

IN THE HIGH COURT OF LESOTHO
(Commercial Court Division)

HELD AT MASERU

CCA/0084/2021

In the matter between:

SELEMELA CONSTRUCTION (PTY) LTD APPLICANT

And

ROAD FUND 1ST RESPONDENT

PEMAHN CONSULTING (PTY) LTD 2ND RESPONDENT

BATLOUNG RAMOKEPA 3RD RESPONDENT

Neutral Citation: Selemela Construction (Pty) Ltd v Road fund and 2 Others
CCA/0084/2021 [2021] LSHC 136 COM (26th November,2021)

JUDGMENT

CORAM: MATHABA J
HEARD ON: 17th November 2021
DELIVERED ON: 26th November 2021

SUMMARY:

Interdict pendente lite – financial considerations alone not enough to justify urgency – Applicant still required to state why it could not be afforded a substantial relief in a hearing in due course – requirements for temporary interdict need to be demonstrated and assessed in conjunction with one another.

ANNOTATIONS:

LEGISLATION

Lesotho High Court Rules of 1980

CITED CASES

LESOTHO

Attorney General & Another v Swissbrough Diamonds Mines (Pty) Ltd and Others LLR & LR 1995-196 173

Lebeko Tsepane v Mahloli Chaba and Another CIV/APN/218/2000

Smally Trading Company v Lekhotla Mats'aba & 10 Others (C of A (CIV) 17 of 2016) [2016] LSCA 22

SOUTH AFRICA

Eriksens Motors (Welkom) Pty Ltd v Protea Motors (Warrenton) 1973 (3) SA 685(A)

Gool v Minister of Justice and Another 1955 (2) SA 682 (C)

Harley v Bacarac Trading 39 (Pty) Ltd (2009) 30 ILJ 2085 (LC)

Hulzer v Standard Bank of South Africa (Pty) Ltd (J469/99) [1999] ZALC 46 (25 March 1999)

IL & B Marcow Caterers (Pty) Ltd V Greatermans SA Ltd And Another; Aroma Inn (Pty) Ltd V Hypermarkets (Pty) Ltd And Another 1981 (4) SA 108 (C)

Luna Meubel Vervaardigers v Makin and Another 1977(4) SA 135

National Treasury v Opposition to Urban Tolling Alliance 2012 (6) SA 223(CC)

Ntefe J Ledimo & Others v Minister of Safety and Security & Others (2242/2003) [2003] ZAFSHC 16 (28 August 2003)

Setlogelo v Setlogelo 1914 AD 221

Simon No v Air Operations of Europe AB and Others 1999 (1) SA 217 (SCA)

INTRODUCTION:

[1] The Applicant has applied on an urgent basis for an interdict pending the finalisation of an application in terms of which it seeks a declaratory order and a review of the decision of the 1st Respondent to have the Applicant forfeit its bid security in the amount of M1,500,000.00. The application is opposed by the 1st and the 2nd Respondents.

[2] The parties first appeared before me on the 22nd October 2021 with the Applicant represented by Mr. *Tsabeha* and the 1st and 2nd Respondents represented by Mr. *Thene* and Ms. *Mokebisa*, respectively. I proceed to reproduce the prayers as they appear in the notice of Motion for better understanding:

- “1. Dispensing with the ordinary Rules that govern the modes and times of service in the proceedings before this Honourable Court.
2. A rule *nisi* be issued and made returnable on the time and date to be determined by the Honourable Court, calling upon the Respondents to show cause if any, why the following prayers shall not be made final or absolute to wit: -
 - a) That the 1st Respondent be ordered to dispatch to the Registrar of this Honourable Court the report of the Independent Consultant

including audio recordings for the two meetings held on the 9th July 2021 and the 25th August 2021 respectively and also the minutes of the seating culminating in the decision to terminate the Applicant's Acceptance letter per **Annexure SC2** to the founding affidavit.

