



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

Case Nos: 5464/24; 5477/24; 5586/24; 5616/24 and 5618/24

Case No: 5464/24

In the matter between:

PRINCETON PROTECTION SERVICES (PTY) LTD

Applicant

and

WESTERN CAPE PROVINCIAL GOVERNMENT

First Respondent

**THE MEC FOR THE DEPARTMENT OF HEALTH
AND WELLNESS WESTERN CAPE GOVERNMENT**

Second Respondent

**THE DIRECTORATE: SUPPLY CHAIN SOURCING
DEPARTMENT OF HEALTH AND WELLNESS
WESTERN CAPE GOVERNMENT**

Third Respondent

**THE HEAD OF THE DEPARTMENT OF HEALTH AND
WELLNESS WESTERN CAPE GOVERNMENT**

Fourth Respondent

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

Fifth Respondent

PHANGELA PRIVATE SECURITY SERVICES (PTY) LTD

Sixth Respondent

GOLDEN SECURITY SERVICES CC

Seventh Respondent

**AMAZIM-ZIM SECURITY AND PRIVATE
INVESTIGATORS (PTY) LTD**

Eighth Respondent

AND

Case No: 5477/24

In the matter between

GRINNELL SECURITY SERVICES (PTY) LTD

Applicant

and

**WESTERN CAPE PROVINCIAL GOVERNMENT
AND SEVEN OTHER RESPONDENTS**

Respondents

AND

Case No: 5586/24

In the matter between

**XOLISWA M HOLDINGS (PTY) LTD
t/a EAGLE AGE PROTECTION SOLUTIONS**

Applicant

and

**WESTERN CAPE PROVINCIAL GOVERNMENT
AND SEVEN OTHER RESPONDENTS**

Respondents

AND

Case No: 5616/24

In the matter between

GREYSTONE TRADING 389CC

Applicant

and

**WESTERN CAPE PROVINCIAL GOVERNMENT
AND SEVEN OTHER RESPONDENTS**

Respondents

AND

Case No: 5618/24

In the matter between

**SECHABA PROTECTION SERVICES WESTERN CAPE
(PTY) LTD**

First Applicant

**SILVER SOLUTIONS 2616 CC t/a
STAR SECURITY SERVICES CC**

Second Applicant

**STAR PROJECT MANAGEMENT (PTY) LTD t/a
AMA SECURITY SERVICES**

Third Applicant

ALL 4 SECURITY SERVICES CC

Fourth Applicant

HELIOS SECURITY AND RISK MANAGEMENT CC

Fifth Applicant

and

**WESTERN CAPE PROVINCIAL GOVERNMENT
AND SEVEN OTHER RESPONDENTS**

Respondents

Coram: NUKU J
Heard on: 16 and 18 April 2024
Delivered on: 2 May 2024

JUDGMENT

NUKU, J

INTRODUCTION

[1] There are five applications which were brought on an urgent basis, all seeking interdictory relief. The interdictory relief sought is the suspension of an implementation

of a tender awarded by the Western Cape Department of Health and Wellness (Department) to Phangela Private Security Services Proprietary Limited (Phangela), Golden Security Services Close Corporation (Golden) and Amazim-zim Security and Private Investigators Proprietary Limited (Amazim-zim), pending final determination of proceedings to review the Department's decision to award the aforesaid tender.

[2] The applications served before Blumberg AJ on 27 March 2024, and he postponed them to 16 April 2024, that being the first day that I heard them. The order postponing the applications granted the parties leave to approach the Acting Judge President for the allocation of a judge to hear the applications as it had become clear that arguments would exceed half a day. The order also incorporated a timetable for the filing of answering affidavits by the respondents on or before Friday, 5 April 2024, the filing of the replying affidavits by applicants on or before Wednesday, 10 April 2024, and the exchange of the parties' heads of argument by Friday, 12 April 2024. It was also ordered that all costs would stand over for later determination.

[3] Although the applications were heard together, they were not consolidated and that necessitates consideration of each application individually although there are some arguments that overlap. I consider it convenient to deal with the applications in the sequence that they were issued.

[4] The first application was launched by Princeton Protection Services Proprietary Limited (Princeton) on 18 March 2024 under case number 5464/2024 (Princeton application). The relevant part of the interdictory relief sought by Princeton reads:

‘2. That, pending the final determination of the review application set out on Part B below (“the review application”), the Respondents are interdicted and or directed as follows:

2.1 Giving effect to the purported notice of termination of services, dated 26 February 2024, which is meant to take effect, as of 1 April 2024; and/or

2.2 Giving effect to the purported appointment of any other service provider for private security at Groote Schuur Hospital.

2.3 That the Applicant be permitted to continue rendering the services it currently renders at Groote Schuur Hospital, on the same terms and conditions as it is currently doing....’

