

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG.**

CASE NO.: 2026-049113

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| (1) | REPORTABLE: YES / NO |
| (2) | OF INTEREST TO OTHER JUDGES: YES /NO |
| (3) | REVISED: NO |

16 April 2026

DATE

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SIGNATURE

TAU PELE CONSTRUCTION (PTY) LTD

Applicant

and

AIRPORTS COMPANY OF SOUTH AFRICA SOC LTD.

First respondent

KORONE ENGINEERS (PTY) LTD

Second respondent

ORDER

NOKO J

[1] On 21 March 2026, I granted the order set below without reasons.

1. The applicant's non-compliance with the forms, requirements and time periods prescribed by the Uniform Rules of Court is condoned, and the relief sought in Part A of the Notice of Motion is treated as one of urgency in terms of Rule 6(12) of the Uniform Rules of Court.
2. The First Respondent's point *in limine* of non-joinder is dismissed.
3. The First Respondent's application for the condonation of the late filing of Heads of Argument is granted.
4. The first Respondent's application for the admission of a supplementary affidavit is dismissed.
5. Pending the outcome and final determination of the relief sought in terms of Part B (the review application):
 - 5.1. The first respondent and second respondent are interdicted and restrained from implementing, executing or taking any (further) steps and/or acts in respect of the decision to award Bid No. BFIA7839/2025/RFP: Rehabilitation of Runway 02/20 and Taxiways at Bram Fischer International Airport for a Period of 12 Months ("the Tender") to the second respondent; and/or
 - 5.2. any contract concluded between the first respondent and the second respondent in respect of and/or pursuant to the award of the Tender ("the Tender Contract(s)").
 - 5.3. The second respondent is interdicted and restrained from:
 - 5.3.1. commencing site establishment, alternatively continuing with site establishment, in respect of the Tender and/or the Tender Contract(s);
 - 5.3.2. mobilising plant, equipment, personnel or materials to the site in respect of the Tender and/or the Tender Contract(s);
 - 5.3.3. commencing any construction, or related works in respect of and/or pursuant to the Tender and/or the Tender Contract(s); and/or
 - 5.4. performing any obligations in respect of the Tender and/or under the contract concluded pursuant to the Tender and/or the Tender Contract(s).
6. The first respondent is ordered to pay the costs of Part A of the application, including costs of counsel on scale B.

[2] The first respondent has requested reasons, which are set out below.

REASONS FOR THE ORDER

Introduction

[3] The applicant launched an application in terms of the Promotion of Administrative Justice Act¹ (“PAJA”) read with Rule 53 of the Uniform Rules of Court in two parts. Part A seeks an urgent interdict against the first and second respondents from implementing the tender awarded to the second respondent on 15 December 2025. Part B seeks the review and setting aside of the tender awarded to the second respondent.²

[4] The first respondent opposes the application. The second respondent is not participating in the *lis*, and any reference to the respondent shall mean the first respondent, except where it is necessary to mention both the first and/or second respondents.

Background

[5] The respondent published a tender inviting bids for the rehabilitation of the runway and taxiways at Bram Fischer International Airport in Bloemfontein, under reference Bid BFIA7839/2025/RFP, for a 12-month period. The closing date was extended by the first respondent on two occasions, with the final date set at 31 December 2025. The tender was published but withdrawn on three occasions for various reasons. Twenty bidders, including the applicant and the second respondent, submitted bids.

[6] The bids were assessed (including evaluation and adjudication), and the second respondent was deemed the best bidder and secretly (not publicly) awarded the tender on 15 December 2025. Following the award, the first and second respondents entered into a service-level agreement, which was signed on 21 December 2025.

¹ 3 of 2000.

² Further, that after setting aside the award, the applicant seeks an order that the tender should be awarded to the applicant, alternatively, be remitted to ACSA for reconsideration.

[7] The applicant avers that it furtively became aware of the award and therefore wrote to the respondent requesting the outcome of the evaluation. This was followed by the launching of an urgent application seeking an order compelling the respondent to provide reasons for the outcome. Soon thereafter, the respondent announced the award on the Treasury website on 12 February 2026. The respondent then sent a notification to the applicant on 13 February 2026, stating that the applicant's bid was disqualified because it did not achieve 70 points in the functionality stage and therefore could not proceed to the price and preference point allocation stage. The applicant then withdrew the urgent application.

