

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: **078950/2024**

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.
05/09/2024	[Redacted Signature]
DATE	SIGNATURE

In the matter between:

INTERNET FILING (PTY) LTD

Applicant

and

MINISTER OF EMPLOYMENT AND LABOUR

First Respondent

DIRECTOR-GENERAL OF EMPLOYMENT AND LABOUR

Second Respondent

AFRINOVA DIGITAL (PTY) LTD

Third Respondent

Delivered: This judgment was prepared and authored by the Acting 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 of the judgment is deemed to be **5 SEPTEMBER 2024**.

REASONS FOR INTERIM INTERDICT

MKHABELA, AJ

Introduction

[1] On 23 August 2024, I granted an interim interdict and undertook to provide reasons thereafter. For convenience, I reproduced the order in its entirety as set out below:

"It is ordered that:

1. *The applicant's non-compliance with the rules of court relating to service, time periods, and forms, and disposing with this application as a matter of urgency in terms of Uniform Rule 6(12)(a) are condoned.*

2. *Pending the final determination of the Review application instituted by the applicant under the above case number 078950/2024, the first, second, and third respondents are interdicted from implementing the award made by the Unemployment Insurance Fund to the third respondent in relation to the request for proposals with reference number UIF3/2023 and any contract entered into between the Unemployment Insurance Fund and the third respondent pursuant to such award.*

2.1 *The first, second and third respondents are further interdicted from implementing the service level agreement signed on 11 July 2024 with immediate effect pending the outcome of the pending review application between the applicant and the first, second and third respondents.*

2.2 *The first and second respondents are authorised to consider extending the Master agreement that lapsed on 18 August 2024 in order to avoid any disastrous consequences caused by the interim interdict, if they are so inclined.*

2.3 *In order to ameliorate any hardship to the third respondent, the first and second respondents are authorised to make payment only of the services rendered by the third respondent from 19 August 2024 to the date of this order.*

2.4 *The reasons for granting the interim interdict are reserved.*

3. *The first and second respondents are ordered to deliver, within 5 court days of receipt of this order, a copy of the record of the decision impugned in the main application under the above case number, which must include the following documents:*

- 3.1 *All the bids received by the UIF under tender UIF 3/2023.*
- 3.2 *In relation to the Bid Evaluation Committee ("BEC"):*
 - 3.2.1 *Copies of the Declaration of Interest forms signed by each member of the BEC (as referred to in paragraph 1 of the Code of Conduct of the BEC members UIF forms).*
 - 3.2.2 *Attendance registers for the meetings of the BEC held on 8, 12 and 13 February 2024.*
 - 3.2.3 *Each member of the BEC's scoresheets before the scores were amended at the meeting of 12 February 2024 and after the scores were amended at the meeting of 12 February 2024.*
- 3.3 *In relation to the Bid Adjudication Committee ("BAC"):*
 - 3.3.1 *The letter of appointment of each member of the BAC that was involved in the approval of the Request for Proposals (on 11 December 2023) and in the evaluation of the tender and/or approval of the BEC recommendations.*
 - 3.3.2 *The Code of Conduct document signed by each member of the BAC that was involved in the evaluation of the tender and/or approval of the BEC recommendations.*
 - 3.3.3 *The minutes of the meetings of the BAC at which the Request for Proposals was discussed and at which the evaluation of the tender was discussed and/or the recommendations of the BEC approved.*
 - 3.3.4 *The transcript of the BAC meeting of 22 May 2024.*
- 3.4 *All correspondence exchanged with bidders before bid closing.*
- 3.5 *The clarification questions asked via email communication to all bidders (as referred to on page 126 of the record).*
- 3.6 *All correspondence with bidders exchanged after bid closing.*
- 3.7 *The SCM pre-check list.*

- 3.8 *The scoring guideline (annexure B to the minutes of the BEC's meeting of 8 February 2024).*
- 3.9 *Proof that the SCM did public servant verification on the CSD (as per the BAC resolution of 22 May 2024).*
- 3.10 *Proof that the SCM verified the successful bidder's tax compliance (as per the BAC resolution of 22 May 2024).*
- 3.11 *The third respondent's response to the email from Dimpho Molekwa (to which the provisional letter of award dated 30 May 2024 was attached).*
- 3.12 *A copy of the contract concluded on 11 July 2024 between Afrinova (Pty) Ltd and the UIF and/or the Director-General of the Department of Employment and Labour relating to the tender ref: UIF3/2023, including the service level agreement signed on 11 July 2024.*
4. *The applicant will deliver its amended notice of motion and supplementary founding affidavit within (10) ten days from the date of receipt of the record.*
5. *The first, second and third respondents shall deliver their answering affidavits within (20) twenty days from the date of receipt of the supplementary founding affidavit.*
6. *The applicant shall deliver its replying affidavit within (10) ten days from the date of receipt of the answering affidavits.*
7. *The applicant shall deliver its heads of argument and list of authorities within (10) ten days from the date of delivery of the replying affidavit.*
8. *The first, second and third respondents shall deliver their heads of argument and list of authorities within (10) ten days from the date of receipt of the applicant's heads of argument.*
9. *The parties will deliver a joint practice note, joint chronology and joint list of authorities within (5) five days from the date of the delivery of the respondents' heads of argument.*
10. *The costs for the urgent application are reserved to be determined by the court that will hear the Review application."*

[2] I accordingly set out the reserved reasons herein below.