[5] The second application was launched by Grinnell Security Services Proprietary Limited (Grinnell) also on 18 March 2024 under case number 5477/2024 (Grinnell application). The relevant part of the interdictory relief sought by Grinnell reads:

‘2. That, pending the final determination of the review application set out in Part B below (“the review application”), the first and second respondents (collectively referred to as “*the Department*”):

2.1 be interdicted from giving effect to the decision of the Department to award tender WCGHSC 0362/1/2023 (“the tender”) to the sixth to eighth respondents;

- 2.2 be interdicted from implementing the awarding of the tender to the sixth to eighth respondents;
- 2.3 be interdicted from concluding and/ or implementing any contract concluded with the sixth to eighth respondents pursuant to the award of the tender.
- 2.4 directing that the Department take all actions necessary to allow the applicant to continue to provide security services at the sites which it is currently servicing (*"the existing contract"*) on the same terms and conditions as those which are currently in place under the existing contract'

[6] The third application was launched by Xoliswa M Holdings Proprietary Limited trading as Eagle Age Protection Solutions (Eagle Age) on 19 March 2024 under case number 5586/2024 (Eagle Age application). The relevant part of the interdictory relief sought by Eagle Age reads:

- '2. That, pending the final determination of the review application set out in Part B below (*"the review application"*), the first and second respondents (collectively referred to as *"the Department"*):
 - 2.1 be interdicted from giving effect to the decision of the Department to award tender WCGHSC 0362/1/2023 (*"the tender"*) to the sixth to eighth respondents;
 - 2.2 be interdicted from implementing the awarding of the tender to the sixth to eighth respondents;
 - 2.3 be interdicted from concluding and/ or implementing any contract concluded with the sixth to eighth respondents pursuant to the award of the tender.

- 2.4 directing that the Department take all actions necessary to allow the applicant to continue to provide security services at the sites which it is currently servicing (*"the existing contract"*) on the same terms and conditions as those which are currently in place under the existing contract'

[7] The fourth application was launched by Greystone Trading 389 Close Corporation (Greystone) on 20 March 2024 under case number 5616/2024 (Greystone application). The relevant part of the interdictory relief sought by Greystone reads:

'2. That, pending the final determination of the review application set out in Part B below (*"the review application"*), the first and second respondents (collectively referred to as *"the Department"*):

- 2.1 be interdicted from giving any further effect to the decision of the Department to award tender WCGHSC 0362/1/2023 (*"the tender"*) to the sixth to eighth respondents;
- 2.2 be interdicted from implementing the awarding of the tender to the sixth to eighth respondents;
- 2.3 be interdicted from concluding and/ or implementing any contract concluded with the sixth to eighth respondents pursuant to the award of the tender.
- 2.4 directing that the Department take all actions necessary to allow the applicant to continue to provide security services at the sites which it is currently servicing (*"the existing contract"*) on the same terms and conditions as those which are currently in place under the existing contract '

[8] The fifth application was launched by Sechaba Protection Services Western Cape Proprietary Limited (Sechaba), Silver Solutions 2616 Close Corporation trading as Star Security Services CC (Star), Star Project Management Proprietary Limited trading as Ama Security Services (AMA), All 4 Security Services Close Corporation (All 4), and Helios Security and Risk Management Close Corporation (Helios) on 20 March 2024 under case number 5618/2024 (Sechaba application). The relevant part of the interdictory relief sought by the applicants in the Sechaba application reads:

‘2. That, pending the final determination of the review application set out in Part B below (“the review application”), the respondents are interdicted and or directed as follows:

- 2.1 giving effect to the purported notice of termination of services provided to the applicants, dated 29 February 2024, which is meant to take effect, as of 1 April 2024.
- 2.2 giving any, or any further, effect to the decision of the first and/ or second respondents (“the Department”) to award tender WCGHSC 0362/1/2023 (“the tender”) to the sixth to eighth respondents;
- 2.3 implementing the awarding of the tender to the sixth to eighth respondents;
- 2.4 be interdicted from concluding and/ or implementing any contract concluded with the sixth to eighth respondents pursuant to the award of the tender.
- 2.4 directing that the Department take all actions necessary to allow the applicant to continue to provide security services at the sites

which it is currently servicing (“*the existing contract*”) on the same terms and conditions as those which are currently in place under the existing contract

3. In the alternative, that pending the final determination of the review application set out in Part B below (“the review application”), the respondents are interdicted and/ or directed as follows:
 - 3.1 giving effect to the purported notice of termination of services provided to the applicants, dated 29 February 2024, which is meant to take effect, as of 1 April 2024.
 - 3.2 giving effect to the purported appointment of any other service provider for sites currently serviced by first, second, fourth and fifth applicants....
4. In the further alternative, that the respondents are interdicted and restrained from allocating any sites which are covered by, and in contravention of, the Order of Acting Justice Sievers dated 27 September 2019.’

[9] What is clear from the above is that the interdict sought by the applicants is directed at three things. First, it is to prohibit the Department from terminating the contracts of those applicants with existing contracts with the Department. Second, it is to prohibit the implementation of the tender awarded to Phangela, Golden and Amazimzim. Third and lastly, it is to extend the contracts, on the same terms and conditions, of those applicants who had existing contracts with the Department before 1 April 2024. This is what some of the applicants referred to as the status quo that they want maintained until the final determination of review proceedings.