- b)** That 1st Respondent be interdicted and restrained from engaging another Company, alternatively, commencing with the Contract for Completion of Construction and Upgrading of Toll Plazaazs: Caledonspoort Toll Plaza, Maputsoe Toll Plaza and Maseru Bridge Plaza pending finalisation of this matter.
- c)** That the decision to terminate Applicant's Acceptance letter be declared irregular, null and void and of no force and effect.
- d)** That it be declared that Clause 8 of the Settlement of Grievances Agreement (Annexure SC 3 to the founding affidavit) is severable from the rest of the agreement only in the event the Respondents might wish to rely on it to oust jurisdiction of the Court and to the extent it may be found to have such effect.
- e)** That the decision of the 1st Respondent to have Applicant forfeit its bid security in the amount of M1,500 000.00 be reviewed and set aside.
- f)** That Applicant be granted costs of suit on Attorney and Client scale.

3. Granting Applicant such further and/or alternative relief.

4. That prayers 1,2(a) and (b) herein should operate with immediate effect as an interim relief pending finalisation hereof.”

[3] Both Mr. *Thene* and Ms. *Mokebisa* indicated that as far as interim relief was concerned, they did not oppose prayer 1 and 2(a) in the Notice of Motion but that they oppose prayer 2(b). I nonetheless indicated that I would still want to be addressed on the issue of urgency and temporary interdict. With pleadings having been closed the matter was argued on the 17th November 2021 on the two issues.

BACKGROUND:

[4] The Applicant is a construction company while the 1st Respondent is a government agency established by Legal Notice No. 179 of 1995. It is responsible to finance road maintenance, upgrading and rehabilitation of road network.

[5] On the 5th November 2020 the 1st Respondent through its Consultant and/or Agent, the 2nd Respondent, issued a re-tender notice for a project intended to upgrade the existing tolling system, civil, building, electrical and mechanical infrastructure for Maseru, Maputsoe and Caledonspoort borders. The purpose of the project is to increase efficiency in revenue in order to improve service delivery related to road network infrastructure.

[6] The Applicant together with other bidders submitted their bids. The Applicant was a preferred bidder following tender evaluation as a result of which it was called for negotiations meeting on the 25 March 2021 after which it was issued with a Letter of Acceptance dated the 14th April 2021. The Letter of Acceptance was issued after the Applicant had addressed the queries that were raised by the 1st Respondent during the meeting of the 25th March 2021.

[7] As a pre - condition for the parties to eventually sign the contract in relation to the execution of the project, the Applicant had four conditions which it had to meet in terms of the Letter of Acceptance which it was issued with. One of the conditions was submission of Health and Safety File within fourteen working days of the receipt of the Letter of Acceptance. The Health and Safety File had to meet defined specification.

[8] It is not disputed that the Letter of Acceptance stated that failure to fulfil any of the four pre- contract conditions shall constitute a repudiation of the agreement by the Applicant and the 1st Respondent shall be entitled at its discretion to terminate the agreement.

[9] The Applicant met three out of four pre- contract conditions and the 1st Respondent asserts that the Applicant failed to submit a compliant Health and Safety file in line with the Health and Safety Specifications. On the other hand, the Applicant denies that the file was not compliant but acknowledges that it had areas that needed to be attended following review. The 1st and the 2nd

Respondents' contention is that the Applicant was given more than reasonable time to submit a compliant Health and Safety file, but it failed to do so even during the extended time.

[10] The Applicant contends that in assessing whether it was given a reasonable time to submit a compliant Health and Safety file, only the last submission must be considered. According to the Applicant, other submissions were reviewed by the 2nd Respondent 's Consultant who was biased against it and was eventually recused from the project. I have observed that even the last submission was not acceptable to the Respondents hence the 1st Respondent took the decision to terminate the Acceptance Letter. The foundation of the contention between the parties is the submission of a compliant Health and Safety file and the consequent decision by the 1st Respondent to terminate the agreement.

URGENCY:

Facts on urgency

[11] On the facts relating to urgency, the Applicant alleges that if the Respondents are not interdicted from engaging another contractor or re-tending for the project, they might elect to carry on when the dispute is still pending before Court. It argues that should it follow normal route, the relief sought

would have been overtaken by the events by the time the matter is finalised and it will unjustly be deprived of the benefits of the contract and left remediless.