[3] The applicant, Internet Filing (Pty) Ltd (Internet) sought an interim interdict on an urgent basis.

[4] The first respondent, the Minister of Employment and Labour (the Minister), is the executive who exercises political oversight of the second respondent, the latter is the accounting officer of the Department of Labour.

[5] Afrinovo Digital (Pty) Ltd (Afrinovo) is the third respondent and also the winning bidder which was awarded the contract by the second respondent.

[6] As I have already alluded, Internet sought an order interdicting the respondents from implementing the award.

[7] It was common cause that Internet instituted review proceedings on 16 July 2024 and launched the current urgent application on 13 August 2024.

[8] It is also common cause between the parties that Internet was under the impression, both prior to the institution of the review proceedings and the launching of the urgent application, that the second respondent and the third respondent had already signed a service level agreement on 11 July 2024. This information was disclosed from the Bar by the third respondent's counsel.

[9] All three respondents opposed the application for an interim interdict that the applicant seeks. In addition, the first and second respondents opposed the applicant's relief both in respect of the interim interdict and the production of the record.

[10] On the contrary, the third respondent indicated that it would not enter the fray pertaining to the production of the record.

[11] Accordingly, the third respondent confined its opposition to the interim interdict as well as the question of urgency. Similarly, the first and second respondents also contended that the application was not urgent, and that the urgency was self-created given that the contract was awarded to Internet more than 47 days ago.

[12] Given the nature of the opposition to the relief that the applicant seeks, there are, in my view, two issues that arise crisply for determination. The first is the question

of urgency and the second is whether the applicant has made a case for the interim relief.

[13] I will deal briefly with the question of urgency. In light of the fact that I have granted an order on 23 August 2024, it follows that I have already held that the application was urgent.

[14] It is trite that the question of urgency is a factual one which must be determined by considering all the facts averred to in the founding papers, and a Court must read the papers cumulatively in order to ascertain whether indeed the application is urgent.

[15] What is foremost important in determining whether an application in any given circumstances is urgent is the primary consideration as to whether the applicant will not obtain substantial redress if the application is not heard as an urgent one. Our case law is replete with relevant authorities, and I do not intend to burden this judgment by regurgitating them.¹

[16] The chronology from the time the applicant was informed that it was unsuccessful vindicates the applicant that it did not unreasonably delay in instituting the review application. The chronology alluded is evident from the first respondent's answering affidavit as well as a hard copy that was handed in court by the applicant's counsel.

[17] There was, however, indeed, a slight delay in launching the urgent application. However, such a negligible delay is understandable. The applicant was still labouring under the impression that there was a provisional award to the third respondent.

[18] Crucially, the provisional award, *inter alia*, provides as follows:

"This letter does not and is not intended to have any contractual effect and no action should be taken by your company at this stage in respect of this contract."

[19] This letter was sent to Afrinovo on 11 June 2024, notwithstanding the fact that it is dated 30 May 2024.

¹ *East Rock Trading 7 (Pty) Ltd & Another v Eagle Valley Granite (Pty) Ltd & Others* [2011] ZAGPJHC 196 at para 6.

[20] Moreover, the second respondent refused to divulge the name of the successful bidder and insisted that the applicant should follow a PAIA² route in order to be furnished with the name of the successful bidder. This was on 26 – 27 June 2024.

[21] Eventually, the applicant discovered the identity of the winning bidder on the e-Tender portal and the applicant instituted its review application on 15 July 2024.

[22] The urgent application was launched on 13 August 2024. As I see it, the applicant has not been dilatory in its attempt to gather more information from the second respondent before launching its urgent application.

[23] After all, the applicant would not be afforded substantial redress if its application is not heard as a matter of urgency.

[24] My decision that the application is urgent is fortified by the fact that if the application is not heard now, it would render the review application moot. Such an eventuality is not farfetched.

[25] Furthermore, if the application is not heard as a matter of urgency, and the applicant is successful in the review application, the review Court would be shackled in formulating a just and equitable remedy as envisaged by Section 172(1) of the Constitution.