[10] The orders sought by Grinnell, Eagle Age and Greystone in the review are couched in identical terms. In the relevant part they read:

7. Reviewing and setting aside in terms of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") the first respondent's, alternatively the second respondent's, further alternatively the fourth respondent's ("the respondents") decision to mark the applicants' tenders WCGHSC 0362/1/2023("the tender") non-responsive and to exclude them from further consideration.
8. Declaring the applicants' bids were responsive to the requirements of the tender.
9. Referring the matter back to the respondents for the applicants' tenders to be re-adjudicated by the third and fourth respondents on the basis that they are deemed responsive.

[11] The relief sought by Princeton and the applicants in the Sechaba application in the review are also couched in similar terms. In the relevant part they read:

1. Reviewing and setting aside in terms of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") the decision to declare the Applicants' tender submissions for tender number WCGHSC 0362/1/2023, as non-responsive.
2. Substituting that decision(s), one that the Applicants are declared responsive and must be included in the panel of service providers constituted pursuant to tender number WCGHSC 0362/1/2023.
3. In the alternative to paragraph 2 above, remitting the Applicants' bid documentation to the Respondent for reconsideration for the purposes of inclusion in the panel of service providers pursuant to tender number WCGHSC 0362/1/2023.

[12] To summarise, Grinnell, Eagle Age and Greystone seek the setting aside of the tender award as well as the remittal of the tender for reconsideration by the Department on the basis that their bids were responsive. Princeton and the applicants in the Sechaba application, on the other hand, seek the setting aside of the tender award as well as the substitution of the decision of the Department with a decision that declares that their tenders were declared responsive and must be included in the panel of service providers constituted pursuant to tender number WCGHSC 0362/1/2023. In the alternative, they also seek the remittal of the tenders for reconsideration by the Department on the basis that their bids are responsive.

FACTUAL BACKGROUND

[13] Nine of the ten applicants provide private security services (Services) at the healthcare facilities of the Department. The Services are provided in terms of contracts between individual applicants and the Department. All these contracts were for fixed terms that were to terminate on 31 March 2024. For convenience I refer to these contracts as 'existing contracts.'

[14] In anticipation of the termination of the existing contracts by effluxion of time, the Department commenced a procurement process with the aim of concluding new contracts for the provision of the Services effectively from 1 April 2024. The invitation to tender was published on 12 May 2023 under tender number WCGHSC03621/1/2023 (Tender) and the closing date was 9 June 2023.

[15] The healthcare facilities in respect of which the Department requires these Services were grouped into zones and the interested service providers were required to submit bids in respect of each zone. The zones were, in turn, divided into two groups, that is metro zones and rural zones.

[16] The Department received 107 bids including those of the applicants. The evaluation of the bids was done in three phases. Phase 1 assessed compliance with mandatory criteria. Phase 2 was an operational assessment of bidder's ability to perform. Phase 3 was to consider price and preference points.

[17] All but eight bids made it past phase 1. Four were excluded for failure to attend the compulsory briefing sessions, ninety-one were excluded for failure to comply with the mandatory criteria regarding the submission of documents and four were excluded for incomplete pricing schedules. Except for Star Project Management (Pty) Ltd, all the applicants were excluded during this phase although there was some argument that Grinnell made it past phase 1.

[18] Operational assessments were conducted in respect of the eight remaining bids. All eight proceeded to phase 3 where they were considered on the price and preference points. In the end the Department awarded the tender to Phangela, Golden and Amazim-zim. All the bidders were advised of the outcome. The Department also communicated its intention to have Phangela, Golden and Amazim-zim take over by 1 April 2024.

[19] Dissatisfied with the Department's decision to award the tender, the applicants brought these applications seeking, in Part A, the interim interdictory relief and in Part B, a judicial review of the Department's decision.

[20] All the applications are opposed by first to the fifth respondents (the government respondents) as well as the eighth respondent. The seventh respondent's opposition is limited to the extent that the relief would impact on the zones that it has been awarded. The sixth respondent did not participate in the proceedings.

[21] As indicated earlier the applications were not consolidated. That notwithstanding, and by agreement between the parties' legal representatives, the government respondents filed one answering affidavit dealing with all five applications. Considering that, I consider it convenient to set out each of the applicants' case. Before doing that, I deal briefly with two issues, namely urgency and the late application for the filing of the eighth respondent's answering papers.

URGENCY

[22] As stated earlier, the application started off in the fast lane. One of the initial points taken by the government departments relates to urgency. To that end, they had filed an affidavit dated 26th March 2024 dealing only with the issue of urgency. By the time the matter came before me, it was not immediately clear whether the government respondents persisted in taking the urgency point. On the second day of the hearing, Mr

De Waal SC, who appeared for the government respondents, advised the court that the government respondents were not persisting with the issue of urgency as a self-standing ground of opposition. That then disposed of the need for the parties to address the court on the issue of urgency.