Principles of urgency

[12] Urgent applications are governed by Rule 8¹. In terms of Rule 8(22)(a), a judge enjoys a discretion to dispense with the forms and service provided for in the Rules and dispose of the matter at a time and place and in such a manner and in accordance with such a procedure as he may deem fit. The discretion in this regard must be exercised judiciously. As it was indicated in **Luna Meubel Vervaardigers v Makin and Another**² “The degree of relaxation should not be greater or less than the exigencies of the case demands. It must be commensurate therewith”.

[13] Whether a matter can justifiably be heard on an urgent basis is underpinned by the issue of absence of substantial redress in an application in due course. Thus Rule 8(22)(b) reads as follows -

“In any petition or affidavit filed in support of an urgent application, the applicant shall set forth in detail the circumstances which he avers render the application urgent and also the reasons why he claims that he could not be

¹ High Court Rules of 1980

² 1977 (4) SA 135 at 138, para F

afforded substantial relief in a hearing in due course if the periods presented by this Rule were followed”

[14] When the Applicant has moved with excessive speed to institute his case or has excusable justification for whatever delays, a Court will come to his assistance if he will not obtain a substantial redress if he were to wait for the normal course laid down by the Rules.

[15] The major considerations in determining whether to accelerate hearing of a matter as urgent are the following³:

- The prejudice that the applicants might suffer by having to wait for a hearing in the ordinary course;
- The prejudice that other litigants might suffer if the applicant is given preference; and
- The prejudice that the respondents are likely to suffer by the abridgment of the prescribed times and an early hearing.

Analysis

[16] For the reasons I set out below, I have little hesitation in arriving at the conclusion that this matter is not urgent when applying the above principles relating to urgency to the facts of this matter. Alternatively, the matter did not warrant Court’s immediate attention.

³ I L & B Marcow Caterers (Pty) Ltd v Greatermans SA Ltd & another; Aroma Inn (Pty) Ltd v Hypermarkets (Pty) Ltd and Another 1981 (4) SA 108 at 112 to 113 para H

[17] The Applicant has not set out in detail why it will not be afforded a substantial relief in a hearing in due course. In short, the Applicant 's case when it comes to urgency is sparse and lacking in particularity – these weighs heavily against it. The reasons advanced by the Applicant as they appear in paragraph 11 of this judgment are not sufficient to justify the matter to jump the queue to the detriment of other litigants who are also awaiting their turn. I also disagree with the assertion that the Applicant will “be left remediless”.

[18] In the event of the Applicant being successful in the review and in obtaining the declarator it is seeking, I do not see how the 1st Respondent will resist a claim for contractual damages and refuse to refund the Applicant the M1,500,000.00. Consequently, it is not clear what the Applicant means when it says it will be remediless and why that would be so.

[19] In as much as the Applicant has not said it in so many words, it is clear that urgency in this matter is actuated by financial considerations. It is therefore apposite to quote Fagan J where he said the following in **I L & B Marco Caterers v Greatermanns SA**⁴, *supra*,

“Other litigants waiting for their matters to be heard would be prejudiced if priority were afforded to these applications as they would have to wait longer.