[8] The notification of disqualification specifically stated that the applicant did not obtain points in respect of, first, the relevant experience of the Construction manager, as the projects he worked on were before his professional registration; secondly, in respect of company experience, as the reference letters provided did not include the title of the key personnel to be contacted. The applicant was informed at the debriefing session on 19 February 2026 that the additional reason for rejection under the manager's experience was the project "... listed as special maintenance, as it lacked sufficient details to determine whether the scope of work included pavement rehabilitation or resurfacing (as opposed to excluded work such as pothole, repairs, seals or overlays)".³

[9] Noting that the applicant was considering launching a review application, an undertaking was sought on 20 February 2026 to suspend the implementation of the tender pending the review proceedings. The request was declined.

[10] The applicant then launched these proceedings on 3 March 2026 in two parts as set out above. The respondent and applicant filed, respectively, an answering affidavit and a replying affidavit, and the pleadings were closed. The respondent further filed a supplementary affidavit after the close of pleadings and sought its admission in terms of rule 6(5)(e) of the Uniform Rules of Court. In addition, the applicant filed supplementary heads of argument, and the respondent requested indulgence to supplement its own, which was granted.

³ See para 16 of the Applicant's Heads of Argument at 054-56.

Contentions and submissions by the parties

Respondent Supplementary Affidavit

[11] The respondent requested that the supplementary affidavit deposed to by the second respondent, which was served on 19 March 2026, be admitted. The respondent contended that the affidavit was necessitated by averments made by the applicant in its replying affidavit, but at the same time averred that it intended to address the “... factual allegations made by Tau Pele itself in its replying affidavit⁴ *as well as the founding affidavit.*”⁵(emphasis added).

[12] The applicant contends that the respondent failed to demonstrate any exceptional circumstances justifying the admission of the supplementary affidavit and that there is no formal application for its admission. It is of no assistance, as it is based on an attachment whose authors have not filed confirmatory affidavits, and there is no request to admit hearsay evidence, the applicant argued.

[13] A party seeking the admission of a further affidavit must demonstrate that the contents were not available when the main affidavit was prepared and filed. In this instance, the information in question was readily available and should have been secured by the respondent. The respondent has specifically stated that the supplementary affidavit is intended to address issues set out in the founding affidavit. In the circumstances, the applicant contends that the supplementary affidavit should not be allowed.

[14] The affidavit was filed after the date on which the application was due to be heard and would have prejudiced the respondent, who may be required to answer it. It is intended to explain the progress made by the second respondent, who is not participating in the *lis*. Although not in the employ of ACSA, the second respondent was performing work on its site, and it is improbable that ACSA would not have been aware of the second respondent's presence there. In any event, ACSA had already stated that the second respondent would not stop implementing the tender, even on the face of the pending litigation, unless there is a court interdict. The said affidavit is alleged to have been prompted by an averment in the replying affidavit filed 7 days earlier, on 12 March 2026. I am therefore not persuaded that

⁴ In which it was stated that the implementation of the tender has not commenced.

⁵ See para 13.4.3. of the Respondents' Supplementary Affidavit at 011-9. See also para 15 where the respondent referred to the averments made by the applicant in its Founding Affidavit.

the respondent has made a persuasive case for the admission of the supplementary affidavit, and, accordingly, the application is refused.

Non-joinder

[15] The respondent contended that the other bidders should have been joined in the *lis*, as they have a legal and substantial interest that may be affected by the order sought by the applicant. It is well-established that any person is a necessary party and should be joined if that person has a direct and substantial interest in any order the Court might make; alternatively, if such an order cannot be sustained or carried into effect without prejudicing that person, unless he or she has waived the right to be joined to the particular facts before him, respondent argued.

[16] The respondent further contends that the applicant's view that the interests of the other bidders would be relevant only in respect of Part B is unsustainable, since Part B is already before this Court, unlike if it were not yet launched. In any event, assessing the issue invites the Court to consider "... the *full scope of the proceedings before the Court, including the review sought in Part B.*" In addition, "If the *procurement process is said to be fundamentally unlawful*, then all participants in that process have a direct and substantial interest in the determination of that issue", the respondent submitted.

[17] The applicant contended that none of the bidders who participated in the bid would be prejudiced by the order which this court may make. Further, the test has been set out in *ABSA Bank Limited v Naude*,⁶ which provides that such a third party should have direct and substantial in the order.