THE EIGHTH RESPONDENT'S APPLICATION FOR CONDONATION FOR THE LATE FILLING OF THE ANSWERING AFFIDAVIT AND HEADS OF ARGUMENT

[23] The eighth respondent was required to deliver its answering papers, in terms of the court order taken by agreement between the parties, on 5 April 2024. This it did not do. It is not clear when its answering affidavit was filed but it is dated 13 April 2024, which is a day after the applicants were required to file their replying affidavits.

[24] The explanation for the delay by the deponent to the affidavit filed on behalf of the eighth respondent, starts off with the respondent's failure to file the answering affidavit by 25 March 2024. This, however, is unnecessary as the parties had subsequently agreed on a new date for the filing of answering papers, the 5th April 2024.

[25] The sum-total of the eighth respondent's explanation is that the decision not to deliver the answering affidavit was a strategic decision taken to avoid costs and in the hope that the applications would be successfully opposed by the government respondents. The deponent goes further stating that he became unavailable at times which he does not spell out in his affidavit. Finally, he states that it was on the urging by

the attorneys acting for the government respondents that the eighth respondent decided to deliver its answering affidavit.

[26] Mr Nyathi, who appeared on behalf of the eighth respondent, frankly acknowledged the shortcomings of the explanation for the late delivery of the eighth respondent's answering papers. He, however, implored the court to condone the lateness on the basis that it would be in the interest of justice to do so. In this regard, he referred this court to the decisions of the Constitutional Court in *Bertie Van Zyl*¹ and *Ferris*².

[27] In *Bertie Van Zyl*, Mokgoro J writing for the majority had the following to say³ '...lateness is not the only consideration. The test for condonation is whether it is in the interest of justice to grant condonation'. (footnotes omitted) In *Ferris*, the Constitutional Court referred to its decision in *Bertie Van Zyl* and went further to state that 'As the interest of justice is a requirement for condonation and granting leave to appeal, there is an overlap between the enquiries. For both enquiries, an applicant's prospects of success and the importance of the issue to be determined are relevant factors.'⁴

[28] In determining whether it is in the interest of justice to condone the lateness, a court is required to consider several factors and there is not an exhaustive list. In light thereof, I invited Mr Nyathi to indicate what factors should be considered in this matter

¹ *Bertie Van Zyl (Pty) Ltd and Another v Minister for Safety and Security and Others* 2009 (10) BCLR 978 (CC)

² *Ferris and another v FirstRand Bank Ltd and another* 2014 (3) BCLR 321 (CC)

³ At para [14]

⁴ At para [10]

to which he only referred to the prospects of success of the eighth respondent's opposition of the application.

[29] In my view, the prospect of success alone in this matter do not tilt the scales sufficiently for the lateness to be condoned. The lateness was deliberate. The eighth respondent's affidavit was filed to deal, in essence, with one issue the government respondents could not deal with, that is the balance of convenience as between the applicants and the eighth respondent. This is an important aspect in respect of which, because of the lateness of the filing of the answering affidavit, the applicants were deprived of an opportunity to deal with in their replying papers. That this must result in great prejudice to the applicants is self-evident.

[30] Also, the approach of the eighth respondent to the application for condonation is as if condonation can be had for the mere asking, something which the Constitutional Court has said cannot be. My view is that taking into account the period of the delay, the absence of a satisfactory explanation for the delay as well as prejudice to the applicants, it would not be in the interests of justice to condone the late filing of the eighth respondent's answering affidavit. The eighth respondent's application for condonation for the late filing of the answering affidavit cannot succeed.

[31] As for the eighth respondent's heads of argument, there was not even an application for condonation and in the absence thereof condonation cannot be granted.

The lateness of the filing of the eighth respondent's answering affidavit as well as the heads of argument cannot be condoned in these circumstances.

[32] The time taken in dealing with arguments in respect of the eighth respondent's application for condonation was miniscule such that a cost order is not warranted. There shall therefore be no order as to costs in respect of the eighth respondent's application for condonation.

***PRIMA FACIE* RIGHT ASSERTED ON BEHALF OF EACH APPLICANT**

[33] One of the government respondents' grounds of opposing Part A is that all the applicants had not alleged any rights that required protection pending the review. Instead, they all had relied on the right to review the outcome of the tender process, which right requires no protection pending the determination of the review.

[34] During argument, all the applicants' counsel disavowed any reliance by the applicants on the applicants' right to review the outcome of the tender process as the right that they sought to have protected pending the final determination of the review. It is thus necessary to have regard to how each applicant pleaded the right/s alleged to require protection pending the final determination of the review.

Princeton

[35] Princeton currently provides Services at the Groote Schuur Hospital and the interdict it seeks pertains only to Groote Schuur Hospital. Its bid was excluded on the basis that it had not submitted a certificate from the National Bargaining Council for the Private Security Sector (NBCPSS). It contends that the decision to exclude it constitutes a reviewable irregularity because it had substantially complied with that requirement as it had provided a letter from the NBCPSS.