⁴ Page 113 to 114 F/C

And what distinguishes these two applications from other matters? Applications for review such as these occur commonly and are not given priority. The prejudice that applicants are complaining about is the possibility that they may suffer losses of profits - the losses, if any, sound in money. Assuming that such losses are irrecoverable, that still does not distinguish these matters from many others awaiting their turn on the ordinary roll. Take for example all the cases wherein general damages are claimed in delict including actions instituted under the Compulsory Motor Vehicle Insurance Act 56 of 1972. Interest is not claimable on the amount awarded and litigants suffer financially by delay in the adjudication of their matters. Moreover, the fact that a litigant with a claim sounding in money may suffer serious financial consequences by having to wait his turn for the hearing of his claim does not entitle him to preferential treatment. On the other hand, where a person's personal safety or liberty is involved or where a young child is likely to suffer physical or psychological harm, the Court will be far more amenable to dispensing with the requirements of the Rules and disposing of the matter with such expedition as the situation warrants. The reason for this differential treatment is that the Courts are there to serve the public and this service is likely to be seriously disrupted if considerations such as those advanced by the applicants in these two matters were allowed to dictate the priority they should receive on the roll. It is, in the nature of things, impossible for all matters to be dealt with as soon as they are ripe for hearing. Considerations of fairness require litigants to wait their turn for the hearing of their matters. To interpose at the top of the queue a matter which does not warrant such treatment automatically results in an additional delay in the hearing of others awaiting

their turn, which is both prejudicial and unfair to them. The loss that applicants might suffer by not being afforded an immediate hearing is not the kind of loss that justifies the disruption of the roll and the resultant prejudice to other members of the litigating public”.

[20] It is perhaps convenient at this stage to indicate that the issue of whether financial hardship is a basis for seeking urgent relief has been a subject of debates in other Courts. It has been held in other decisions that as a general rule, financial hardship does not establish a basis for urgency⁵. In **Ntefe J Ledimo & Others v Minister of Safety and Security & Others**⁶ Rampai J said the following:

“In the three cases I have quoted above the courts have held that the mere fact that irreparable financial losses have been suffered or would be suffered by the applicant was not, by itself, sufficient ground to ground the requisite urgency necessary to justify a departure from the ordinary court rules. In applying this principle, a judge will do well to keep the words of wisdom which were expressed through the lips of Kroon J on p 15 in **Caledon Street Restaurants CC** (supra). I find it apposite to echo those sentiments here by quoting him verbatim:

“However, the following comments fall to be made. First, to the extent that these cases may be interpreted as laying down that financial exigencies cannot be invoked to lay a basis for urgency, I consider that

⁵ *Hulzer v Standard Bank of South Africa (Pty) Ltd (J469/99)* [1999] ZALC 46 (25 March 1999) at para 13

⁶ (2242/2003) [2003] ZAFSHC 16 (28 August 2003) at para 32

no general rule to that effect can be laid down. Much would depend on the nature of such exigencies and the extent to which they weigh against other considerations such as the interests of other party and its lawyers and any inconvenience occasioned to the court by having to entertain an application on an urgent basis. Second, whatever the extent of the indulgence, the sanction of the court thereof that an application be heard as a matter of urgency, would not in general , in this Division, accord the matter precedence over other matters and result in the disposal of the latter being prejudiced by being delayed.”

[21] In **Harley v Bacarac Trading 39 (Pty) Ltd**,⁷ the Court held:

‘If an applicant is able to demonstrate detrimental consequences that may not be capable of being addressed in due course and if an applicant is able to demonstrate that he or she will suffer undue hardship if the court were to refuse to come to his or her assistance on an urgent basis, I fail to appreciate why this court should not be entitled to exercise a discretion and grant urgent relief in appropriate circumstances. Each case must of course be assessed on its own merits.’

[22] It is clear therefore that there is no immutable rule that financial exigencies cannot be invoked to lay a basis for urgency. This ensures that Court retains their discretion in adjudicating whether the matter is urgent or not. However, alleging financial exigencies alone, without demonstrating their

⁷ [\(2009\) 30 ILJ 2085 \(LC\)](#) at para 8.

impact and why the Applicant will not obtain a substantial relief in a hearing in due course is not sufficient.

[23] I remain unconvinced that a departure from the normal principle that financial hardships do not substantiate a case of urgency is justified *in casu*. The Applicant has failed to put a strong case as far as urgency is concerned. However, since I asked the parties to address me on the issue of interim interdict as well, I proceed to inquire if it would be justifiable to grant an interim interdict. The reason for this approach is simple – I am on the view that though the matter did not warrant immediate attention, it would nonetheless qualify to be on the semi – urgent roll if there was such in our jurisdiction. Again, when I first met the parties representatives on the 22nd October 2021, the Respondents were not opposed to the matter being dealt with on an urgent basis, though they backtracked from that position when they filed their Answering Affidavits.

