



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: 21132/2018

In the matter between:

MHONKO'S SECURITY SERVICES CC

Applicant

And

CITY OF CAPE TOWN

1st Respondent

CHAIRPERSON OF THE SUPPLY CHAIN

MANAGEMENT BID ADJUDICATION COMMITTEE

2nd Respondent

APPEAL AUTHORITY OF THE CITY OF CAPE TOWN

3rd Respondent

CAPITAL SHIP TRADING 605 (PTY) LTD

4th Respondent

SECURITEM (PTY) LTD

5th Respondent

KHUSELANI SECURITY AND RISK

MANAGEMENT (PTY) LTD

6th Respondent

FIDELITY SECURITY SERVICES (PTY) LTD

7th Respondent

GPARM PROTECTION SERVICES CC

8th Respondent

IMVULA QUALITY PROTECTION (AFRICA)

(PTY) LTD	9 th Respondent
PROSEC GUARDS CC	10 th Respondent
CHIPPA TRAINING ACADEMY (PTY) LTD	11 th Respondent
DISTINCTIVE CHOICE 477 CC	12 th Respondent
BIDVEST PROTEA COIN (PTY) LTD	13 th Respondent
OOSTENBERG PATROLS CC	14 th Respondent
SECHABA PROTECTION SERVICES	
WESTERN CAPE (PTY) LTD	15 th Respondent
BYERS SECURITY SOLUTIONS (PTY) LTD	16 th Respondent
ENTHAL G FORCE SECURITY SERVICES CC	17 th Respondent
HELIOS SECURITY AND RISK MANAGEMENT CC	18 th Respondent
ALL 4 SECURITY SERVICES CC	19 th Respondent
SILVER SOLUTIONS 2616 CC	20 th Respondent
RED ANT SECURITY RELOCATION AND EVICTION SERVICES (PTY) LTD	21 st Respondent

Date of hearing: 28 November 2018

Date of judgment: 30 November 2018

JUDGMENT

SAVAGE J:

Introduction

[1] In this urgent application the applicant, Mhonko's Security Services CC, seeks interim interdictory relief against the respondents pending the review of the award of a tender for the provision of certain security services granted by the first respondent, the City of Cape Town ('the City'), and the conclusion of any further tender process. The application is opposed by the City, as well as the fourth, fifth, eleventh, fifteenth, eighteenth, nineteenth and twentieth respondents.

[2] The application is brought in two parts with only the urgent relief sought in part A of the notice of motion currently before this Court. The determination of *inter alia* the review of the award of the tender under Part B of the application remains for determination at a later date. The urgent relief currently sought by the applicant seeks *inter alia* to interdict the implementation of the tender for security services awarded by the first, second and third respondents to the fourth to twenty first respondents in terms of City of Cape Town Tender 207S/2016/7 ('the tender'); and the termination of the ongoing unarmed guarding services provided by the applicant on a month-to-month basis to the City; with a direction that the current contract between the applicant and the City be extended until the completion of the review application and any subsequent renewed tender process.

[3] The City and the fourth, fifth, eleventh, fifteenth, eighteenth, nineteenth and twentieth respondents oppose the application, in the first instance, on the grounds that it is not urgent. In the event that the matter is found to be urgent, these respondents contend that the requirements for the grant of the interim interdictory relief sought have not been met. The issue of urgency is considered first.

Background

[4] The applicant was awarded on tender a contract to provide unarmed guarding services to the City, which commenced in October 2014. The contract term ended in June 2017, following which it was extended on a month-to-month basis thereafter. The last contract extension, with effect from 1 July 2018, was for a period of not more than six months, alternatively until implementation of the new tender, whichever occurred first.

[5] On 10 May 2018 the City informed the applicant that its bid made in respect of the new tender to provide unarmed guarding services to the City had been unsuccessful. On 31 May 2018 the applicant lodged its appeal in terms of s 62 of the Municipal Systems Act 32 of 2000 against the decision. On 10 August 2018 the applicant was advised that its appeal had been unsuccessful.

[6] On 31 August 2018 the applicant's attorneys wrote to the City calling on it "*to revisit its conclusion that the tender was non-responsive*" and consider again the applicant's bid. In this letter it was stated that "*...we are instructed to consider bringing urgent proceeding to interdict any award of the tender...*". On 17 September 2018 the City wrote to the applicant. In this letter the applicant was informed that the City was unable to reconsider its decision not to award the tender to the applicant. The applicant was informed that five review applications had been launched by other unsuccessful bidders in respect of the 2017 tender process. This had occurred on 24 August 2018. Those review applications were by agreement, on agreed expedited timeframes, heard during October 2018 by Williams AJ and judgment in the matters remains reserved. On 30 October 2018 the City sent the applicant a letter notifying the applicant of the termination of its provision of its month-to-month security services with effect from the end of November 2018.

