



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

- (1) REPORTABLE: Yes ☐ / No ☒
(2) OF INTEREST TO OTHER JUDGES: Yes ☐ / No ☒
(3) REVISED: Yes ☒ / No ☐

Date: 02 May 2026

[REDACTED]

Case 2026-088949

In the matter between:

TRANSNET SOC LIMITED

Applicant

and

FIDELITY SECURITY SERVICES (PTY) LTD

First Respondent

NOMGWENYA SECURITY AND TRADING CC

Second Respondent

MARUMOFASE SECURITY CC

Third Respondent

KYA GUARDS (PTY) LTD

Fourth Respondent

SILVER SOLUTIONS 1522 CC

Fifth Respondent

MABOTWANE SECURITY SERVICES CC

Sixth Respondent

MAXI PHUMELE SECURITY (PTY) LTD

Seventh Respondent

**INDLANGAMANDLA SECURITY PROTECTION
AND PROJECTS CC**

Eight Respondent

BILANE SECURITY CC

Ninth Respondent

JUDGMENT

DU PLESSIS J

Introduction

[1] This is an urgent application in terms of section 18(3) of the Superior Courts Act 10 of 2013, in which Transnet seeks an order suspending the operation and execution of the order granted by Windell J on 7 April 2026,¹ pending the determination of Transnet's application for leave to appeal and any ensuing appeal.

[2] The order which Transnet seeks to suspend is interlocutory in nature. It directed Transnet, in terms of rule 53(1)(b), to dispatch to the registrar and to Fidelity the record of the proceedings sought to be reviewed and set aside in the main application, within ten days, and further directed that the record include all documents and materials relevant to the decision-making process relating to a specific tender.

[3] Transnet submits that the order should be suspended because the contemplated appeal has a strong prospect of success, or that exceptional circumstances exist for the appeal, and because Transnet and other tenderers will suffer irreparable harm if the record is produced before the appeal process is exhausted. Fidelity (Fidelity) opposes, contending that no case is made out for the relief.

Background

[4] The review application was instituted by Fidelity in May 2025, after it had participated in the tender process but discovered that the tender had not been awarded to it. It seeks to challenge Transnet's conduct in adjudicating and awarding the tender. It contends that its bid was treated as non-responsive (a reviewable decision) or otherwise rejected unlawfully, unfairly, and irrationally. The nub of the problem comes with Fidelity's replying affidavit: it may be that the reason they were

¹ Judge Windell is on long leave, and thus the leave to appeal will only be finalised on her return.

not awarded the tender is different from these two grounds, but they can only determine this once they have the record.

[5] Whichever way, Transnet disputes *the existence* of the impugned decision. They say that the founding affidavit for the review application does not lay a factual basis to support the review grounds on which Fidelity relies for the relief sought. They thus refuse to produce the record. Transnet did not voluntarily furnish the Rule 53 record; as a result, Fidelity had to approach the court to compel production, which order Windell J granted on 7 April 2026.

[6] In her judgment, Windell J relied on *Murray NNO v Ntombela*² (“Murray NNO”). Transnet states *Famous Idea Trading 4 (Pty) Ltd t/a Dely Road Courier Pharmacy v Government Employees Medical Scheme*³ (“Famous Idea”) that was handed down before Windell J’s judgment expressly rejects Murray, and therefore she has incorrectly decided the matter, which is why they are appealing. However, they were compelled to deliver a record within a set amount of time, and since it is an interim order, it is not suspended when leave to appeal is filed. Furthermore, with Windell J on long leave, the leave will only be heard in June, by which time Transnet will be in contempt of court if it does not institute these proceedings.

Urgency

[7] The application was launched on an urgent basis because the order granted by Windell J requires the applicant to dispatch the Rule 53 record within a fixed period, and the order is not automatically suspended by the noting of an application for leave to appeal. The matter warrants prompt attention to avoid uncertainty as to the applicant’s obligations under that order and the risk of non-compliance.

The legal framework

[8] Section 18(2) provides that, unless a court under exceptional circumstances orders otherwise, the operation and execution of an interlocutory order not having the

² [2024] ZASCA 24.

³ [2026] ZACC 5.

effect of a final judgment is not suspended pending an application for leave to appeal or an appeal. Section 18(3) provides that a court may order otherwise only if Transnet proves on a balance of probabilities that it will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders. The requirements are thus exceptional circumstances,⁴ irreparable harm to Transnet if refused, and the absence of irreparable harm to the respondent if granted.

[9] Transnet states that the exceptional circumstances are that the judgment of Windell J is inconsistent with the Constitutional Court's decision in *Famous Idea*, as she relied on the majority judgment of the Supreme Court of Appeal in *Murray NNO*, which the Constitutional Court found to be "clearly wrong".⁵ Transnet submits that *Famous Idea* requires a court to determine, before ordering production of a Rule 53 record, whether the founding affidavit in the review establishes review jurisdiction by identifying a reviewable decision and setting out the factual basis for the grounds of review.