INTERIM INTERDICT:

[24] The requisites for granting interim interdict are well settled. Both Counsel for the Applicant and for the 1st Respondent referred to these requirements as they are laid down in the seminal judgment in **Setlogelo v Setlogelo 1914 AD 221**. These requirements which the Applicant must establish can be summarised as follows:

- (a) a *prima facie* right, though open to some doubt;
- (b) a well-grounded apprehension of irreparable harm if interim interdict is not granted and ultimate relief is eventually granted;
- (c) the balance of convenience favours the granting of the interim interdict;
- (d) the absence of any other satisfactory remedy.

[25] These requirements must not be assessed separately or in isolation, but in conjunction with one another. In **Eriksens Motors (Welkom) Pty Ltd v Protea Motors (Warrenton)**⁸ the Court said the following with reference to these requirements:

“The foregoing considerations are not individually decisive, but are interrelated; for example, the stronger the applicant’s prospects of success the less his need to rely on prejudice to himself. Conversely, the more the element of ‘some doubt’, the greater the need for the other factors to favour him. The Court considers the affidavits as a whole, and the interrelation of the foregoing considerations, according to the facts and probabilities; see *Olympic Passenger Service (Pty.) Ltd. V Ramlagan*, 1957 (2) SA 382 (D) at p. 383D – G. Viewed in that light, the reference to a right which, ‘though *prima facie* established, is open to some doubt’ is apt, flexible and practical, and needs no further elaboration.”

⁸ 1973 (3) SA 685 (A) at 691 (F)

[26] **Eriksens Motors (Welkom) Pty Ltd**, *supra*, was quoted with approval in **Attorney General & Another v Swissbourgh Diamonds Mines (Pty) Ltd and Others**⁹. I respectfully disagree with the observation in **Lebeko Tsepane v Mahloli Chaba and Another**¹⁰ that “...the **threshold test** has with development of our law shifted from **prima facie right** that it used to be. The balance of convenience has since been elevated to being **the core test.**” Reference was made to **Attorney General & Another v Swissbourgh Diamonds Mines (Pty) Ltd and Others**, *supra*, to support this observation. The Court of Appeal in the latter case acknowledged that since the decision in **American Cyanamid Company v Ethicon Co.** 1975 All E.R 504 (HL), English Courts elevated the “**balance of convenience**” to being the core test. The Court did not go as far as making any pronouncement whose effect was to elevate any of the requirements.

Prima facie right

[27] As it was said in **Simon No v Air Operations of Europe AB and Others**¹¹ the correct test in adjudicating *prima facie* right in the context of an interim interdict is to take the facts averred by the Applicant, together with those facts put up by the Respondent that are not or cannot be disputed and consider whether, having regard to inherent probabilities, the Applicant should obtain a final relief on those facts at the trial. The facts set up in contradiction

⁹ LLR & LB 1995 – 1996 173 at 183

¹⁰ CIV/APN/218/2000 at 13, judgment delivered on the 10th December 2001.

¹¹ 1999 (1) SA 217 (SCA) at 228 G

by the Respondent should be considered and if serious doubt is thrown upon the case of the Applicant, he cannot succeed. [See: **Gool v Minister of Justice and Another** 1955 (2) SA 682 (C) at 688B-F.

[28] In **National Treasury v Opposition to Urban Tolling Alliance**¹², the Constitutional Court of South Africa observed that-

“Under the *Setlogelo* test the prima facie right a claimant must establish is not merely the right to approach a court in order to review an administrative decision. It is a right to which, if not protected by an interdict, irreparable harm would ensue. An interdict is meant to prevent future conduct and not decision already made. Quite apart from the right to review and to set aside impugned decisions, the applicants should have demonstrated a prima facie right that is threatened by an impending or imminent irreparable harm. The right to review the impugned decisions did not require any preservation pendente lite.”

