

THE REPUBLIC OF SOUTH AFRICA



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

Case Number: 9697 / 2023

In the matter between:

ROYAL SECURITY CC

Applicant

and

SS SALUTIONS (PTY) LTD t/a SEAL SECURITY

First Respondent

TYTE SECURITY SERVICES CC

Second Respondent

WESTERN CAPE PROVINCIAL GOVERNMENT

Third Respondent

**THE MEC FOR THE DEPARTMENT OF INFRASTRUCTURE
WESTERN CAPE PROVINCIAL GOVERNMENT**

Fourth Respondent

**THE DIRECTOR OF ACQUISITIONS & CONTRACT
MANAGEMENT OF THE DEPARTMENT OF INFRASTRUCTURE
WESTERN CAPE PROVINCIAL GOVERNMENT**

Fifth Respondent

**THE CHIEF DIRECTOR OF SUPPLY CHAIN MANAGEMENT
OF THE DEPARTMENT OF INFRASTRUCTURE
WESTERN CAPE PROVINCIAL GOVERNMENT**

Sixth Respondent

**THE MEC FOR PROVINCIAL TREASURY
WESTERN CAPE PROVINCIAL GOVERNMENT**

Seventh Respondent

**THE HEAD OF THE DEPARTMENT OF INFRASTRUCTURE
WESTERN CAPE PROVINCIAL GOVERNMENT**

Eighth Respondent

THE BID EVALUATION COMMITTEE OF THE

Ninth Respondent

**DEPARTMENT OF INFRASTRUCTURE
WESTERN CAPE PROVINCIAL GOVERNMENT**

**THE BID ADJUDICATION COMMITTEE OF THE
DEPARTMENT OF INFRASTRUCTURE
WESTERN CAPE PROVINCIAL GOVERNMENT**

Tenth Respondent

**THE DEPARTMENT OF POLICE OVERSIGHT AND
COMMUNITY SAFETY, WESTERN CAPE
PROVINCIAL GOVERNMENT**

Eleventh Respondent

In re the application between:

SS SALUTIONS (PTY) LTD t/a SEAL SECURITY

Applicant

and

WESTERN CAPE PROVINCIAL GOVERNMENT

First Respondent

**THE MEC FOR THE DEPARTMENT OF INFRASTRUCTURE
WESTERN CAPE PROVINCIAL GOVERNMENT**

Second Respondent

**THE DIRECTOR OF ACQUISITIONS & CONTRACT
MANAGEMENT OF THE DEPARTMENT OF INFRASTRUCTURE
WESTERN CAPE PROVINCIAL GOVERNMENT**

Third Respondent

**THE CHIEF DIRECTOR OF SUPPLY CHAIN MANAGEMENT
OF THE DEPARTMENT OF INFRASTRUCTURE
WESTERN CAPE PROVINCIAL GOVERNMENT**

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**THE MEC FOR PROVINCIAL TREASURY
WESTERN CAPE PROVINCIAL GOVERNMENT**

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**THE HEAD OF THE DEPARTMENT OF INFRASTRUCTURE
WESTERN CAPE PROVINCIAL GOVERNMENT**

Sixth Respondent

**THE BID EVALUATION COMMITTEE OF THE
DEPARTMENT OF INFRASTRUCTURE
WESTERN CAPE PROVINCIAL GOVERNMENT**

Seventh Respondent

**THE BID ADJUDICATION COMMITTEE OF THE
DEPARTMENT OF INFRASTRUCTURE
WESTERN CAPE PROVINCIAL GOVERNMENT**

Eight Respondent

**THE DEPARTMENT OF POLICE OVERSIGHT AND
COMMUNITY SAFETY WESTERN CAPE
PROVINCIAL GOVERNMENT**

Ninth Respondent

ROYAL SECURITY CC	Tenth Respondent
RED ANT SECURITY CONSORTIUM	Eleventh Respondent
S ISMAIL t/a ALCATRAZ	Twelfth Respondent
MASIBAMBANE SECURITY SERVICES (PTY) LTD	Thirteenth Respondent
UTHEMBEKILE SECURITY SERVICES CC	Fourteenth Respondent
AMA SECURITY (PTY) LTD	Fifteenth Respondent
SILVER SOLUTIONS 1522 CC	Sixteenth Respondent
DC SECURITY (PTY) LTD	Seventeenth Respondent
ENSEMBLE SECURITY	Eighteenth Respondent
SECHABA PROTECTION SERVICES (PTY) LTD	Nineteenth Respondent
PROSEC GUARDS CC	Twentieth Respondent
SECURICAPE SERVICES (PTY) LTD	Twenty-First Respondent
TYTE SECURITY SERVICES CC	Twenty-Second Respondent

Coram: Gamble et Wille, JJ

Heard: 22 April 2024

Delivered: 30 April 2024

JUDGMENT

WILLE, J: (GAMBLE J, CONCURRING)