[36] Princeton deals with the *prima facie* right in paragraphs 71 to 77 of the founding affidavit. These paragraphs read:

- '71. As indicated here in above, the applicant is one of the incumbent service providers in terms of the previous tender. The applicant has via this experience, gained vast and specific experience regarding the respondents' security needs.
- 72. The applicant's bid was substantially and substantively compliant. Notwithstanding this, the applicant has been unfairly and unlawfully excluded from the process.
- 73. The applicant, and by consequence its employees, have a constitutional right to just administrative action. As has been explained above, this constitutional right has been violated. There have been reviewable irregularities which have led to the irregular exclusion of the applicant from consideration. The grounds are narrow, yet fundamentally flawed.
- 74. The perverse effect of the unlawful exclusion of the applicant is that respondent will now pay more for the service. This is so because the exclusion of the applicant will reduce competition and therefore increase the price for the service. The effect of this is that the respondent will be non-compliant with section 217 of the constitution.

75. I have been advised that properly construed, section 217 of the constitution requires that the process must be competitive. The inclusion, rather than the exclusion, of the applicant would further the competitive nature of the process. Furthermore, the inclusion of the applicant would lead to cost-effectiveness (also a requirement of section 217 of the constitution), because prices would need to be lowered by the inclusion of more compliant bidders, than excluding them.
76. Should interdictory relief not be granted, there will be potential loss of employment of 198 officers in respect of the Groote Schuur Hospital site. The applicant will need to retrench these officers. This will affect not only those officers, but their respective families. In addition, the applicant's decline in its financial situation will place its existence in peril - this in turn places my personal livelihood at jeopardy.
77. In light of the above, it is respectfully averred that the applicant's prima facie right is not only its right to review the adverse decision, but is a right which if not protected, irreparable harm may ensue'

Grinnell

[37] Grinnell currently provides Services at the Red Cross War Memorial Children's Hospital in terms of framework agreement WCPT-TR01/2017/2018. The contract concluded between Grinnell and the Department pursuant thereto expired on 31 March 2024. Its bid was excluded on the basis that it did not bid for all the services required by the Department. It contends that the decision to exclude it constitutes a reviewable irregularity in that (a) there was no requirement that bidders had to bid for all the services required by the Department, (b) the Department, in its clarification letter, never conveyed the requirement to bid for all the services, (c) the tender was awarded to only

three bidders when the tender documents did not specify that the tender was a winner takes all, and (d) the tender requirements were vague and ambiguous.

[38] The *prima facie* right it relies on is dealt with in paragraphs 104 to 111 which read:

- '104. I am advised that the first requirement for an interim interdict is that an applicant needs to show a *prima facie* right, even if it may be subject to some doubt. This may be established by showing prospects of success on review.
- 105. The reason why Grinnell seeks a general interdict in respect of the implementation of the tender, is because it would be extremely difficult, if not impossible, for three companies to provide the full spectrum of services required by the Department at all the facilities throughout the province. Any failure on their part to provide a full and comprehensive service, imposes severe risks to the department, its staff and patients. Alternatively, there should at least be an interdict in favour of Grinnell at our sites.
- 106. It is respectfully submitted that, on the facts and circumstances set out above, it is evident that a material irregularity occurred in the evaluation and subsequent disqualification of Grinnell's bid and Grinnell has a right to have the decision reviewed and set aside in order to protect its right to just administrative action in terms of section 33 of the constitution, read with PAJA.
- 107. Had Grinnell not been unlawfully and unfairly disqualified, it stood an excellent chance of being successful, at least in respect of the Red Cross War Memorial Children's Hospital facility, where it has provided services to the department at a competitive rate for years. During this period there have been no complaints by the department as to the nature, scope and quality of the services provided.
- 108. For current purposes it is submitted that Grinnell has provided a compelling basis to indicate the strong likelihood that the review proceedings will be successful.

The interim relief which Grinnell seeks – i.e. to freeze the status quo until such further processes are exhausted – is necessary to ensure the integrity of the tender process and to ensure that Grinnell can be given effective relief. An eventual finding that the department acted unlawfully will be meaningless without the interim relief being granted.

109. Grinnell currently employs 80 guards to service the department's contract at Red Cross War Memorial Children's Hospital. Grinnell has always been committed to upholding the dignity of employment of our guards. We have nurtured a work environment that values their skills, experience, and dedication. The termination of their employment by the department pursuant to an unlawful procurement process strips them of this dignity and respect, treating them as disposable assets rather than valued individuals contributing to the safety and the security of the Department.
110. The guards, many of whom have served the department for the past two years, take great pride in their work and the sense of responsibility they hold to protect the department's assets. The abrupt termination of their employment as a result of an unlawful procurement process will have an immediate and far-reaching impact on their financial well-being, as well as their dignity.
111. As I have submitted, Grinnell has strong prospects of success in the review proceedings. Far more than a *prima facie* right, Grinnell has actually shown a clear right to the relief sought.'