[18] The respondent referred to *Fidelity Security Services*,⁷ on the basis of which the court struck out the application for non-joinder. The paragraph in question concerns a party's averment of what the court has apparently said. The court's judgment is not attached to support the averment. To this end, the less said about it, the better. A further authority cited by the respondent is *DV8 Technology Group*,⁸ where it was held that "[j]oinder must

⁶ [2015] ZASCA 97; 2016 (6) SA 540 (SCA).

⁷ *Fidelity Security Services (Pty) Ltd v Airports Company South Africa SOC Ltd and Others* [2024] ZAGPJHC 561, at para 6.

⁸ *DV8 Technology Group (Pty) Ltd v Mobile Telephone Network SA Ltd and Others* [2022] ZAGPJHC 375.

be evaluated from the point of view of the potential effect of the order on the parties not joined, rather than the subject matter of the litigation.”⁹

[19] I find it incorrect to state that this court is seized with Part B of the application and may determine that the procurement process was unlawful. Both arguments by the respondent fall outside the scope of the order sought in Part A. To the extent that the respondent could not persuade the court as to how the interim interdict would affect the other unsuccessful bidders, ergo *cadit quaestio*. The point *in limine* of non-joinder is bound to fail.

[20] The point *in limine* of non-joinder for the purposes of Part A of the application is found to be unsustainable and is dismissed.

Urgency

[21] The applicant’s counsel argued that the application was handled with the required urgency. It was launched within a 6-court-day period, calculated from 20 February 2026, when the respondent rebuffed a request for an undertaking not to proceed with the implementation of the award. To this end, the applicant contended that the urgency was not self-created. The counsel referred to *East Rock Trading* 7¹⁰ and submitted that in other instances, any delay, if any, is not necessarily fatal.

[22] Counsel further argued that the applicant would not obtain substantial redress if the proceedings were initiated in the usual manner, given that the contract was for only 12 months. Proceedings on the normal roll could result in an order that is ineffective, as the contract may already have been completed by the time the matter is finalised. Therefore, the denial of the remedy of an interim order leaves a litigant without the targeted remedy in principle.

[23] In summary, he continued, the period between the debriefing session and the date when the application was instituted has been properly explained. In any event, the respondent has not suffered financially or experienced prejudice caused by any party.

⁹ Id at para 52.

¹⁰ *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others* (“*East Rock Trading 7*”) [2011] ZAGPJHC 196.

Finally, Notshe AJ explained that where public funds are involved, technicalities should not be used to hinder a proper adjudication.¹¹

[24] The respondent set out the background that led to the need to embark on the project and the subsequent tender. The respondent is under statutory obligations to ensure public safety at its airports. The Civil Aviation Authority has issued a red flag regarding the safety of the runway at Bloemfontein Airport. The identified remedy is the review, which is available; therefore, the absence of substantial redress is not established. The applicant's counter-contention that the review court may not award loss of profit is unsustainable, since the statutes accord the court discretion to afford a just and equitable remedy or to exercise wide remedial powers. The applicable test is set out in *OUTA*,¹² which states that the restraint of statutory authority should be allowed only in the clearest cases, and this is not one.

[25] The respondent further argued that the applicant was informed of the outcome of its bid adjudication on 13 February 2026 and did not launch the urgent application until 3 March 2026, a period of 3 weeks. The applicant, therefore, adopted a leisurely approach, and any alleged urgency is self-created.

[26] The respondent's counsel further argued that the applicant failed to prove that it would not obtain substantial redress in due course, despite being aware that review is available as a remedy. If the court accepts the argument that review as a form of redress collapses when no interdict is granted pending review, it would mean that, in all procurement reviews, all matters would be urgent.

[27] It is trite that a party launching an urgent application must demonstrate the reasons that underpin the urgency and further show that it would not be afforded substantial redress in due course.¹³ In addition, urgency should not have been self-created. I have considered the submissions made on behalf of the applicant and find that the period between the notification of the award and the launch of the proceedings was satisfactorily explained.

¹¹ Id.

¹² *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* ("OUTA") [2012] ZACC 18; 2012 (6) SA 223 (CC); 2012 (11) BCLR 1148 (CC).

¹³ See Rule 6(12) of the Uniform Rules of Court and *East Rock Trading* 7 above n 9.