[29] The Applicant alleges *prima facie* right based on the alleged strong prospects of success as, according to it, the decision by the 1st Respondent is not supported by law in material aspects and is based on wrong statements of the facts. It argues that it is incorrect that it squandered three (3) opportunities to submit a compliant Health and Safety file. It further asserts that the Public Procurement Regulations 2007 do not support the decision taken and further that the Applicant did not fail to submit a performance bond security. According to the 1st and the 2nd Respondents, the Applicant has not proven *prima facie*

¹² 2012 (6) SA 223 (CC) at 237 to 238 para [50]

right but simply wants to benefit from its own non – compliance. They maintain that the Applicant did not submit a compliant Health and Safety file on several occasions and that even the 3rd Respondent still found the file to be non – compliant after it was queried by the 2nd Respondent ‘s Consultant on previous occasions.

[30] The core difficulty for the Applicant is that its submissions were considered by the Respondents not to be compliant with Health and Safety requirements. According to the Letter of Acceptance, submission of a compliant Health and Safety file was one of the pre- conditions for signing of the contract between the Applicant and the 1st Respondent. There was a deadline within which the file was to be submitted which was, at some stage, even extended – though the extension falls within the period which the Applicant does not want to be considered. The Applicant does not deny that the file which it submitted was not approved following the review. Its main contention is that it should have been ‘*given a reasonable time and opportunity to improve its file by incorporating the comments by the Consultant*’. Another difficulty is that the agreement has already been terminated and that the right to review the impugned decision does not require preservation pendente lite.

[31] Given the outcome I reach on other requirements, I need not resolve, for present purposes, if the Applicant demonstrated *prima facie* right or not. My reluctance to make a definitive ruling on the existence of *prima facie* right is

actuated by my cautious approach not to inadvertently make any pronouncement on the review grounds, particularly when the Applicant is premising its *prima facie* right on its prospects of success in the review.

Apprehension of irreparable harm

[32] The Applicant argues that if the interdict is not granted, there is a possibility that works might be done or even be completed while the matter remains pending and that a claim for damages will not be an adequate remedy because Applicant cannot lawfully claim for work it has not done. It asserts that it will not be possible to recover to the fullest extent the damages suffered. The Respondents deny that the Applicant will suffer irreparable harm as its bid security will be returned and damages paid if it is able to demonstrate that the agreement was wrongfully terminated.

[33] I am unable to comprehend why the harm the Applicant will suffer is irreparable. Should the decision to terminate the agreement be declared null and void and of no force and effect, I know no reason why the Applicant would not have a claim for damages against the 1st Respondent. Again, should the decision of the 1st Respondent to have Applicant forfeit its bid security in the amount of M1,500,000.00 be reviewed and set aside, I do not see how the 1st Respondent would validly refuse to refund the Applicant M1,500,000.00. It is not being argued that the 1st Respondent is a pauper and will therefore not be able to

refund the Applicant or meet the claim for damages or that its financial capability is questionable.

Balance of convenience

[34] With respect to this requirement, the Applicant argues that it is in the public interest that the tender be awarded to the correct tenderer. It asserts that the only prejudice that the Respondents stand to suffer is delay and that if the interim interdict is not granted but the review is finally granted, a new contractor would have been engaged and probably paid pursuant to invalid administrative action. The Respondent contends that it is in the public interest that the works continue to allow smooth passage of people and goods at the borders. They argue further that the project will also enable the 1st Respondent to fulfil its mandate on collecting levies on behalf of the Government of Lesotho more efficiently by engaging a contractor who would finish the project so that focus shifts to other projects of national interest.