[26] The contention by the first respondent that urgency is self-created is not bona fide given the clandestine nature in terms of which the Service Level Agreement was signed on 11 July 2024. My conclusion that the first respondent was not bona fide in dealing with the applicant is vindicated by the fact that the signing of the Service Level agreement was not disclosed to the applicant in the meeting that took place between the representatives of the Department and the applicant on 15 July 2024.

[27] It follows therefore that the contention that the application was not urgent has no merit and falls to be rejected.

[28] For all these reasons, I am inclined to exercise my discretion and hold that the application is urgent.

² Promotion of Access to Information Act 2 of 2000.

[29] I turn now to the production of the record.

[30] It is not in dispute that the first and second respondents have been producing the requested record in drips and drabs. The time for the delivery of the record, albeit on the truncated timeline, had expired on 31 July 2024.

[31] Some of the record had been delivered after the launch of the urgent application. The first and second respondents' counsel submitted that a record pursuant to a Rule 53 cannot be requested on an urgent basis. I disagree.

[32] There is no doubt that the review is pursued on a semi-urgent basis. This is vindicated by the fact that the parties had already approached the office of the Deputy Judge President for a special allocation. Furthermore, the parties have already agreed to file further affidavits and heads of argument in order to facilitate an expedited hearing.

[33] It follows therefore that the relief for the delivery of the outstanding record is plausible under the circumstances and therefore susceptible to be granted on an urgent basis.

[34] What remains is the question as to whether a case for the interim interdict had been made by the applicant. On this score, the requirements for an interim interdict are also trite and well enunciated in the ancient case of *Setlogelo v Setlogelo*:³

- a. The existence of a *prima facie* right;
- b. A well-grounded apprehension of irreparable harm if the interim relief is not granted (and the ultimate relief is eventually granted);
- c. The balance of convenience favours the granting of the interdict;
- d. The absence of a suitable remedy.

³ 1914 AD 221 at 227.

[35] The Constitutional Court in the case of *OUTA*⁴ added a gloss to these requirements to the effect that when a Court considers the granting of an interim interdict, it must do so in a way that promotes the object, spirit and purport of the Constitution.⁵

Prima facie right

[36] The applicant has a *prima facie* right to have its tender adjudicated fairly, lawfully and in accordance with the applicable regulations. In this regard and without traversing issues that are within the domain of the review Court, the applicant has asserted that the tender was evaluated on a 80/20 point system. The applicant asserts that awarding the tender to Afrinova pursuant to such an evaluation would flaunt Regulation 3(2) of the Procurement Regulations.

[37] In the circumstances, the applicant has a *prima facie* right to a fair evaluation of the tender as well as a *prima facie* right to a just administrative action as envisaged by PAJA.

Irreparable harm

[38] It is in my view a no brainer that the applicant would suffer irreparable harm if the interim interdict is not granted and it is ultimately successful in the review. Such a scenario would resemble what happens in *All Pay*.⁶ The egg would have been scrambled and it would be impossible to unscramble it.

Balance of convenience

[39] This involves a balancing act, in other words who, between the applicant and the respondents, would suffer more harm if the interim interdict is granted. Since the

⁴ *National Treasury & Others v Opposition to Urban Tolling Alliance & Others* 2012 (6) SA 223 (CC) (*OUTA*).

⁵ *OUTA* above n 4 at para 45.

⁶ *All Pay Consolidated Investment Holdings (Pty) Ltd & Others v Chief Executive Officer of the South African Social Security Agency & Others* 2014 (1) SA 604 (CC).

parties have agreed that the review would be on an expedited basis, any harm occasioned by the granting of the interim interdict would be negligible. The balance of convenience favours the granting of the interim interdict since doing so maintains the status quo pending the finalisation of the review application.

Absence of a suitable remedy

[40] There is no other remedy that would secure the status quo until the hearing of the review application. The current status quo is that the third respondent commenced taking over the provision of the services from 19 August 2024. It was approximately 4 days when I granted the interim interdict.


[41] Failure to grant the interdict would render the review application superfluous and would deny the applicant of an effective remedy. On the other hand, if the award of the tender is above any scrutiny, the third respondent's right to continue providing the service would be re-instated.

[42] For all these reasons, the order that I granted on 23 August 2024 was warranted.

Order

[43] In the premises the following order is made:

1. The order granted on 23 August 2024 is confirmed.



R B MKHABELA
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES

For the Applicant:

Adv T Prinsloo instructed by Lowndes
Dlamini Incorporated

For the 1st & 2nd Respondents:

Adv H C Christoff Janse van Rensburg
instructed by the State Attorney

For the 3rd Respondent:

Adv Mketi instructed by Quba &
Associates Attorneys

Date of hearing: 23 August 2024

Date of reasons: 05 September 2024