THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO: 3059/2010
Date Heard: 25/11/10
Date Delivered:9/12/10

In the matter between:

SIMUNYE DEVELOPERS CC **APPLICANT**

Versus

LOVEDALE PUBLIC FET COLLEGE **1ST RESPONDENT**

VDZ CONSTRUCTION (PTY) LTD **2ND RESPONDENT**

JUDGMENT

SMITH J:

Introduction

[1] The applicant unsuccessfully tendered for a contract to renovate one of the student hostels at the first respondent's Zwelitsha campus. Although the applicant scored the highest number of points, the tender was awarded to the second respondent. The applicant now seeks an interim order interdicting and restraining the respondents from continuing with the work

pending the outcome of a judicial review of the first respondent's decision to award the tender to the second respondent.

[2] The second respondent is a college for further education and training established in terms of the Further Education and Training Colleges Act, no 16 of 2006 ("the FET Act").

The Facts

[3] The material facts of this matter are largely common cause. They are briefly as follows.

[4] During August 2010 the first respondent published a notice inviting tenders for renovations to student hostels at its Zwelitsha campus. The prospective tenderers were required to submit their tenders by no later than 17 September 2010. The said notice stated, *inter alia,* that the principles of the Preferential Procurement Policy Framework Act, Act no 5 of 2000 ("the PPPFA") would apply and that "*a tender's submission will be evaluated according to the sum or Award of Points in respect of the tender value and the status of the enterprise".* The points would be scored as follows: "*90 Points for Price, 4 Points for HDI status, 2 Points for female, 2 Points for Youth; 2 Points for Disability*". The tender notice further more stated that "*[t]he lowest or any tenderer need not necessarily*

be accepted and that this project may not be awarded to the most favourable Tenderer if it is deemed that that Tenderer is overcommitted."

[5] The tender documents contained a further requirement relating to functionality and tenderers were required to score a minimum of 15 points for quality in order to qualify for further consideration. The points for quality would be scored as follows: "*previous experience 10 points, performance on previous projects 20 points.* The tender documents stipulated how these points were to be allocated.

[6] It appears that 13 tenders were submitted by the stipulated closing date. After the preliminary assessment and scoring on functionality and quality issues, both the applicant and the second respondent achieved points in excess of the required minimum and were accordingly regarded as responsive, thus qualifying for further adjudication.

[7] It is also common cause that the applicant, being the lowest tenderer, scored the highest namely 94 points and the second respondent scored 91.81. The applicant's tender price was R4 408 067. 64 and that of the first respondent was R4 487 000. 00. It was on this basis that the principal agent, Mr Bisiwe, from Arthur T

Bisiwe Quantity Surveyors, recommended that the tender submitted by the applicant be accepted. He stated the reasons for his recommendation thus: "*they have scored the highest number of points and have fulfilled all the requirements.*"

[8] Mr Bisiwe's report was presented to a meeting of the evaluation committee on 29 September 2010. At that meeting it was decided to appoint two of the committee members, namely Mr Jacobs and Mr Dickson, to further investigate the quality of the applicant's workmanship in other projects. This was apparently necessary because the applicant was unknown to the committee members. Jacobs and Dickson thereafter investigated the quality of work performed by the applicant at a recently completed project at a school in Scenery Park. Their written report, which is dated 28 September 2010, stated the following:

> 8.1 the work at the school was completed some time in 2008 and comprised of new buildings and renovations of old school class rooms;
>
> 8.2 they had spoken to a school principal who was clearly dissatisfied with the quality of work and had "*stated categorically that he had hassle* (sic) *with this contractor regarding quality workmanship.*"
>
> 8.3 the principal had pointed out a missing window handle in his office and a vault door that was being opened and

closed with a vice grip supplied by the contractor;

8.4 that the principal had brought these issues to the attention of the applicant but there has not been any attempt on its part to remedy them;

8.5 that they had made the following observations: the paint is flaking off the walls, aluminium guttering is in bad shape, in places it seems a straight edge was not used to plaster, one classroom door had a big gap between the door and the floor level, the roof is not level and some copings corners were broken during constructions and were simply patched;

8.6 Numerous colour photos were annexed to the report. These vividly depict the structural and other defects referred to in the report.

On the basis of these findings they recommended that the second correspondent be appointed. These recommendations were duly submitted to the Chief Executive Officer, Mr Stofile in his capacity as chairperson of the evaluation committee.