[10] This is not entirely correct. In *Famous Idea* the Constitutional Court was concerned with a true jurisdictional objection, raised under rule 6(5)(d)(iii), to the competence of the review itself, including whether the impugned conduct constituted reviewable administrative or public power at all. The court stated in the paragraph⁶ the applicants refer the court to in their heads of argument, the following:

"If a party does not establish in its founding affidavit that the court has review jurisdiction to adjudicate the subject matter of the controversy, it is not entitled to a "review" record. If a party wants to review a decision based on the PAJA, it must allege that the decision constitutes administrative action and why it says so. If a party fails to lay a factual basis for the review ground, it will have failed to engage the court's review jurisdiction. Jurisdiction as used in *Standard Bank* and *Richards Bay* encapsulates territorial, personal and subject-matter jurisdiction. The challenge to a court's jurisdiction may be made in terms of rule 6(5)(d)(iii) and that issue must be determined upfront before the record is produced."

⁴ *Incubeta Holdings v Ellis* 2014 (3) SA 189 (GJ).

⁵ Para 65.

⁶ Para 63.

[11] Likewise, *Murray NNO* concerned a jurisdictional objection regarding whether the decision is based on the exercise of a reviewable public power and is thus reviewable at all. Both *Famous Idea* and *Murray NNO* dealt with a true jurisdictional objection directed at whether the impugned conduct involved the exercise of reviewable public power at all. *Famous Idea* makes clear that an objection of that kind must be determined upfront before the record is produced. That is not the objection raised here, because Transnet does not contend that a disqualification or 'non-responsive' decision, if it existed, would fall *outside* PAJA, and contends only that the particular decision pleaded by Fidelity does not exist in the form alleged.

[12] Transnet's reliance on *Famous Idea* is thus overstated. Fidelity is not seeking anything extraordinary. It seeks production of the record in a Rule 53 review arising from a public tender process, so that it may know the basis upon which its bid was unsuccessful and formulate its case properly. That is aligned with the ordinary purpose of Rule 53 in review proceedings and does not constitute an exceptional circumstance warranting suspension of the order already granted.

[13] Nor does Transnet's dissatisfaction with Windell J's reasoning, even if sincerely held, amount to exceptional circumstances by itself. If that were so, section 18(2) and (3) would be available to every aggrieved litigant who notes an application for leave to appeal against an interlocutory order by characterising an alleged legal error as exceptional.

[14] Transnet places considerable emphasis on confidentiality. It states that the record contains bid submissions from all participating tenderers, their pricing, technical proposals, evaluation matrices, minutes of deliberations, and reports and recommendations, and that once produced to Fidelity, the information cannot be retrieved or "unseen". None of the successful tenderers has opposed the review application.

[15] The complaint is further advanced at a high level of generality. It identifies categories of documents rather than specific documents or portions of documents, and

there is no factual basis to explain why particular material is confidential, privileged, irrelevant, or properly shielded from production.

[16] More seriously, at the stage when the order compelling production was sought, Transnet did not advance any case for limited disclosure, redaction, a confidentiality regime, or the exclusion of identified material. Instead, it now resists the production of the record in its entirety.

[17] That is insufficient to establish irreparable harm on the balance of probabilities. Courts reviewing records have repeatedly recognised that internal reports, deliberations and notes may form part of the record and are not excluded merely because they are internal or because a litigant invokes broad confidentiality claims.⁷

[18] By contrast, suspending the order would cause real prejudice to Fidelity. The underlying tender concerns a limited-term contract. Fidelity seeks to review a live procurement outcome and says it cannot do so properly without access to the record explaining why its bid failed and how the adjudication and award were carried out. Delay in providing the record entrenches the practical effects of the procurement decision and impedes Fidelity's ability to ventilate its challenge.

[19] It is unnecessary in this application to determine definitively whether the contemplated appeal will succeed. It is sufficient to say that Transnet has not persuaded this court that the proposed appeal is sufficiently strong, when considered together with the remaining section 18 requirements, to justify the extraordinary relief sought. Since Transnet's prospect argument rests on the *Famous Idea* argument discussed above, and for reasons explained above, that proposition is open to doubt.

[20] Transnet has failed to establish exceptional circumstances as contemplated in section 18(2) and (3). It has likewise failed to prove, on a balance of probabilities, that it will suffer irreparable harm if the order is not suspended, or that Fidelity will not suffer irreparable harm if the order is suspended.

⁷ *Helen Suzman Foundation v Judicial Service Commission*, 2018 (4) SA 1 (CC) at para 22.

[21] In all the circumstances, the application falls to be dismissed.

Order

[22] The following order is made:

1. The application is dismissed, with costs, to be taxed on scale C.


WJ du Plessis

Judge of the High Court, Gauteng Division,
Johannesburg

Date of hearing: 29 April 2026

Date of judgment: 2 May 2026

For Transnet: MH Ramaepadi SC & K Kgatla instructed
by Mkhabela Huntley Attorneys Inc

For the respondent: S Grobler SC instructed by Dirk Kotze
Attorneys