[7] On 15 November 2018, three months after having been informed that its appeal had been unsuccessful, the applicant launched this urgent application. In the founding affidavit of Ms Buyelwa Eunice Bomela, filed in support of the application, the issue of urgency was addressed as follows:

'61. Applicant has pursued its appeal remedy and sought, vainly, to obtain from the City necessary backing evidence for its case, under PAIA. Applicant has, through subsequent demand, attempted to persuade the city as to the flaws of its process, that has been rebuffed. Given this, the City is quite clear and has been under no illusions as to the flaws in their process and applicants intent, throughout, to pursue this matter, if necessary, in court (although this has always been the least desirable route for many reasons).

62. Applicant's important PAIA request, which would have supported its review (and to which the City has itself referred in its letter disclosing reasons of 21 May 2018), has been tardily handled by the City and rejected on entirely spurious grounds. The rejection of the PAIA request was only responded to by the City on the 5th of October 2018.
63. The Applicant thereafter sought legal advice, and instructed its attorneys to brief counsel. Unfortunately, counsel chosen was not able to produce papers on an urgent basis. Other counsel had to be sourced, and have managed to draft papers and bring this application within a week.
64. Should this matter not to be entertained on an urgent basis the Applicant's employees stand to suffer irreparable harm.
65. The termination later, although dated 30 October 2018, was only received by me on 1 November 2018. Services as relating to other areas under this tender had not been terminated.
66. The bringing of this application consequently (has) not being inordinately delayed.'

[8] Mr Oosthuizen SC for the City argued that the obvious question which arises and which is not explained is why the applicant waited in excess of three months from 10 August 2018 until 15 November 2018 to launch this application. The information requested of the City by the applicant might be relevant to the review but not to the interim relief sought. Furthermore, it was argued that at all material times the applicant was legally represented, with the explanation as to the unavailability of the chosen counsel stated to be "*feeble and manifestly without merit*". The urgency cannot be created by the decision of 30 October 2018 to cancel the applicant's services since that cancellation decision is challenged in the review application (Part B) and the cancellation amounts to the logical implementation of the tender award decision, which the applicant knew would follow.

[9] The City submitted further that the applicant was aware that review applications were launched in August 2018 by unsuccessful bidders in the same position of the applicant and that that application was, by agreement, heard on an

accelerated basis, with judgment reserved. It was submitted that on 21 November 2018, another unsuccessful bidder, in WCHC case number 16617/18, brought an application for urgent interim relief which was struck from the roll for lack of urgency, with costs. Furthermore, successful bidders have already made arrangements and incurred substantial expenses in preparation for the takeover pursuant to the award of the tender. For these reasons, the City seeks that the matter be struck from the roll with costs for lack of urgency.

[10] The fourth, fifth, eleventh, fifteenth, eighteenth, nineteenth and twentieth respondents also oppose the application for an interim interdict on the basis that it is not urgent. This was contended it to be so in that the applicant had exhausted and internal remedies on 10 August 2018 when its appeal was refused. Mr *Filand* for these respondents argued that it was apparent from the letter dated 30 August 2018 addressed by the applicant's attorneys to the City that the applicant had been aware that it could launch urgent proceedings and legal advice would have made it apparent that given that the appeal had been concluded, the City could not revisit its decision in regard to the tender. Furthermore, it was stated on opposing papers filed that steps had been taken and costs incurred to commence with the provision of services in respect of which these respondents had been contracted with effect from 1 December 2018.

[11] Mr *Sidaki* for the applicant, heads of argument having been prepared with Mr *Masuku* SC, submitted that the City does not deny that the matter is urgent but claims that the applicant's conduct undermined urgency. It was argued that the suggestion that there exists unreasonable delay is premised on a misapprehension of the relevant facts. This is so in that the events that precipitated the bringing of the urgent application for interim relief in Part A arose between 31 October 2018 and 2 November 2018, when the letter terminating the month-to-month contract was received by the applicant. The applicant's conduct in relation to the urgent relief, it was submitted, must therefore be assessed from 30 October 2018 and not from 17 September 2018 or before. This is so in circumstances in which the applicant was given a month's notice to pack up its operations, retrench

its employees and close its business. Two weeks after receipt of notice the urgent application was launched, with the timeframes imposed in the application and causing no prejudice to the City.

Evaluation

[12] It is trite that urgency is a reason that may justify deviation from the times and forms the rules prescribe. It relates to form, not substance, and is not a prerequisite to a claim for substantive relief. Where an application is brought on the basis of urgency, the court is permitted in rule 6(12) to dispense with the forms and service usually required and dispose of the matter in the manner it considers appropriate.¹ Rule 6(12)(b) requires that the applicant must set out the circumstances on which it is averred that it is urgent and the reasons why the applicant claims that it cannot be afforded substantial redress at a hearing in due course. A lack of urgency will entitle a high court in the exercise of its discretion to refuse to enrol a matter where the ordinary forms and procedures have not been followed, in which case the matter may be struck from the roll.²

[13] An applicant may not create its own urgency³ and must bring an application at the first available opportunity, since the longer it takes to do so may have the effect of diminishing urgency.⁴ It should be shown that there will be an absence of substantial redress if the applicant is not heard as a matter of urgency.