Eagle Age

[39] Eagle Age currently provides Services at the Vanguard Hospital, Stikland Hospital and College of Nursing pursuant to the award of tender WCPT-TR01/2017/18. The contract concluded between Eagle Age and the Department pursuant to the said award of the tender expired on 31 March 2024. The reasons provided for the exclusion of its bid were that it failed to submit (a) a registration certificate issued by the NBCPSS,

and (b) sufficient evidence of its submission of a Workplace Skills Plan to the Safety and Security Sector Education and Training Authority (SASSETA). It contends that the decision to exclude it constitutes a reviewable irregularity in that (a) it submitted all the mandatory documents, (b) the tender was awarded to only three bidders when the tender documents did not specify that the tender was a winner takes all, and (c) the tender requirements were vague and ambiguous.

[40] Eagle Age deals with the *prima facie* right in paragraphs 84 to 91 of its founding affidavit. The contents of these paragraphs are a mirror image of the contents of paragraphs 104 to 111 of the Grinnell application referred to above. The only difference is that Eagle Age employs 104 guards which have been servicing Vanguard Hospital, Stikland Hospital, and the College of Nursing since October 2019.

Greystone

[41] Greystone currently provides Services to the Department in respect of George, Knysna, Uniondale, Caledon, Grabouw, Hermanus, Mossel Bay, Swellendam, Riversdal, Beaufort West, Murraysburg and Laingsburg. This is in terms of a contract that expired on 31 March 2024. The reasons provided for the exclusion of its bid were that it failed (a) to submit a registration certificate issued by the NBCPSS (b) proof of submission of a Workplace Skills Plan to SASSETA, and (c) B-BBEE Certificate or an affidavit dated within 3 months of the tender closing date. It contends that the decision to exclude it constitutes a reviewable irregularity in that it submitted all the mandatory

documents, and that the decision to award the tender to three bidders was arbitrary, capricious, and irrational.

[42] Greystone deals with the *prima facie* right in paragraphs 75 to 82 of its founding affidavit. The averments contained in these paragraphs also mirror those in the Grinnell and Eagle Age applications with the minor variations regarding the number of employees as well as the sites serviced by Greystone.

Sechaba applicants

[43] Sechaba currently provides Services to the Department in respect of Delft Hospital, Delft Symphony CDC, Bishop Lavis CHC, Kraaifontein CHC, Elsie's River CHC, Ruiterswacht CHC, Ravensmead CHC, Bellville CDC, Bothasig CDC, Durbanville CDC, Goodwood CDC, Parow CDC, Reed Street CDC, Scottsden CDC, Karl Bremer Hospital, Karl Bremer Ad hoc, Mowbray Maternity, New Somerset New Somerset Ad hoc. This is in terms of a contract that expired on 31 March 2024. The reasons provided for the exclusion of its bid were that it failed to submit bids for all the services required by the Department. It contends that the decision to exclude it constitutes a reviewable irregularity in that (a) the Department misconstrued the tender specifications, (b) there was no omission as its pricing schedule provided all the prices in respect of services it was bidding for and left out those in respect of which it did not intend to bid for, (c) the Department could not require the bidders to submit prices in respect of services which the bidders did not intend to bid for, (d) the decision to award the tender to three bidders was arbitrary, capricious and/ or irrational.

[44] Star currently provides Services to the Department in respect of Grassy Park CDC, Lady Michaelis CDC, Lotus River CDC, Retreat CHC, Victoria Hospital, Orthotics and Prosthetic Centre, DP Marais Hospital, Retreat CHC and Retreat Ad hoc. This is in terms of a contract that expired on 31 March 2024. The reason provided for the exclusion of its bid relates to proof of submission or failure to submit the Workplace Skills Plan to SASSETA, a reason which Star contends is incomprehensible. It contends that the decision to exclude it constitutes a reviewable irregularity in that (a) the decision to award the tender to three bidders was arbitrary, capricious and/ or irrational, and (b) the tender specifications were vague and ambiguous.

[45] AMA did not have an existing contract with the Department prior to the publication of the tender. AMA made it to the third phase of evaluation. AMA was, however, not awarded the tender because of its low scoring in respect of the B-BBEE preference point. It contends that the decision to exclude it constitutes a reviewable irregularity in that (a) the decision to award the tender to three bidders was arbitrary, capricious and/ or irrational, and (b) the tender specifications were vague and ambiguous.

[46] All 4 currently provides services to the Department in respect of False Bay Hospital, Hout Bay Hospital and Hout Bay CDC. This is in terms of a contract that expired on 31 March 2024. The reasons provided for the exclusion of its bid were that it failed to submit the certificate of registration with NBCPSS as well as proof of

submission of the Workplace Skills Plan with SASSETA. It contends that the decision to exclude it constitutes a reviewable irregularity in that (a) it submitted both the documents that form the basis of its exclusion, (b) the decision to award the tender to three bidders was arbitrary, capricious and/ or irrational, and (c) the tender specifications were vague and ambiguous.