[9] After the submission of the said documentation further queries were raised by the adjudication committee. These were, *inter alia*:

9.1 Why the principal agent had made a recommendation with the regard to the applicant without first considering the

quality of its work;

9.2 That it required further information with regard to the steel work as opposed to aluminium work performed by the applicant because the latter was not relevant to the tender;

9.3 The committee also required a report from Jackson and Dickson regarding the quality of workmanship on a recent project completed by the second respondent.

[10] Jacobs and Dickson thereafter submitted a further report regarding the quality of work performed by the second respondent at the Life Hospital in Berea wherein they stated the following:

10.1 that it is a standard practice of the hospital not to allow pictures to be taken of the facility. They could therefore not attach any photos to the report;

10.2 that the work is of a high standard and they were told that it is flagship project of Life Hospital Group;

10.3 that they were "*quite impressed*" with what they had seen.

[11] After having considered these further reports, the adjudication committee made a final recommendation to the Chief Executive Officer that the second respondent be appointed. The tender was eventually awarded to the second respondent on 28 October 2010.

Urgency

[12] Before I proceed to consider whether or not the applicant has successfully established all the requirements for interim relief, I must deal with the issue of lack of urgency which was raised *in limine* by Mr Ford who appeared on behalf of the first respondent.

[13] Mr Ford submitted that the applicant has failed to comply with Rule 12 of the Rules of Practice. That rule requires an applicant to set out sufficient details regarding urgency in its founding papers. The rule also requires a certificate of urgency to be filed in which, the reasons for urgency are fully set out with sufficient particularity for the question of urgency to be determined solely from it and without reference to the application papers.

[14] He submitted that the applicant has failed to set out sufficient details regarding urgency, both in its certificate of urgency, and application papers, to justify the extent of the drastic truncation of the time limits provided for in the rules. He has submitted that the application should be dismissed on this basis alone. He submitted further that the fact that all the papers had been filed, and that the matter was now before court on the return date, did not mean that the applicant was relieved of its duty to justify non–compliance with the rules. In this regard he referred to the unreported decision of **Caledon Street Restaurants CC and Monica De' Aviera,** Case

no 2656/97, wherein Kroon J stated at page 10, line [16] – [21] the following:

> "[i]t is to be emphasised that the fact that in the result, and after postponement of the matter, the papers are complete by a particular date and the matter is in that sense ripe for hearing, must not be allowed to cloud the issue whether the applicant's modification of the rules on the grounds of urgency was unacceptable."

[15] It is so that both the certificate of urgency and founding affidavit are rather scant on factual averments regarding the issue of urgency. Having regard to the history of this matter as it appears from the papers before me, I am however of the view that there were indeed circumstances requiring urgent action on the part of the applicant.

[16] The applicant became aware of the first respondent's decision to award the contract to the second respondent on the 8th of November 2010. The applicant's attorneys thereafter addressed a letter to the first respondent on the same day wherein it requested the first respondent to reconsider its decision to award the tender to the second respondent. The first respondent's attorneys replied on the 9th November 2010 stating that the first respondent was adamant that its decision was lawful and that any legal action taken in this regard would be defended. It appears that this letter was only received by the applicant on 10 November 2010. The application papers were issued on 12 November and served on both

respondents on 15 November 2010. There has therefore not been any undue delay on the part of the applicant in bringing these proceedings.

[17] I am of the view that even though the information regarding urgency contained in the certificate of urgency and in the papers are not as comprehensive as one would have expected them to have been under the circumstances, there are sufficient facts in the application papers to justify the extent of the applicant's non compliance with the time periods provided for in the Rules. It is clear, even on the respondents' version, that the completion of the contract is urgent and that the hostels are required to be ready and available for occupation by students by February 2011. Under these circumstances, in my view, the applicant did not have much choice but to come before the court in the form in which it did. Although in a manner of speaking the applicant just about made it by the skin of its teeth, it has nevertheless justified the extent of its non-compliance with the Rules and it was therefore appropriate for the matter to be heard on an urgent basis.