Introduction

[1] The tenth respondent makes an application that the first three paragraphs of the order handed down by this court about two months ago be implemented immediately, pending any further appeals by the twenty-second respondent.¹

[2] The twenty-second respondent wants the order not to be suspended pending the outcome of the application for leave to appeal and the final determination of any appeal against the order in any court going forward.²

[3] This court's order concerning the initial review application dismissed the applicant's application and the twenty-second respondent's counterapplication for judicial review. It confirmed the award by the first to ninth respondents of the tender to the tenth respondent. The tenth respondent was due to take over and commence the operations required under the tender contract within one calendar month of the order date.³

[4] In addition, the applicant and the twenty-second respondent were ordered to hand over the security operations under the tender to the tenth respondent and do everything necessary to enable the tenth respondent to commence with the required security services within the stipulated timeframe.⁴

[5] The applicant was ordered to pay the tenth respondent's costs for the interdict application, which confirmed that the initial review application should not have been chartered in the first place. After that, only the twenty-second respondent applied for leave to appeal. This application for leave to appeal was heard along with this urgent implementation application as a matter of practicality and to save judicial resources.⁵

[6] This court recently dismissed the twenty-second respondent's application for leave to appeal. The implementation date for handing over the security operations to the tenth respondent was substituted and expedited. In response to this, the twenty-second respondent has now hastily filed another application for leave to appeal,

¹ This application is chartered in terms of section 18 (3) of the Superior Courts Act, 10 of 2023. ("Act").

² Whether in the High Court, the Supreme Court of Appeal, or the Constitutional Court.

³ The order was granted on 21 February 2024.

⁴ The tenth respondent was to take over the security operations by 21 March 2024.

⁵ The application for leave to appeal was dismissed by this court on 24 April 2024.

which was the trigger for the delivery of this judgment dealing with the implementation application launched by the tenth respondent.⁶

Context

[7] The security tender, forming the subject of the initial review application, was awarded to the tenth respondent nearly a year ago. Shortly after that, the applicant instituted an urgent application for an order that, pending the final determination of a review application, the provincial respondents be interdicted and restrained from implementing or giving legal effect to the decision in awarding the tender to the tenth respondent.⁷

[8] Essentially, to regulate the further conduct of the proceedings and, from a practical perspective, to ensure the continuity of these vital security services, an order was handed down in the interdict proceedings containing some of the following terms: (a) the applicant and the twenty-second respondent would continue to render the services which they had been providing in terms of an extant service level agreement, (b) the tenth respondent would render the protection services for a specified housing project pending the outcome of the review application and, (c) pending the outcome of the review application, should the provincial respondents require any further security services to be rendered at additional sites, it could appoint, at its sole discretion, either the applicant, the tenth respondent or the twenty-second respondent to provide such services in terms of any service level agreements concluded with the provincial respondents.⁸

[9] For practical purposes, the applicant and the twenty-second respondent continued to perform services under an impugned tender award that had been awarded jointly to them about three years ago. Put another way, they continued to enjoy the full benefit of the entire contract period. In addition, the applicant and the twenty-second respondent continued to benefit from an award that had previously been set aside for almost a year longer.⁹

[10] It must be emphasized that neither the provincial respondents nor the applicant applied for leave to appeal nor for the implementation application. In addition, the tenth respondent has taken over the security services previously

⁶ This application is to the Supreme Court of Appeal and was filed on 26 April 2024.

⁷ This was the urgent interdict application launched on 15 June 2023.

⁸ This order was handed down by Justice Francis in June 2023 (the "interim" order)

⁹ This is in terms of Francis J's interim interdict, and by the time this application was heard,

rendered by the applicant in accordance with the court order granted more than two months ago.¹⁰

Consideration

[11] The tenth respondent submitted that exceptional circumstances have been demonstrated in this application. It also says that some of the facts relevant to the requirements for exceptional circumstances are also pertinent to the requirements for irreparable harm. I agree with both submissions. I say this because the twenty-second respondent has had the windfall of a two-year contract, which was unlawfully awarded, and continues to reap these benefits even though a new contract has been lawfully granted to the tenth respondent.¹¹

[12] The twenty-second respondent avers that it will suffer harm if the implementation applicant is successful and contends that the harm it will suffer is outweighed by the harm the tenth respondent will suffer should it be unsuccessful. The core argument by the twenty-second respondent seems to be that severe harm would befall it and its employees if the order were to be implemented. This must be measured against the relevant background as there can be no question that the tenth respondent has been unable to perform in terms of a contract awarded to it almost a year ago. This is causing it irreparable harm because the contract's intended duration is only two years.¹²

[13] The tenth respondent has, among other things, undertaken the following to fulfil the contract awarded to it: (a) provided significant insurance for its guards, (b) provided significant performance guarantees, (c) established sites in six different districts in terms of the tender document and, (d) affected operational requirements for the complete takeover of all sites.¹³

[14] Simply put, the tenth respondent has been losing daily revenue on not being permitted to perform under a lawfully awarded tender. On the other side of the coin, the twenty-second respondent has been benefiting from an unlawfully awarded tender for close to three years and will suffer no judicially cognizable harm whatsoever if the tenth respondent were to perform the services provided in its contract for the remaining little more than one year of its intended duration. The

¹⁰ The twenty-second respondent refuses to abide by the terms of the court order of 21 February 2023.