Attempts by the applicant to secure an undertaking from the respondent are encouraged, unlike a party who would simply rush to courts, which are under-resourced, for a matter that could have been resolved *inter se*. The Constitutional Court held in *South Africa Informal Traders Forum*¹⁴ that “...it was only prudent and salutary that the applicants first sought to engage the city before they rushed to court.”¹⁵ The contention that urgency was self-created in this instance is unsustainable.

Merits

Interim interdicts

[28] The applicant contends that he has satisfied the requirements for an interim interdict. Further, the applicant has a right to administrative action that is lawful, reasonable, transparent, competitive, cost-effective and procedurally fair. He further contended that, as set out in *Webster*,¹⁶ where the court held that, for the purpose of the interim interdict, a litigant is required to show a *prima facie* right, though open to doubt; the applicant has done so. Counsel continued, submitting that the procedure adopted by the respondent does not meet the expectations of section 217 of the Constitution. The applicant’s disqualification on the basis that the applicant failed to state the referee’s title is not sound, firstly, because the title does not necessarily refer to an occupational standing as intimated by the respondent; secondly, because the conditions of the tender do not regard such alleged non-compliance as a disqualification criterion; and finally, because the court should seriously consider the title challenge as *de minimis non curat lex*. In any event, the requirements for the contactable referees would have been an issue to be taken up after the functionality stage, counsel argued.

[29] On the other hand, the respondent's description of the word as referring to the officer, the position of a referee, or his designation is untenable and, at worst, merely an ambiguous requirement which should not be interpreted against the bidders.

[30] Regarding the second ground of disqualification, it was not clear that the decision not to consider specialised maintenance experience, which may have referred to the

¹⁴ *South Africa Informal Traders Forum and Others v City of Johannesburg and Others* [2014] ZACC 8; 2014 (6) BCLR 726 (CC); 2014 (4) SA 371 (CC).

¹⁵ *Id* at para 37.

¹⁶ *Webster v Mitchell* 1948 (1) SA 1186 (W) at 1189-1190.

pothole-repair project, was untenable. As counsel argued, it appears that the respondent may not have understood the terminology used and should have at least clarified this position with the applicant. The applicant avers that this terminology is also used by other State entities, including SANRAL. To this end, the applicant contends that failing to award points for objectionable issues rendered the administrative action unfair.

[31] With regard to the disqualification based on the manager's experience, for which 20 points would have been awarded, the applicant takes no umbrage.

[32] In turn, the respondent contends that the title in the tender documents referred to the referee's office, position, or designation. Further, all bidders were expected to ensure that their companies complied with the published tender evaluation criteria, and it would have been unfair to the other bidders if the applicant's non-compliance had been condoned or afforded the applicant any special latitude.¹⁷ To this end, the applicant failed to accumulate the 30 available points.

[33] The respondent further contended that the applicant failed to "... ensure that the project relevance was clearly articulated, and that the supporting references were provided in the manner required by the tender".

[34] Regarding the specialised services, the respondent contended that the applicant failed to provide a clear explanation of whether specialised maintenance involves qualifying rehabilitation or resurfacing, and that the applicant was at fault. This meant the respondent would have to speculate, which runs counter to the tender requirements. The contention that the respondent should have sought clarification is also untenable, as it would imply that the applicant is being given special treatment, counsel submitted.

Reasonable apprehension of Irreparable Harm

[35] The applicant contends that if the second respondent is permitted to implement the contract, the ongoing adjudication of the matter may become academic or impractical, as the contract may have been concluded by the time the review is finalised. This contention is premised on the argument that the court is reluctant to award the applicant lost profits

¹⁷ See para 148 of the Respondent's Answering Affidavit at 009-40.

arising from unlawful or unfair denial of a fair administrative action, which may have led to a tender being awarded and to the loss of profit that could have been generated.

[36] The respondent contended that the tender has already been awarded, and that the applicant is not entitled to an interdict in respect of injuries already incurred. Respondent's Counsel referred to *OUTA*¹⁸ and submitted that the applicant has failed to demonstrate that its case meets the test for the clearest case requiring the court's intervention. The applicant has further failed to show that its case is sufficiently exceptional to warrant an interim restraint on the implementation of a statutory procurement.

[37] In the *Logbro Properties*¹⁹ Cameron JA referred to the 'ever-flexible duty to act fairly' that rested on a provincial tender committee. Fairness must be assessed in light of the circumstances of each case. In the given circumstances, it may be fair to ask a tenderer to explain an ambiguity in its tender; it may be fair to allow a tenderer to correct an obvious mistake; it may, particularly in a complex tender, be fair to request clarification or details required for its proper evaluation. Whatever is done must not cause the process to lose the attribute of fairness or, in the local government sphere, the attributes of transparency, competitiveness, and cost-effectiveness.