Administrative action and the provisions of PAJA

[18] Mr Ford has argued *in limine* also that the applicant has failed to establish in its papers that the first respondent is an administrator as defined in terms of the Promotion of Administrative Justice Act, no 3 of 2000 ("the PAJA") or that the decision taken by the first respondent fall within the definition of administrative action in terms of that Act. He submitted that the appointment by the first respondent of a contractor to renovate a student hostel does not amount to the performance of a public function. I do not agree with these submissions. As I have stated before, the first respondent was established in terms of s. 3 of the FET Act. In terms of that section a member of the executive council establishes a public college by notice in the gazette and from money appropriated for this purpose by the provincial legislature. There are numerous indications in the Act that the college established in terms thereof is a public entity and performs a public function. By way of example, s. 3(6) provides that the assets of a public college may not be attached as a result of any legal action taken against the college. In terms of s. 22 the member of the executive council is enjoined to fund colleges established in terms of the Act on a fair, equitable and transparent basis from money appropriated for this purpose by the provincial legislature and s. 19 provides for the management staff of a public college to be appointed by the Member of Executive Council in terms of the Public Service Act. The principal of the

college must report to the Head of Department in terms of his or her performance agreement.

[19] In terms of the PAJA an "*organ of state*" is an entity as defined by s.239 of the Constitution. In terms of that section an organ of state is defined as follows:

> "(a) any department of state or administration in the national, provincial or local sphere of government; or
> b) any other functionary or institution –
> i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or -
> ii) exercising a public power or performing a public function in terms of any legislation."

PAJA defines an administrative act as follows:

> "…any decision taken, or any failure to take a decision, by-
>
> (a) an organ of state, when-
>
> i) exercising a power in terms of the Constitution or a provincial constitution; or
>
> (ii) exercising a public power or performing a public function in terms of any legislation; or
>
> (b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision."

[20] In deciding whether or not a particular act constitutes administrative action regard must be had, inter alia, to: the source of the power exercised; the nature of such power; its subject matter; whether it involves the exercise of a public duty and how

closely it is related, to policy matters, which are not administrative, on the one hand and the implementation of legislation on the other, which is. See: **Pennington v Friedgood and Others 2002 (1) SA 251.**

On this test there can be little doubt that the first respondent, being an institution which performs a public function, namely teaching, is funded by government and to a considerable extent controlled by it, falls within this definition of an organ of state. The act of procuring for goods and services, whether in terms of the provisions of the PPPFA or s.217 of the Constitution, must of necessity be an administrative act which is subject to judicial review. The constitutional and/or legislative injunctions to act fairly and transparently would otherwise be devoid of any meaning.

[21] Mr Ford has correctly pointed to the fact that the definition of an "*organ of state*" contained in the PPPFA differs from that in the Constitution. In terms of the PPPFA an organ of state is defined as:

> "(a) national or provincial department as defined in the Public Finance Management Act, 1999 (Act 1 of 1999);
>
> b) a municipality as contemplated in the Constitution;
>
> c) a constitutional institution defined in the Public Finance Management Act, 1999 (Act 1 of 1999);
>
> d) Parliament;
>
> (e) a provincial legislature;
>
> (f) any other institution or category of institutions included in the definition of 'organ of state' in section 239 of the Constitution and

> recognised by the Minister by notice in the *Government Gazette* as an institution or category of institutions to which this Act applies".

[22] The applicant has not been able to show that the first respondent has in fact been designated as an institution or category of institutions to which the PPPFA would apply. I agree with Mr Ford's submission that the first respondent was therefore by law not compelled to procure in terms of the provisions of the PPPFA. In any event, being an organ of state as defined in terms of the Constitution, the first respondent was still enjoined in terms of s. 217 of the Constitution to contract for goods or services, in accordance with a system which is fair, equitable, transparent, competitive and costs effective. Even though the first respondent was not under a legal compulsion to procure in terms of the PPPFA, it has voluntarily adopted the scoring formulae, adjudication principles and criteria provided for in that Act and prospective tenderers had submitted their tenders on the understanding that their tenders would be adjudicated in accordance therewith. The tender could only have been fair and transparent if their tenders were adjudicated in terms of those stated criteria and principles. There can therefore in my view be little doubt that a failure on the part of the first respondent to have substantially complied with those principles would serve to vitiate any resultant decision.