[47] Helios currently provides services to the Department in respect of The Cape Town Regrographic Clinic, Dorp Street Reproductive Health Centre, Green Point CDC, District Six CDC and the Observatory Forensic Pathology Institute. This is in terms of a contract that expired on 31 March 2024. Its bid was excluded because it did not bid for all the services required by the Department. It contends that the decision to exclude it constitutes a reviewable irregularity on the same grounds as those advanced on behalf of Sechaba.

[48] The Sechaba applicants deal with the issue of a *prima facie* right in paragraphs 108 to 114 of the founding affidavit. The averments made in this regard mirror those made in the Princeton application. Curiously there is no differentiation in respect of AMA which did not have an existing contract with the Department.

SUMBISSIONS ON BEHALF OF THE APPLICANTS ON THE ISSUE OF *PRIMA FACIE* RIGHT

[49] Mr Jamie SC, who appeared with Ms Christians on behalf of Grinnell and Eagle Age submitted that Grinnell and Eagle Age seek to protect three species of rights. The

first, he termed the public interest. The second was the right to make a living. The third was the right of the guards employed by both companies.

[50] Mr Nacerodien, who appeared for Princeton and the Sechaba applicants, submitted that there was an imminent breach of the Constitutional rights of Princeton and Sechaba applicants as contained in section 33 and 217 of the Constitution read with Promotion of Administrative Justice Act 3 of 2000 (PAJA). He further submitted that the right to have access to health care as provided for in section 27 of the Constitution, the right to life as provided for in section 11 of the Constitution, as well as the right to freedom and security of person as provided for in section 12, were some of the rights that Princeton and the Sechaba applicants sought to protect pending the finalisation of the review.

[51] Ms Christians, who appeared on behalf of Greystone associated herself with most of the arguments made by her colleagues. She further submitted that Greystone approached the court out of concern for public safety that stood to be harmed by employment of only three service providers to provide Services to the Department.

WHAT THEN IS THE *PRIMA FACIE* RIGHT THAT AN APPLICANT FOR AN INTERIM INTERDICT IS REQUIRED TO ESTABLISH?

[52] The answer to this question is, in my view, to be found in the statement by Corbett J (as he then was) in *LF Boshoff Investments*⁵ where, dealing with the requirements of an interim interdict, he stated:

‘Briefly these requirements are that the applicant for such temporary relief must show-

- (a) that the which is the subject-matter of the main action and which he seeks to protect by means of an interim relief is clear or if not clear, is prima facie established, though open to doubt;...

[53] It thus appears that it is not just any right that an applicant can put up in proceedings for interim relief, but it must be the right that requires protection pending the main proceedings instituted for the final determination of a dispute relating to that right. As was stated in *Albert*⁶ ‘Interdicts are based upon rights, that is, rights, which in terms of the substantive law are sufficient to sustain a cause of action. Such right may arise out of contract, or a delict; it may be founded in the common law or some or other statute.’⁷ In my view, therefore, interdicts of this nature are concerned with protection of extant rights, which although may be disputed are subject to vindication in the main proceedings.

[54] To paraphrase, the right sought to be protected must the same right sought to be vindicated in the main proceedings. This, however, is not always the case but as a minimum the outcome of the main action must have some bearing on the right sought to be protected in the interim. In the circumstances of this case what is required of the

⁵ L F Boshoff Investments (Pty) Ltd v Cape Town Municipality 1969 (2) SA 256 (C) at 267A

⁶ Albert v Windsor Hotel (East London) (Pty) Ltd (in liquidation) 1963 (2) SA 237 (E) at 240E – 241G

⁷ Prest, Law and Practice of Interdicts, Jut and Co, 1996 at p52 (references to cases omitted)

applicants is to establish, albeit on a *prima facie* basis, the existence of a right or rights which will be vindicated in the review proceedings. In the alternative, the outcome of the review must be demonstrated to have some bearing on the *prima facie* rights relied on upon by the applicants. Having dealt with the nature of a right that has to be established, it is now time to consider whether the rights relied upon by the applicants, are the same rights sought to be vindicated in the review or whether the outcome of the review will have any bearing on the rights sought to be protected by the interim interdict.

DISCUSSION

[55] I have set out above the relief sought by the applicants both in Part A, that is the interim interdictory relief and Part B, the review proceedings. It is common cause that the review proceedings are about the vindication of the applicants' rights to just administrative action that is lawful, reasonable, and procedurally fair. As already stated above, none of the applicants relied on this right in seeking the interim interdict.

[56] In as much as there was much debate about the *prima facie* right that the applicants sought to have protected by the interim interdict they seek in these proceedings, none of them suggested that any of such rights are the rights sought to be vindicated in the review proceedings. This is not surprising because proceedings for judicial review are concerned only with the right contained in section 33 of the Constitution as given content to by PAJA.