Alternative remedy

[38] Counsel for the applicant referred to *Sebenza*²⁰ and contended that no alternative remedy is available to the applicant. The request for an undertaking not to implement pending the challenge was rebuffed; accordingly, the applicant had no alternative but to proceed to court. A claim for damages is not available where a party seeks only loss of profit.

[39] The respondent maintained that the right to review remains an alternative remedy, and therefore, the applicant cannot be heard to say that there is no alternative remedy.

¹⁸ *OUTA* above n 5.

¹⁹ *Logbro Properties cc v Bedderson No and Others* [2002] ZASCA 135; [2003] 1 All SA 424 (SCA); 2003 (2) SA 460 (SCA) at para 8.

²⁰ *Sebenza Kahle Trade CC v Emalahleni and Another* [2003] 2 All SA 340 (T).

Balance of convenience

[40] Regarding the balance of convenience, the applicant acknowledged that the project is of critical importance and relates to safety. This is illustrated by the respondent who adverted the tender at least twice and requested an extension from the bidders on three occasions.

[41] The amount involved is also substantial; Bosielo J stated that 58 million is a large sum, and the situation in this case is aggravated by the respondent's tender amount exceeding the applicant's by R116 million.

[42] The respondent, in turn, submitted that it would be inconvenienced and prejudiced, as the second respondent has already begun implementing the tender. Any order that may restrain ACSA from implementing the contract would have a catastrophic effect on the runway. As stated in the *City of Tshwane*,²¹ where the horse has bolted, the balance of convenience tilted in favour of the City of Tshwane. In any event, counsel continued, granting an interdict is a discretionary remedy, and the court would consider the facts presented and the importance of the project and reach its conclusion within the purview of the law.

[43] The respondent further contended that the project constitutes critical airside infrastructure, that any delay would jeopardise airport safety, and that this is a critical compliance issue under ICAO and SACAA regulations. In addition, there is a public-interest element.

[44] The constitutional court has decided that the remedy would be granted only in the clearest cases.²² The applicant's case does not fall within the clearest class of tender illegality that typically justifies interdicting the implementation. Its basis is that the title/reference information issue, the special maintenance scope issue, and the construction manager registration are reviewed as record disputes, the respondent argues.

²¹ *City of Tshwane Metropolitan Municipality v AfriForum and Another* 2016(6) SA 279 (CC).

²² See *OUTA* above n 5 at para 47 and *Maano Chemicals (Pty) Ltd v Rand Water SOC Ltd* ("Maano Chemicals") [2024] ZAGPJHC 842.

[45] The court may still exercise its discretion, having regard to the importance of the project, as was stated in *Stock*²³ where it was held that even if it is clear that there is unlawfulness, the importance of the project may override the conclusion that may flow therefrom.

Issues

[46] The issue for determination is whether the requirements for an interim interdict are met.

Legal principles and discussions

[47] It is trite that an applicant for an interim interdict must satisfy the following requirements: a *prima facie* right, though open to doubt; a well-grounded apprehension of irreparable harm if the interdict is not granted; no alternative redress; and a balance of convenience.²⁴

[48] Whilst this court is not sitting as a review court, it is required to peek into the grounds of review to assess the strength of the review. If there is a likelihood that the review will succeed, it becomes appropriate to grant an interdict.²⁵ The applicant's basis for impugning the decision to disqualify its bid, first, on the ground that the applicant did not set out the referees' titles, has merit. The applicant's understanding that a title is a prefix to someone's name rather than a position or occupation is plausible.²⁶ I also agree that the terms and conditions do not identify the absence of a title as a disqualifying criterion, and that, in any event, it appears to be a minor issue. The second basis that the specialised service was not described as the respondent hoped for cannot be decided against the applicant. Authorities²⁷ have confirmed that, where an issue could have been resolved with

²³ *Stock and Another v Minister of Housing and Others* 2007 (2) SA 9 (C).

²⁴ See *Setlogelo v Setlogelo* 1914 AD 221.