See the unreported judgement of Froneman J (as he then was) in

the matter of **TPB Buildings & Civils (PTY) LTD v The East London Industrial Development Zone Proprietary Limited and Others** Case No. 230/09. In that matter the applicant, being a private company wholly owned by the state, also did not fall within the ambit of an organ of state as defined by the PPPFA, but had stated in its tender invitation that the provisions of the PPPFA shall be applicable. The learned judge found that even though it was not by law required to adjudicate tenders in accordance with the PPPFA, it was still constrained to procure goods and services in the manner prescribed by s. 217 of the constitution. The learned judge held at para [24] as follows in this regard:

> "The effect of the incorporation of the 'principles' or 'prescripts' of the PPPFA and its regulations are not to be determined, in this context, by an argument based on the alleged invalidity of the regulations because they are *ultra vires* the provisions of PPPFA, but rather by enquiring whether the parties to the tender process were treated fairly, firstly in the sense whether they knew what the 'rules of the game' were going to be, and, secondly, whether those rules were fair in the particular circumstances of the case. Fairness, not *ultra vires,* should determine the issue."

[23] For these reasons I am of the view that the decision of the first respondent to appoint the second respondent was indeed an administrative act and subject to judicial review in terms of the PAJA.

<u>Legal requirements for interim relief</u>

[24] It is trite law that in order to succeed with its claim for an interim interdict the applicant is required to establish:

24.1 a *prima facie* right;

24.2 a well grounded apprehension of irreparable harm if the interim rule is not granted and the ultimate relief is eventually granted;

24.3 that the balance of convenience favours the granting of interim interdict; and

24.4 that the applicant has no other satisfactory remedy.

[25] The granting of an interim interdict is a discretionary remedy and the aforementioned requisites should therefore not be considered in isolation but holistically.

***Prima facie* right**

[26] In deciding whether or not the applicant has successfully established a *prima facie* right, the correct approach is to consider the facts as set out by the applicant, together with any fact set out by the respondent, which the applicant cannot dispute, and to decide whether, with regard to the inherent probabilities and the ultimate onus, the applicant should on those facts obtain relief at the trial.

See: Webster v Mitchell 1948 (1) SA 1186 at 1189.

Also: Ferreira v Levin NO and Others, Vryenhoek v Powell NO and Others 1995 (2) SA 813 at 817F-H.

A court will therefore only be in a position to exercise its discretion to grant interim relief after it has undertaken at least a preliminary assessment of the merits of an applicant's case. **See: Ferreira v Levin (supra).**

[27] A court will therefore grant interim relief where an applicant has established a *prima facie* right "*though open to some doubts"* and in the words of Holmes J in the matter of **Olympic Passenger Service (Pty) Ltd v Ramlagan 1957 (2) SA 382 (D) at 383D-G,** provided that there is 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 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".

As I stated earlier, the facts are mainly common cause and those facts which have been put up by the first respondent can in my view not be seriously disputed by the applicant.

I am mindful of the fact that this being an application for interim relief, I am required to do no more than express a prima facie view

regarding the legal issues pertinent to the review application. Our courts have consistently adopted the view that complicated issues of law must preferably not be dealt with at the interlocutory stage. See: **Beecham Group Ltd v B-M Group (Pty) Ltd 1977 (1) SA 50 (T) at 55-56.** In this matter however all the issues have been adequately ventilated as answering and replying papers have been filed. I have been comprehensively addressed by counsel on all the legal issues and I am therefore in a position to express such a prima facie view. In fact the matter was ripe for hearing and Mr Ford has understandably contended that the court was in a position to pronounce on the review application. For some reason however Mr Sandi has persisted with the application for interim relief and I am therefore only required to decide that issue.

Applicant's grounds of review

[28] The applicant has submitted that the first respondent's decision to award the tender to the second respondent was fundamentally flawed and reviewable under s. 6 of PAJA for the following reasons:

> 28.1 the applicant had complied with all the requirements of the tender and was recommended by the implementing agent, Bisiwe Quantity Surveyors, to be awarded the contract;

28.2 the first respondent had gone beyond the specification of the tender when it mandated two members of the committee to inspect the project of the applicant without such members having the qualifications to conduct such investigations, without affording the applicant an opportunity to comment on the adverse findings in the report;

28.3 the suitability of the applicant to be awarded the tender was adequately assessed by the qualified agents when the points relating to functionality were considered and the applicant had scored the minimum requiring it to qualify for further adjudication;

28.4 the committee had therefore adopted a method of assessment which was beyond the scope of the tender and without recourse to the tenderers;

28.5 the decision was arrived at because of irrelevant consideration being taken into account and/or relevant considerations not being considered;

28.6 the first respondent's bid committee had embarked on a "*frolic of their own*" regarding their investigation of the completed project of the applicant and wrongly rejected the existing reports of experts on the project in question.