[57] That the review proceedings are only concerned with the right to just administrative action that is lawful, reasonable, and procedurally fair is clear from the grounds of review as well as the orders sought, none of which bears any relation to the rights put up by the applicants to support their claim to an interim interdict.

[58] The public interest, the right to make a living, and the rights of the guards employed by Grinnell and Eagle Age are not that right that the review court is being called to determine. And the outcome of the review has no bearing on these rights. Similarly, the plethora of rights put up on behalf Princeton and the Sechaba applicants are not subject to vindication by the review court, and there can be no suggestion that the outcome of the review has any bearing on these rights. That is also the case with the public safety right relied upon Greystone. The applicants, therefore, have failed to establish a *prima facie* right that requires protection pending the finalisation of the review.

[59] The question that flows from the above is whether the court is still required to consider the other requirements of an interim interdict in circumstances where the right sought to be protected is not the same right that is to be vindicated in the main proceedings. In my view, the answer must be in the negative. This is so because the success of the applicants, in the review, has no bearing on the rights that they seek to have protected by the interim interdict. It is well to remember that the contracts of nine of the applicants had run their course and the applicants can claim no rights beyond

those conferred by those contracts. Worse still is the case of AMA who had no existing contract with the Department.

[60] It is a different matter where the existence of the right sought to be protected has been cast in doubt. In those circumstances the court would still be required to consider the irreparable harm, the balance of convenience as well as the absence of other satisfactory remedy. This is not such a case because the only right that is the subject of the main proceedings is the one which the applicants have conceded that it does not require protection by means of an interim interdict. It follows therefore that the applications cannot succeed. There was an alternative claim on behalf of Sechaba relating to an order granted by Sievers AJ, an issue which I deal with briefly below.

THE SIEVERS AJ ORDER

[61] On 27 September 2019, Sievers AJ granted an order in favour of Sechaba under case number 16827/2019. The order interdicted, pending the final determination of a review application, the Western Cape Provincial Government Acting Director: Supply Chain Management, the Accounting Officer of the Western Cape Department of Finance, Western Cape Provincial Government and the Department of Health, Western Cape from (a) giving effect to the purported extended notice to Sechaba, which notice was to take effect on 20 September 2019 and (b) giving effect to the purported appointment of Eagle Age, Metro City Protection Services CC t/a Metro City Protection and All 4 to various health facilities falling under the Department. The order further

directed that Sechaba be permitted to continue rendering the services it was currently rendering at the time until the finalisation of the review.

[62] The allegations were that, by awarding the tender to Phangela, Golden and Amazim-zim, the Department was in contempt of the order granted by Sievers AJ. The papers do not make it clear whether an interdict is sought because the Department is in contempt, or whether the intention was to hold the Department in contempt. In either case, no case was properly made. It was not explained why an interdict would be necessary when Sechaba already has an order in place as all that would be left was to either execute on the order or initiate contempt of court proceedings. Any reliance on the order granted by Sievers AJ by Sechaba cannot be of any assistance. This is even more so, that the parties are not the same in that matter and in this matter. It remains to deal with the issue of costs.

COSTS

[63] It was submitted on behalf of the applicants, relying on what has become known as the *Biowatch* principle, that there should be no order as to costs in the event of the dismissal of the applications. This, it was submitted, is because an application for an interim interdict forms an integral part of the review proceedings which are undoubtedly proceedings to vindicate Constitutional rights.

[64] Mr De Waal SC left the matter in the hands of the court as he said that he was not aware of any authority that the Biowatch principle applies in respect of interim interdictory proceedings.

[65] None of the parties referred to any authority dealing with interim interdictory relief pending proceedings to vindicate a Constitutional right. At face value it does, though, seem correct that if you should be insulated against an adverse costs order in the main proceedings to vindicate a right, the same should also apply when a litigant seeks interim protection of that right. In my view, therefore, there should be no order as to costs.

ORDER

[66] In the circumstances I make the following order:

- 66.1 The eighth respondent's application for the late filing of its answering affidavit is refused;
- 66.2 All five applications are dismissed; and
- 66.3 There shall be no order as to costs.

Judge L.G. Nuku
Judge of the High Court

APPEARANCES**For the Applicant in Case No: 5464/24:**

A Nacerodien instructed by Asherson Attorneys

For the Applicants in Case Nos: 5477/24 and 5586/24:

I Jamie SC and A Christians instructed by Dirk Kotze Attorneys

For the Applicant in Case No: 5616/24:

A Christians instructed by Wayne Hufkie Attorneys

For the Applicant in Case No: 5618/24:

A Nacerodien instructed by Mark Hess Attorneys

For the First to the Fifth respondents:

J De Waal SC and M Mokhoaetsi instructed by The State Attorney, Cape Town

For the Sixth Respondent:

No appearance

For the Seventh Respondent:

Ms. Mathe-Ndlazi instructed by Lingani and Partners Inc

For the Eighth Respondent:

D Nyathi instructed by BDP Attorneys