




IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: NO.	
(2) OF INTEREST TO OTHER JUDGES: NO.	
(3) REVISED.	
2024-08-20	
<u>DATE</u>	<u>SIGNATURE</u>

Case Number: 2024-088430

Heard on: 14 August 2024

Delivered on: 20 August 2024

In the matter between:

FORENSIC INVESTIGATION RISK AND RECOVERY

MANAGEMENT (PTY) LTD

Applicant

and

THE UNEMPLOYMENT INSURANCE FUND

First Respondent

24SIX CA

Second Respondent

ALTITUDE BUSINESS ADVISORY

Third Respondent

CHAPU CA

Fourth Respondent

DITHETO ACCOUNTANTS

Fifth Respondent

EZEE CHARTERED ACCOUNTANTS

Sixth Respondent

IZALA VERIFICATORS	Seventh Respondent
IZALA VERIFICATORS CPT	Eighth Respondent
KST HOLDING	Ninth Respondent
KULUNGWANA ACCOUNTANTS	Tenth Respondent
LEBONE LA AFRICA CONSULTANTS	Eleventh Respondent
LEOLO AND PARTNERS CHARTERED ACCOUNTANTS	Twelfth Respondent
MAINE MANAGEMENT AND CHARTERED ACCOUNTANT	Thirteenth Respondent
MKWANAZI INVESTMENTS	Fourteenth Respondent
MNB CHARTERED ACCOUNTANTS	Fifteenth Respondent
MOROBI CHARTERED ACCOUNTANTS	Sixteenth Respondent
NAMBE FINANCIAL CONSULTANTS	Seventeenth Respondent
NDEMEX CONSULTING	Eighteenth Respondent
NKS CASA	Nineteenth Respondent
OMC CONSULTING	Twentieth Respondent
RSND CONSULTING PROFESSIONALS	Twenty-First Respondent
SAMBA SOLUTIONS	Twenty-Second Respondent
SIMDAR CONSULTING	Twenty-Third Respondent
SONDLO CHARTERED ACCOUNTANTS	Twenty-Fourth Respondent
SVZ CONSULTING	Twenty-Fifth Respondent
THABI CONSULTING	Twenty-Sixth Respondent
THE ACCOUNTING VILLAGE	Twenty-Seventh Respondent

UBUNTU BUSINESS ADVISORY AND CONSULTING**(LISTED AS UBAC FORENSICS ON CIPC)**

Twenty-Eighth Respondent

THE DEPARTMENT OF LABOUR

Twenty-Ninth Respondent

This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for handing down is deemed to be 20 August 2024.

JUDGMENT

STRIJDOM J

- [1] In this matter the applicant sought an order in the urgent Court that:
- 1.1 The applicant's non-compliance with the Rules of the Court in relation to notice and service of Part A of the application be condoned in accordance with Rule 6(12);
 - 1.2 Pending the final determination of the applicant's Part B Review application:
 - 1.2.1 The first respondent is interdicted from concluding any contract in terms of Tender UIF6/2023 ("the Tender");
 - 1.2.2 The respondents are interdicted from implementing any contract already concluded in terms of the Tender.

[2] At the commencement of the application after the first respondent argued the condonation application for the late filing of its answering affidavit and the parties argued the issue of urgency, I ruled that condonation is granted for the late filing of the answering affidavit and that the application is urgent.

[3] The application was opposed by the 1st, 2nd, 3rd, 12th, 16th, 17th, and 23rd respondents.

[4] On 21 February 2024, the first respondent issued a call for tender to appoint on its panel of service providers.¹

[5] The applicant has applied for the tender but on 13 July 2024 was unsuccessful.²

[6] On 22 July 2024, the first respondent provided a decision and reasons therefore and stated that the reason for the refusal was that the applicant did not score sufficient points because it did not demonstrate three years experience in “pure” audit and “pure” forensics as opposed to “forensic” audit and accounting.³

[7] On 25 July 2024, the applicant sent the first respondent a Notice of Objection requesting the first respondent to take its own decision on review and suspend appointing its panel in terms of the tender because it constituted a complete breach of the applicable legislation.⁴

¹ Caselines: Founding affidavit para 75, pp02-40; Annexure “FA8”, pp02-76-02-151

² Caselines: Founding affidavit paras 44 and 77, pp02-34 and 02-41

³ Caselines: Founding affidavit, para 92, pp02-44; Annexure “FA3”, pp02-66

⁴ Caselines: Founding affidavit, para 52, pp02-35 Annexure “FA4” and “FA5”, pp02-69 to 02-73

[8] On 05 August 2024, the applicant learnt that the first respondent started with the conclusion of contracts and introductory proceedings with the appointed members of its panel.⁵

[9] If the interdictory relief sought is interim in effect, form and substance the applicant must establish the following to succeed:

- (a) a right *prima facie* even though open to some doubt;
- (b) a well-grounded apprehension of irreparable harm if the interim relief is not granted;
- (c) a balance of convenience in their favour; and
- (d) the lack of another remedy adequate in the circumstances.

[10] It was argued by the first respondent that the applicant failed to prove a *prima facie* right in that the first respondent adhered to the provisions of the Constitution and particularly section 217.

[11] It was further submitted by the first respondent that the harm that the applicant stands to suffer is a commercial interest and that the applicant will have another remedy in which it can claim damages.

[12] As far as the balance of convenience is concerned, the first respondent contends that the employers in terms of the MOAs they have signed, are only obliged to keep the records for a period of 5 years. These MOAs have been signed as early as April 2020 and consequently the 5 years will run out during April 2025. If records are disposed of, then the verification project will be rendered moot.