²⁵ See *Vea Road Maintenance and Civils (Pty) Ltd v The South African National Roads Agency SOC Limited and Another* [2023] ZAKZDHC 87 at para 33, in which the sentiments of Khampepe ADCJ (as she then was) in *Economic Freedom Fighter v Gordhan and Others* 2020(6) SA 325 were quoted with approval.

²⁶ It was held in *Allpay Consolidated Investments Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency, and Others* 2014 (1) SA 604 (CC) at para 92 that: "[t]he purpose of a tender is not to reward bidders who are clever enough to decipher unclear directions. It is to elicit the best solution through a process that is fair, equitable, transparent, cost-effective and competitive. Because of the uncertainty caused by the wording of the request for proposals and the bidder's notice 2, that purpose was not achieved in this case".

²⁷ See *Logbro Properties*, n19.

the bidder, it would not amount to favouritism. To this end, there are good prospects that the grounds would be sustained during the review proceeding.

[49] Concerning the *prima facie* right, though open to doubt, it is trite that a litigant in the position of the applicant has a right to a fair administrative action²⁸ that is lawful, reasonable, and procedurally fair. In addition, it is settled law that failure to protect the applicant against unlawful conduct offends the rule of law. In the circumstances, it is unquestionable that the applicant is entitled to a *prima facie* right (though it may be open to doubt) which they seek to assert. I therefore find no basis to quarrel with the submission that this first requirement is met.

[50] With regard to the requirement of the absence of an alternative remedy, the applicant's submission that no appropriate alternative relief is available has merit. Firstly, it is correct that the refusal to be treated fairly and possibly to be awarded the bid is harm that cannot be redressed by a damages claim. The Constitutional Court held that “[c]ompelling public considerations require that adjudicators of disputes, as of competing tenders, are immune from damages claims in respect of their incorrect or negligent but honest decision”²⁹ The Constitutional Court further held in the *Esorfranki Pipelines*³⁰ that “...where the state’s misconduct is deliberate and dishonest and where substitution or remittal are not viable forms of relief, or where this relief will not suitably remedy the loss sustained by a party, circumstances may exceptionally require compensatory relief in order to ensure a just and equitable result”.³¹ It follows from the foregoing judgments that the applicant may not claim damages except where the decision is tainted with fraud, intentional misconduct, or corruption. As such, the contention by the respondent that the review court is at large to award any remedy is therefore not entirely correct.

[51] With regard to irreparable harm, counsel submitted that in the event the applicant is not granted an interim interdict, the review court may still conclude that the decision was

²⁸ See section 33 of the Constitution, read with the Promotion of Just Administration Act 3 of 2000.

²⁹ *Steenkamp NO v Provincial Tender Board of the Eastern Cape* [2006] ZACC 16; 2007 (3) SA 121 (CC); 2007 (3) BCLR 300 (CC) at para 55.

³⁰ *Esorfranki Pipelines (Pty) Ltd v Mopani District Municipality* [2022] ZACC 41; 2023 (2) BCLR 149 (CC); 2023 (2) SA 31 (CC).

³¹ *Id* at para 56.

invalid but find it impractical to award any relief other than costs.³² The relief would be rendered abstract, hypothetical, meaningless, academic or of no practical application. The SCA in *Tyte Security*³³ quoted with approval the sentiments echoed in *Hoffman-La Roche & Co AG and Others v Secretary of State for Trade and Industry* [1975] AC 295 at 355; [1974] 12 All ER 1128 at 1146 (HL), where Lord Wilberforce stated that “[t]he object of [an interim injunction] is to prevent a litigant, who must necessarily suffer the law’s delay, from losing by the delay the fruit of his litigation; this is called” irreparable” damage, meaning that money obtained at trial may not compensate him.”³⁴ The applicant’s application is to prevent loss if the tender is implemented or allowed to continue.

[52] Regarding the question of balance of convenience, it is trite that the court would conduct an exercise of weighing the prejudice or harm to be suffered by the respective parties if the interim is granted or not granted. It is further settled in our jurisprudence that where the applicant’s prospects of success are stronger, such an applicant need not rely on a balance of convenience in his favour, and where it is a weak prospect, the balance of convenience must favour him.³⁵ My assessment set out above clearly indicates that the prospects of success in the review are good and, accordingly, the balance of convenience need not be interrogated.