¹¹ This is clearly something out of the ordinary and of an unusual nature.

¹² The facts show that exceptional circumstances exist and the tenth respondents is suffering irreparable harm.

¹³ By 30 June 2023

twenty-second respondent does not engage with these factual averments, which are common cause.¹⁴

[15] The argument by the twenty-second respondent is that it accepts that while the tenth respondent may suffer some financial harm, such harm is not irreparable since it concerns only monetary losses, which can be compensated through damages if the tenth respondent ultimately succeeds in the appeal. I disagree. I say this because a breach of administrative jurisdiction usually implies public law remedies and not private law remedies, aiming to prevent, remedy, or undo an improper administrative action, provide administrative justice to a wronged person, promote efficient and effective public administration, and strengthen the rule of law.¹⁵

[16] This court retains a broad general discretion to grant the implementation application and to determine the conditions upon which the right to execute must be exercised. Our jurisprudence dictates that public interest should be considered when deciding whether an order appealed against should be implemented pending the outcome of an appeal.¹⁶

[17] It is common cause that the price tendered by the tenth respondent was the most favourable, being lower than all the others by a significant margin. In contrast, the applicant's and the twenty-second respondent's bids exceeded the pre-tender estimate. Thus, should the current situation remain in place and the twenty-second respondent be allowed to continue rendering the services, the public purse will suffer and incur expenditure that would have been saved on the tenth respondent's watch.¹⁷

[18] These facts bear testimony to the extent of the existing and ongoing prejudice to the tenth respondent and the public at large. The only argument left by the twenty-second respondent to counter these facts is to fall back on its submissions that the award needed to be revised. However, this is a component of the criteria that only concerns the prospects of success on the appeal, which finds application when an implementation application must be determined.¹⁸

¹⁴ The contract is due to terminate in June 2025.

¹⁵ This I indicated in my leading judgment on page 21, para [76].

¹⁶ *Ntlemenza v Helen Suzman Foundation and Another* 2017 (5) SA 402 (SCA) at paras 28 and 35 to 37.

¹⁷ The extant extensions have generated in excess of R70 million for the applicant and the twenty-second respondent.

¹⁸ The application for leave to appeal was dismissed by the court on 24 April 2024.

[19] The twenty-second respondent's opposition to the implementation application is primarily based on its professed belief that the tenth respondent failed to adhere to the tender requirements and submitted a non-compliant bid and that the leading judgments were wrong and fall to be overturned on appeal.¹⁹

[20] A new test applies for leave to put into operation and execute an order pending the outcome of an appeal process. The relevant sections that find application indicate as follows:

*'...Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal....'*²⁰

and

*'...A court may only order otherwise as contemplated in subsection (1) or (2) if the party who applied to the court to order otherwise, in addition, proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders...'*²¹

[21] Thus, it must be so that the court is given discretion when adjudicating upon an implementation order. Whether to grant an exceptional order remains entirely within the court's discretion. In exercising its discretion, regard must be had to the prospects of success in any application for leave to appeal since those will bear down on the issue of exceptionality. As a matter of pure logic, the merits of an implementation application must consider the merits of an application for leave to appeal. The twenty-second respondent's application for leave to appeal has now been dismissed by this court, and I find that implementing the orders would be the only just and equitable outcome in these circumstances.²²

[22] I propose the following order:

1. The operation and execution of the orders numbered 1,2 and 3 of this court granted on 21 February 2024, read with paragraph F on the order of this court

¹⁹ These objections were all technical and did not touch on the merits of the tender process and award.

²⁰ Section (18) (1) of the Superior Courts Act, 10 of 2013.

²¹ Section (18) (3) of the Superior Courts Act.10 of 2013.

²² *Ntlemenza v Helen Suzman Foundation and Another* 2017 (5) SA 402 (SCA) at paras 28 and 35 to 37.

dated 24 April 2024, are to be implemented pending the outcome of any appeal process by the twenty-second respondent or until another court otherwise directs.

2. The twenty-second respondent shall be liable for the costs of and incidental to this application, such costs to include the costs of two counsel where so employed.
3. The costs of senior counsel are to be in accordance with scale C, and the costs of junior counsel shall be in accordance with scale B.

WILLE, J

I agree, and it is so ordered:

GAMBLE, J