⁵ Caselines: Founding affidavit, para 59, pp02-37

[13] The 2nd, 3rd, 12th, 16th and 17th respondents contested the requirements of the balance of convenience and no alternative remedy. It was argued that in this matter there are twenty-eight respondents who were successful tender bidders and awarded the tender issued by the first respondent. It was submitted that the prejudice to be suffered by these successful bidders outweighs the prejudice claimed by the applicant. It was further argued that with regards to alternative remedies, the applicant has access to alternative remedies and should exhaust said remedies before embarking on interdicting the respondents. It was not argued what alternative remedies are available to the applicant.

[14] The 23rd respondent argued that the applicant has failed to demonstrate that the harm it might suffer from a temporary exclusion outweighed the potential disruptions and financial implications for the entire project, exacerbating recovery issues. It was submitted that the balance of convenience favours the respondents for the reason that halting the entire project for the applicant's inclusion would unjustly prejudice the successful bidders who are poised for project execution. It was also argued that an alternative remedy has been proposed, allowing for the preservation of the applicant's work portion.

Prima facie right

[15] The applicant is entitled to a fair, transparent and competitive administrative process in terms of section 217 of the Constitution.

[16] Requirements for relevant experience in terms of the call for tender is specialised experience in audit and accounting.⁶

⁶ Caselines: 02 Application pp02-119

[17] The Tender does not call for pure accounting and auditing, nor are the services foreshadowed in the tender pure accounting and auditing services. The applicant has demonstrated compliance by showing that it has provided accounting and auditing services for three years and that such services align themselves to the forensic scope of works as per the Tender.

[18] "Pure" accounting and auditing was not mentioned in the tender but rather that the purpose of the tender was to verify whether COVID funds were abused/misused by the employers, for which forensic auditors are most suited, which would mean scoring full points for that requirement instead of a zero as awarded by the first respondent.

[19] In my view the applicant has demonstrated a *prima facie* right to be appointed to the panel because it is a firm of forensic auditors with relevant experience.

An actual or well-grounded apprehension of irreparable harm

[20] A mere launch of the review application would not stop the first respondent in its track. There is no other effective remedy in the ordinary course, which would replace the irreparable harm suffered by the applicant. The duration of the Tender is only 12 months and the applicant would never be able to be on the panel as the unopposed dates are in 2025 already while the opposed motions of this magnitude may take longer than 12 months as it require a special allocation for hearing due to the sheer volume of papers that may be filed by all 30 parties to this application.

Balance of convenience

[21] The essence of the balance of convenience is to assess which of the parties will be least seriously inconvenienced by being compelled to endure what may prove to be a temporary injustice until the answer can be found at the end of a trial. The stronger the prospects of success, the less need for the balance of convenience to

favour the applicant. A very strong case on the merits may persuade a Court to grant an interim interdict despite the balance of convenience being strongly against an applicant.

[22] The balance of convenience is inextricably bound up with the discretion of the Court.

[23] The tender is only for 12 months and if not stopped in its tracks now, a review in Part B may be moot at the time it is heard and the applicant would lose all chances to perform any contracts in terms of it.

[24] In my view the applicant has demonstrated a strong case against the first respondent and that the balance of convenience favours the applicant as it aims at holding the first respondent to the rules of its own tender.

Alternative Remedies

[25] The applicant is not aware of any internal remedies, and, in this regard, enquired from the first respondent if any such internal remedies exist.⁷

[26] It is evident that the applicant does not have an alternative remedy available which would rectify or satisfy any loss that he stands to suffer should the interim interdict not be granted.

[27] In *Steenkamp v Provincial Tender Board of the Eastern Cape*⁸ it was decided that a disappointed tenderer's claim in delict for out-of-pocket expenses in preparing

⁷ Caselines: pp25-4. Letter dated 01 August 2024 para 3

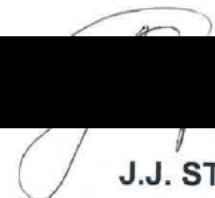

⁸ (528/2004) [2005] ZASCA 120; [2006] 1 All SA 478 (SCA); 2006 (3) SA 151 (SCA) (30 November 2005) (1) (14 August 2024 20-135-20-147

the tender will inevitably fail, at the causation hurdle. Those expenses were not caused by any administrative impropriety because they would in any event have been incurred and are always irrecoverable, irrespective of whether or not the tender was awarded to that party, properly or improperly. The applicant can therefore not claim damages.

[28] I conclude that the interim interdict is a necessity to ensure that the review court's jurisdiction under section 172(1)(b) of the Constitution is not rendered nugatory.

[29] I am persuaded that on the papers, the applicant met all the requirements of an interim interdict.

[30] In the result the draft order marked "X" is made an order of Court.

J.J. STRIJDOM

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 2024-088430

HEARD ON: 14 August 2024

FOR THE APPLICANT: ADV. A. GRANOVA

INSTRUCTED BY: V Chetty Inc.

FOR THE 1ST RESPONDENT: ADV. P. NYAPHOLI-NOTSIE

INSTRUCTED BY: State Attorney

FOR THE 2ND, 3RD, 12TH, 16TH AND 17TH RESPONDENTS: ADV. D.J. NASSER

INSTRUCTED BY: Xuba & Associates Attorneys

FOR THE 23RD RESPONDENT: MR. NTSHABE

INSTRUCTED BY: Voyi Incorporated Attorneys

DATE OF JUDGMENT: 20 August 2024