Judicial review in terms of the Constitution and the PAJA

[29] The cause of action for the judicial review of administrative

action now arises from the PAJA and not from the common law as in the past. The common law grounds for judicial review have now been codified in PAJA. See **Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs 2004 (4) SA 490 at 506** para [25].

[30] In the matter of **Foodcorp (Pty) Ltd v Deputy Director-General, Department of Environmental Affairs and Tourism: Branch Marine and Coastal Management and Others 2006 (2) SA 191 SCA** at page 196 para [F]-[H] the Supreme Court of Appeal held that the distinction between appeals and reviews must be maintained:

> "… since in a review a court is not entitled to reconsider the matter and impose its view on the administrative functioning. In exercising its review jurisdiction a court must treat administrative decisions with *deference* by taking into account and respecting the division of powers inherent in the Constitution. This does not 'imply judicial timidity or an unreadiness to perform the judicial function'. The quoted provision s. 6(2)(h) of PAJA, requires a simple test, namely whether the decision was one that a reasonable decision-maker could not have reached or, put slightly differently, a decision-maker could not reasonably have reached".

[31] It is now trite law that even though the legal basis for judicial review are now to be found in the Constitution and the PAJA, the body of common law which had been developed prior to the adoption of the Constitution and the enactment of PAJA remains relevant to the interpretation of PAJA. The position is therefore still that our courts will be reluctant to interfere if the decision sought to be reviewed is *bona fide* and objectively justifiable within the

context of PAJA. A court cannot therefore interfere simply because it disagrees with the decision. See: **Durbsinvest (Pty) Ltd v Town and Regional Planning Commission, KwaZulu-Natal and Others 2001 (4) SA 103 (N) at 107.**

The PPPFA

[32] Section 2(f) of the PPPFA provides that a contract must be awarded to the tenderer who scores the highest points unless objective criteria in addition to those contemplated in paragraphs (d) and (e) justify the award to another tenderer. Paragraph (d) relates to specific goals and paragraph (e) stipulates that any specific goal for which a point may be awarded must be clearly specified in the invitation to submit a tender. Regulation 9 of the regulations made in terms of the PPPFA similarly provides that a contract may be awarded to a tender that did not score the highest number of points on reasonable and justifiable grounds.

[33] There is clearly no statutory obligation on an organ of state to stipulate in the tender documents which objective criteria it may consider in a decision not to award the contract to the tenderer who has scored the highest points. In fact it would often be impossible to provide a *numerous clausus* of such criteria.

[34] If one considers the scheme provided for in the PPFA, it seems inevitable that these objective criteria would invariably relate to the ability of a tenderer to perform the work in accordance with the tender specifications. They would often relate to the track record of a prospective tenderer in other related projects, its infrastructure and available financial resources and equipment. It goes without saying that when an organ of state considers the allocation of substantial public funds for such a project, it has a duty to ensure that the decision to appoint a particular tenderer will result in value for money. A decision to award a tender in the face of such objective criteria which put serious doubts on a tenderer's ability to complete the work satisfactorily and in accordance with the tender specifications, may well constitute wasteful expenditure. In this regard the organ of state will obviously have to consider the extent of the difference in the tender prices of the highest scoring tenderer and the tenderer which it is considering for the award. It goes without saying that the bigger the difference the more onerous it becomes for objective criteria to justify a decision not to award to the highest scoring tenderer.

Validity of the reasons for decision to appoint the second respondent

[35] When it took the decision to award the tender to the second

respondent, the first respondent had the following information before it: that the first respondent had recently completed a building project in respect of which the client was unhappy with structural and other defects; that there were numerous complainants about the quality of the workmanship and that after these were brought to the attention of the first respondent, there has not been any attempt to remedy the problems. The committee could also have regard to the colour photos which vividly depict defects. These facts, in the view of the second respondent, had put serious doubt on the ability of the applicant to perform the work in accordance with the tender specifications. It was on the basis of these facts that the first respondent had taken a decision not to award the tender to the applicant despite the fact that it had scored the highest number of points. These criteria in my view constitute a classical example of the objective criteria contemplated by s. 2(f) of the PPPFA and the *"reasonable and justifiable grounds*" contemplated in terms of the regulations. The criteria clearly relate to the ability of the applicant to complete the work in accordance with the tender specifications and to the satisfaction of the first respondent. They can in my view by no stretch of the imagination be regarded as arbitrary or capricious as is contended for by the applicant.