[53] Notwithstanding the foregoing, the court may still consider whether implementation has already begun. The version presented is that implementation has not begun. There is doubt or concern about why the respondent entered into an agreement in December 2025 and announced it in February 2026, after the applicant had launched an urgent application. This leaves the impression that the aim was to ensure that, at the time of any challenge, the successful bidder would have at least begun implementation. It should

³² See *Chairperson: Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others* [2005] ZASCA 90; 2008 (2) SA 638 (SCA); [2005] 4 All SA 487 (SCA).

³³ *Tyte Security Services CC v Western Cape Provincial Government and Others* [2024] ZASCA 88; 2024 (6) SA 175 (SCA) at para 21.

³⁴ See also *Millenium Waste Management (Pty) Ltd v Chairperson Tender Board: Limpopo Province and Others* [2007] SCA 165; [2007] SCA 165 (RSA); [2008] 2 All SA 145; 2008 (2) SA 481; 2008 (5) BCLR 508; 2008 (2) SA 481 (SCA), Jafta JA as he then was, intimated that the High Court may have to give priority to review matters as granting effective relief to vindicate the infringed rights would be drastically reduced.

³⁵ *CIPLA Medprop (Pty) Ltd v Aventus Pharma SA, Aventis Pharma SA and Other v Cipla Life Sciences (Pty) Ltd and Others* [2012] ZASCA 108; 2013 (4) SA 579 (SCA); 2012 BIP 30 (SCA) at para 61.

be noted that the court may still order an interdict against implementation, even if doing so could cause financial damage or prejudice to the organ, if the tender is inherently flawed.

[54] The counsel for the respondent correctly contended that the court should assess whether its order would not intrude into the exclusive domain of another branch of government. Furthermore, temporary restraint should be ordered only in the clearest of cases.³⁶ Although the clearest of cases was not defined, the court held that “... however, one important consideration would be whether the harm apprehended by the claimant amounts to a breach of one or more fundamental rights warranted by the Bill of Rights...”³⁷ (emphasis added). It follows that this would not be the sole consideration.

[55] In this case, the following factors favour the applicant: the grounds for the disqualification are clearly unsustainable, and the amount involved, which could be saved had the second respondent not been appointed, exceeds R 100 million. This makes a serious dent in the public purse. The applicant correctly referred to the judgment of Bosielo J, noting that a difference of R 58 million is a significant disparity and should raise concern among right-thinking people with a modicum of economic sense. To this end, I find that this is the clearest and exceptional case warranting the interim interdict.

[56] Whilst there should generally be reluctance to disrupt the functioning of state organs, the state organ itself should uphold and respect the principle that public procurement must be fair, equitable, transparent, competitive and cost-effective. The state organs should not believe that the courts would readily be persuaded that the ends justify the means by asserting that the service to be provided is important, and that the courts should then turn a blind eye to failures to comply with the regulatory framework and constitutional imperatives.³⁸ To this end, the argument that, if the tender is not implemented, the respondent will fall foul of regulatory prescripts is being advanced to

³⁶ See *Maano Chemicals* above n 23.

³⁷ See *OUTA* above 5.

³⁸ Despite the alleged urgency, the tender was advertised twice, extended three times by the Respondent, and it also took almost two months after the award of the tender (including the launching of the first urgent application by the applicant) for the Respondent to publish the award. That notwithstanding, Jafta J (see n 34) has proposed that review matters may need to be determined swiftly for the benefit of both parties. A new or different regime appears necessary to avert the unpalatable consequences of undergoing the lengthy court process.

compromise the constitutional principles referred to in section 217 of the Constitution, thus countenancing the sacrifice of those principles on the altar of expediency.

[57] I therefore find that the applicant has made out a proper case for the relief sought, and the opposition mounted by the respondent is unsustainable.

Costs

[58] Counsel for the applicant contended that the respondent had raised spurious defences, relied on hearsay evidence, and filed heads late, which led to the postponement. The court should show its opprobrium and award punitive costs against the respondent. I am not persuaded by this contention.

[59] The respondent's counsel, on the other hand, contended that the application should be struck off on the basis of lack of urgency or be dismissed on the basis of non-joinder.

Order

[60] As a result, I made an order as set in paragraph 1 above.



M V Noko
Judge of the High Court

Date of hearing: 26 February 2026

Date of judgment: 15 April 2026

Appearances:

For the Applicant:

GW Amm SC with WA Van Aswagen,
instructed by Peyper Attorneys.

For the First Respondent:

P Ngcongo with SB Nxumalo,
instructed by Y Renqe Attorneys.