[14] The applicant has provided an armed guarding services to the City in terms of contract awarded on tender to it. By agreement, the contract term was extended on month-to-month basis, from 2017 for an extended period, until notice of termination of the contract was given in a letter dated 30 October 2018. The reason provided for the termination was that the City was “operationalising” the tender in respect of which the applicant was unsuccessful and that is intended with

¹ *Commissioner for South African Revenue Service v Hawker Air Services (Pty) Ltd; Commissioner for South African Revenue Service v Hawker Aviation Services Partnership and Others* [2006] ZASCA 51; 2006 (4) SA 292 (SCA) ; [2006] 2 All SA 565 (SCA) at para 9.

² Ibid.

³ *East Rock Trading 7 (Pty) Ltd v Eagle Valley Granite (Pty) Ltd* [2012] JOL 28244 (GSJ at para 7.

⁴ *Collins t/a Waterkloof Farm v Bernickow NO and Another* [2001] ZALC 223.

effect from 1 December 2018 to deploy new service providers at the sites currently being serviced by the applicants. The applicant was aware that from 1 July 2018 it rendered services on a month-to-month basis, for a period of not more than six months, alternatively until implementation of the new tender, whichever occurred first, and that one month's notice of termination could be given the applicant.

[15] The notice of extension of the contract for six months, or until implementation of the tender, made it clear that a decision to implement the tender granted could lead to an early termination of the contract extension. The applicant would in July 2018, when the contract extension was granted, have been aware of the fact that such an early termination may in due course arise. This is so in that when the applicant was informed that its appeal against its unsuccessful bid in the tender process had not been successful, it would also have been apparent that if the City decided to implement the tender as awarded, the six-month extension may be terminated prior to the conclusion of the six month period. The City's decision to terminate the act in accordance with its contract with the applicant does not in itself create urgency. This is all the more so when the fact remained that the month-to-month contract was in place given that the tender process had not been concluded and the outcome implemented. As a consequence, the month-to-month contract was directly related to the award and implementation of the tender. It concerned the provision of the same services which were the subject matter of the tender and the six month contract had been granted on the express basis that it may be terminated as a result of the implementation of the tender in due course.

[16] As from 10 August 2018, when the applicant was informed that its bid had been unsuccessful, it was aware that the tender would not be granted to it. It would also have been aware that, as a result of the award of the tender, the month-to-month contract would come to an end. In spite of this, and although the applicant's attorneys had threatened urgent proceedings, no steps were taken for three months to launch this urgent application. This was an extended and inordinate delay, in my mind, and one which was not explained adequately by the applicant.

[17] As was stated in *Gallagher v Norman's Transport Lines (Pty) Ltd*⁵ the rules do not tolerate an illogical knee-jerk reaction to urgency. The entitlement to deviate from the rules is dependent on the urgency which is shown to prevail and this must be of some marked degree. It may not be self-created and a litigant may not simply sit back without taking steps to seek urgent relief, or seek such relief without a full and proper explanation for any delay in doing so.

[18] On the facts of this matter, I am not persuaded that the applicant acted with the degree of haste that was required of it in this matter. It was aware from 10 August 2018 that its bid had been unsuccessful and it is not open to it to approach to this Court more than three months later and claim urgency, when it did not treat the matter as urgent itself. Nor did the termination of the month-to-month contract, which could only have been anticipated by the applicant when it was made aware that its bid had failed, create the required urgency for the applicant. To find that it did would be to approach the issue of urgency in the illogical and knee-jerk manner cautioned against in *Gallagher*.

[19] The merits of the application and relief sought in Part B of the notice of motion remain to be determined in due course. As was made clear in *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v CEO, SA Social Security Agency and Others*,⁶ in the event of a finding of invalidity in respect of the award of the tender, the affected decision or conduct must be declared unlawful and a just and equitable order made. Such an order would take account the constitutional principles governing public procurement, with priority given to the public good, and the rights or expectations of an unsuccessful bidder, such as the applicant, will be assessed in this context. This will include any financial consequences arising from the termination of the month-to-month contract by the City.

[20] For all of these reasons, the view I take of this application is that it falls to be struck from the roll for lack of urgency. There is no reason why costs should not follow the result. I am not of mind to grant the costs of two counsel.

⁵ 1992 (3) SA 500 (W) at 502I – 503A.

⁶ 2014 (1) SA 604 (CC); [2013] ZACC 42 at para 56.

Order

[21] The following order is made:

1. The application is struck from the roll for lack of urgency, with costs.

K M SAVAGE
Judge of the High Court

Appearances:

For Applicant: Mr T Sidaki (heads prepared by Mr T Masuku SC)
Instructed by Godla & Associates

For 1st to 3rd Respondent: Mr AC Oosthuizen SC and Mr N de Jager
Instructed by Herold Gie Broadhead Inc.

For 4th, 5th, 11th, 18th,
19th and 20th Respondents: Mr D Filand
Instructed by Swartz Hess Attorneys