[36] When viewed in the context of the numerous challenges faced

by the first respondent these factors become even more compelling. The first respondent has stated that the hostel in question had fallen into such a severe state of disrepair that it was no longer suitable for student accommodation and that it had resulted in student unrest and rioting. It therefore had to put in place urgent steps to renovate and repair the hostel in order to ensure that it is available to accommodate students in the new year and more particularly and approximately mid February 2011. It was therefore essential for the first respondent to make sure that it appoints the right contractor for the job as any potential delays could have serious consequences for it ability to commence with teaching in the new year.

[37] The basis for the first respondent's decision in this regard is, in my view, rendered even more reasonable by the fact that there is a difference of approximately only R80 000.00 between the two tender amounts. It is conceivable that such a relatively modest "*saving*" could rapidly be eroded and the first respondent could even suffer considerable financial losses if the work is not done in accordance with the tender specifications. Mr Sandi, who appeared for the applicant contended that it was incumbent on the first respondent to have brought the contents of Dickson and Jacobs' report to the attention of the applicant and to allow him to respond thereto. Mr Sandi was however unsurprisingly not able to point to

any authority for this proposition. Such an approach would in my view be anathema to tender procedures, it would be impractical and make it almost impossible for organs of state to procure effectively for goods and services. Any individual or entity that submits a tender in response to a tender invitation which clearly stipulates applicable specifications and conditions, must be taken as having submitted to that procedure and must accept that the relevant information, either provided by the tenderers or unearthed by the organ of state through independent investigation, is invariably considered in secret and without any reference to the tenderers. As I have stated earlier, it matters not whether or not the court agrees with the decision as long as it is objectively justifiable and reasonable. For these reasons and on a preliminary consideration of the merits I am of the view that the applicant has virtually no prospects of success in the review application.

Balance of convenience

[38] The applicant faces another fundamental difficulty and that is that it has not placed any facts before the court in support of its contention that the balance of convenience is in its favour. The respondents on the other hand have shown that the balance of convenience is overwhelmingly in their favour. First of all, in respect of the first respondent and its students, there are the circumstances

referred to above and which render the completion of the project urgent. Secondly, the second respondent stands to suffer considerable harm if the interim relief is granted but the final relief is refused particularly when no tender has been made for the payment of damages. Mr Paterson has submitted that an applicant is under these circumstances required to tender to the affected parties, such as the second respondent, to pay damages in the event of an interim order being granted and final relief not granted. The applicant has not made any tender in this regard despite being requested to by the second respondent to do so.

[39] Mr Sandi submitted that the balance of convenience favours the applicant because it will suffer irreparable harm if the interim relief is not granted as it has no alternative remedy and will not be able to claim damages from the first respondent even if the applicant were to be successful in the review application. I am of the view that there is no merit in this argument. The second respondent runs a similar risk and the consequences for the first respondent and the affected students will be even more far reaching if interim relief is granted. I am therefore of the view that the applicant has also failed to establish this requirement. In the light of the doubtful prospects of success in the review application and the balance of convenience being so comprehensively in favour of the respondents, there is no justifiable basis on which the court can

exercise its discretion in favour of the applicant.

[40] In the circumstances I am of the view that the applicant has failed to establish that it is entitled to interim relief which it seeks in terms of its notice of motion and that that part of the application must fail.

Order

[41] In the result the following order shall issue:

a) The application for an interim interdict pending the outcome of the review proceedings is dismissed with costs.

_____

J.E SMITH
JUDGE OF THE HIGH COURT

Appearances

Counsel for the Applicant	:	Advocate Sandi
Attorneys for the Applicant	:	Malusi & Co C/o GM YEKO 3F Anglo Africa Street GRAHAMTOWN
Counsel for 1st Respondent	:	Advocate Ford, SC

Attorney for the Respondent	:	Smith Tabata 126 Alexandra Road King William's Town Ref: McCune
Counsel for 2nd Respondent	:	Advocate Paterson, SC
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