any exercise of public power must meet the 'clearest of cases' standard.[35]

[28] In *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd and Others*,[36] the Constitutional Court considered the impact of *OUTA* on the balance of convenience requirement. It remarked, per Unterhalter AJ, that an important consideration in *OUTA* had been whether the harm apprehended by the applicant amounted to a breach of one or more fundamental rights warranted by the Bill of Rights. In that regard, the court had been required to intrude into a 'policy-laden and polycentric decision of the executive' concerning the ordering of public resources; this lay 'in the heartland of executive-government function and domain'.[37] Unterhalter AJ found that the fact that the harm grounding the interim interdict sought amounted to a breach of one or more fundamental rights 'tempers the impact of what may otherwise be too stringent a test'.[38] The learned judge continued as follows:

'*OUTA* must be read in the context of the fact that what was at issue there was a highly policy-laden decision by a member of the executive arm of government *and* violations of fundamental rights protected in the Bill of Rights were not at issue. In the main it is those two considerations that informed the court's final decision. I believe that the role to be played by

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[32] 2020 (6) SA 325 (CC).
[33] Para 42.
[34] Hoexter and Penfold, n 24 above, at 806–7.
[35] D E van Loggerenberg *Erasmus: Superior Court Practice* RS 28 (2025) D6–30.
[36] 2023 (4) SA 325 (CC).
[37] Paras 300–1.
[38] Para 302.

this factor must depend on the nature of the executive decision. Ordinarily, this factor must apply on a sliding scale. The more policy-laden or polycentric the decision, the more the role this factor must play in influencing the court's determination. The lesser the policy-ladenness or polycentricity, the lesser the influence of this factor. But courts must never lose sight of the fact that this remains a balancing exercise. Affected fundamental rights must always play a critical role in that balance. And in some cases the affected rights may be of such a nature, and their breach so grievous, that they may influence the decision in favour of the victim of the rights violation, even in the face of a highly policy-laden and polycentric executive decision. The ultimate question is: what is the outcome dictated by the balancing exercise?'[39]

[29] The present matter pertains to the BEC's decision to disqualify the applicant's bid for want of satisfying the requirements attached to the evaluation of its functionality. This was neither a policy-laden nor a polycentric decision. Furthermore, the apprehended harm amounts to a breach of the applicants' right to just administrative action, which is entrenched in the Bill of Rights. Based on the principles enunciated in *OUTA*, and subsequently clarified in *Eskom Holdings SOC Ltd*, the circumstances of the present matter do not place the applicants beyond the reach of the interim relief sought. An order to that effect will, moreover, be limited in scope and time, such that the municipality will not be prevented altogether from exercising the powers and performing the duties associated with the repair and maintenance of municipal roads. The restraint pertains to certain portions of less than a dozen streets in the town of Makhanda, and only until the determination of the final relief sought under part B of the application. It cannot be said, by any stretch of the imagination, that the granting of interim relief will cause separation-of-powers harm.

[30] Regarding the other arguments advanced by the respondents, the threat of the National Treasury's refusal to allow any further 'roll over' of funding was unsubstantiated. No supporting affidavit from anyone at National Treasury confirmed that this would be the outcome if the work was not completed by 31 March 2026; furthermore, no letter, circular, or guideline to that effect accompanied the papers.

[39] Para 303.

The risk is speculative at best. Whereas the municipality has already taken steps to implement the tender, the papers indicate that this has not progressed much further than site establishment and handover. Mabona Civils may well have engaged with local labourers and started acquiring materials, but no evidence was presented that a delay caused by the granting of an order would create sufficient prejudice to tip the scales of convenience against the applicants. Mabona Civils has, in any event, not opposed the proceedings.

[31] The applicants' formal objection, lodged on 2 December 2025, came to nought. It is clear from the municipal manager's communication on 23 December 2025 that the municipality was of the view that it had already dealt with the objection by referring it to its Legal Services Department. The resulting 'review', including additional reasons for the disqualification of the bid, was, in the municipal manager's opinion, decisive of the matter. There is, in the circumstances, no other satisfactory remedy available to the applicants.

Relief and order

[32] The court is persuaded that the applicants have established a case for urgency. Furthermore, the court is satisfied that they have met the requirements for interim relief, as set out in *Setlegelo* and subsequently qualified by the Constitutional Court in *OUTA* and other cases when the exercise of a statutory power was implicated. The only remaining issue is that of costs. Despite the interim nature of the relief to be granted, there is no reason why the general rule should not apply; the applicants are entitled to the recovery of their expenditure.

[33] Consequently, the following order is made:

(a) the applicant's non-compliance with the Uniform Rules of Court regarding service, and forms, is hereby condoned, and the matter is disposed of on an urgent basis, in accordance with rule 6(12);

(b) the respondents are interdicted with immediate effect from implementing or giving any further effect to the award of 'Tender no. MLM/2025-26/INFRA/001 – Re-Advert, Rehabilitation for Flood Damages Phase 2 in Makana Local Municipality' ('the tender') to the third respondent, pending the determination of part B of the application to review and set aside the decision to award the tender to the third respondent; and

(c) the first and second respondents are liable and are ordered to pay the party-and-party costs of part A of the application, jointly and severally, on scale C.

JGA LAING

JUDGE OF THE HIGH COURT

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