[35] Smooth passage of people and goods at the borders promotes trade facilitation which is necessary as countries aim to revive their economies in the midst of COVID 19 pandemic. Again, Courts should be cautious not to interfere with governments' initiatives to mobilise domestic revenue through orders which they give. I accept that the Applicant is likely to suffer prejudice if the interim interdict is not granted, but its prejudice does not exceed and is not comparable to the prejudice which the 1st Respondent will suffer if the project is

delayed. Delaying the project has ripple effects. This will not only frustrate the 1st Respondent's efforts to timeously upgrade the tolling system, but it will result into the 1st Respondent being unable to collect revenue in order to support other projects of national interest. I am alive to the important mandate of the 1st Respondent and that it falls within the camp of government. As it was emphasised in **National Treasury v Opposition to Urban Tolling Alliance**¹³, *supra*, "...a Court considering the grant of an interdict against the exercise of power within the camp of government must have the separation of powers consideration at the very forefront." That is not to say that even in befitting cases, a temporary interdict cannot be granted against a government institution.

The absence of any other satisfactory remedy_

[36] Though in his Heads of Argument, Mr. *Tsabeha* made mention of this requirement, he never addressed it, neither has it been specifically canvassed as a stand-alone requirement in the Founding Affidavit. However, under the heading "reasonable apprehension of irreparable harm" in the Founding Affidavit, the Applicant alleges that "a claim for damages cannot be an adequate remedy because the Applicant cannot lawfully claim for the work it has not done. It will therefore be impossible to recover to the fullest extent the damages suffered."

[37] The Respondents' answer is that the Applicant will be entitled to claim for damages for wrongful termination of the contract which would

¹³ Page 241 para 68

include monies it would have earned had the contract not been terminated. Mr. *Thene* did not address this requirement in his Heads of Arguments but Ms. *Mokebisa* did. She reiterated that the Applicant has the avenue of claiming breach of contract by the 1st Respondent which can be remedied by damages.

[38] In **Smally Trading Company v Lekhotla Mats'aba & 10 Others**¹⁴ the Court of Appeal had the occasion to deal with an application where the Appellant wanted the Respondents to be restrained from performing certain actions in pursuance of a tender awarded to some of the Respondents pending the finalisation of appeal instituted by the Appellant against the dismissal by High Court, of an application relating to the tender. The Court said the following:

“[7] In this case I was not satisfied that the applicant had satisfied that it did not have another satisfactory remedy. In para 6.4 of the founding affidavit it was merely stated that the applicant ‘would suffer irreparable harm because damages will not adequately compensate the loss [it] would suffer if the tender is not properly processed.

[8] I do not agree with this statement. If the applicant is ultimately successful in its attack on the withdrawal of the initial tender process and the award of the tender under the ‘selective’ process (which excluded the applicant from tendering) and it proves that it would have won the initial tender then it will have no difficulty in quantifying its

¹⁴ (C of A (CIV) 17 of 2016) [2016] LSCA 22 (25 May 2016):

damages, which prima facie would be the profits it would have made on the contract, something which it should easily be able to prove and recover. It followed that the application had to fail.”

[39] A key factor in Mr. *Tsabeha*'s argument was that the Applicant holds strong prospects of success in the review proceedings. Though I did not want to make any pronouncement on the review proceedings, I looked into that argument and remain of the view that when evaluated together with other factors, the conclusion is that the applicant cannot succeed in obtaining an interim interdict. It bears repeating that I am not making any pronouncement on the review and declarator prayers that the Applicant is seeking. Neither am I suggesting that the Applicant has a weak case. The parties still need to file Heads of Argument and address me on these prayers.

ORDER

[31] In the circumstances and following my discussions with the parties, wherein Mr. *Tsabeha* confirmed that he was abandoning prayer 2(a) in the Notice of Motion as the documents and audio recordings referred to therein have already been availed to the Applicant, I make the following order:

1. As far as it relates to the adjudication of the prayer relevant to interdict *pendente lite*, the applicant's non-compliance

with the Rules of Court that govern the modes and times of service in the proceedings before this Court is condoned;

2. The application for interdict *pendente lite* (prayer 2 (b) in the notice of motion) is dismissed.
3. The application is postponed *sine die* in respect of other prayers that the Court has not pronounced itself on.

A.R. MATHABA J
Judge of the High Court

For the Applicant:	Mr. S.S Tsabeha
For the 1 st Respondent:	Mr: P. Thene
For the 2 nd Respondent:	Ms. M. Mokebisa