



IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.

③ REVISED.

2/11/23
DATE

Case Number: 2023-088251

In the matter between:

THE DOCUMENT WAREHOUSE (PTY) LTD

Applicant

and

SOUTH AFRICAN SOCIAL SECURITY AGENCY

First Respondent

METROFILE (PTY) LTD

Second Respondent

ALLIANZ GLOBAL CORPORATE & SPECIALTY

SOUTH AFRICA LTD

Third Respondent

SNGCA DIGITAL SOUTH AFRICA (PTY) LTD

T/A AGS RECORDS MANAGEMENT

Fourth Respondent

This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for handing down is deemed to be 2 November 2023.

JUDGMENT

POTTERILL J

Introduction

[1] The applicant, The Document Warehouse (Pty) Ltd [TDW], is seeking an urgent interdict against the first respondent, South African Social Security Agency [SASSA] from implementing Tender SASSA: 04-23-CS-HO [the Tender] granted in favour of the second respondent, Metrofile (Pty) Ltd [Metrofile] and/or negotiating or concluding any contract and/or service level agreement(s) pursuant thereto. Both SASSA and Metrofile are opposing the application. Part B, the review of the awarding of the Tender to Metrofile is not before me.

[2] TDW has been the incumbent service provider for the past seven years providing the services in line with the requirements of a previous tender now awarded to Metrofile. The contract between TDW and SASSA expires at the end of November 2023.

[3] The project objective of the terms of reference [ToR] of the tender in a nutshell is for transportation, offsite storage maintenance retrieval services and support services of files. The number of beneficiary records in the nine regions for which SASSA is responsible is 60 548 234 as on 31 March 2023. The storage facilities must be located in all of the nine regions within 30 kilometres of the current SASSA Records

Management Centres. The successful bidder must also provide sufficient office accommodation for SASSA's records management centre staff within the offsite records storage. No interim storage space is permitted and the files must be moved to a permanent storage area from the outset. The Tender thus has to ensure that SASSA fulfils its legal duty that beneficiary records are stored, preserved and easily retrieved in the documents life cycle.

Arguments on behalf of TDW

[4] The urgency lies in the imminent implementation of the Tender award commencing on 1 September 2023. In terms of the ToR the storage facilities and offices for the SASSA must have access to these facilities as from 1 September 2023 for *inter alia* progress monitoring, relocation of SASSA records, assets and connectivity set-up. TDW received notice of the award on 4 August 2023 by accessing SASSA's website. TDW requested SASSA to on 18 August 2023 undertake not to implement the award. TDW did investigations and only on 31 August 2023 did TDW gather enough evidence to conclude that Metrofile's bid must have been invalid and non-compliant with the Tender. It was submitted that at the very least Metrofile would not be compliant with providing facilities and offices for access to SASSA from 1 September 2023.

[5] Furthermore, it was argued that there are good prospects of success on review because the tender has peremptory requirements which Metrofile cannot fulfil. In terms of clause 10.3.3. of the Special Conditions bidders had to, in respect of all nine provinces, submit proof of either:

- their ownership of the identified storage facilities; alternatively
- proof of an intention to lease identified storage facilities for the duration of the contract.

[6] In the Northern Cape [Kimberley] a lease agreement was attached where to Metrofile is not a party but Signature Data is the party concluding the lease agreement.

This lease agreement does not constitute proof of Metrofile's intent to lease storage facilities in that province. From investigation the only director of Signature Data works and lives in Gauteng and has no previous experience in the industry covered by the Tender.

[7] For the North West [Mahikeng] compliance with this special condition was a letter dated 14 May 2023 on the letterhead of MI Binazir Property Developers CC recording that it was an "intention to lease by Signature Data Systems and Solutions." The document only describes the physical features of a property situated at 724 Tokarat Street, Aslaagte, Mahikeng. It does not state where the property is going to be leased, for what period and at what rental.

[8] Pertaining to the provinces of the Free State, Limpopo and Eastern Cape the lease agreements attached had either expired without proof that options were exercised to renew the leases, or the lease period did not cover the duration of the Tender period.

[9] It was submitted that the decision to award the tender to Metrofile was thus irrational, unreasonable and contrary to the material conditions of the tender. The decision thus ought to be set aside under section 6 of PAJA. TDW has a *prima facie* right in showing it has prospect of success in the review application. Furthermore, TDW has a *prima facie* right not to be subjected to unlawful, unreasonable or unfair administrative action.

[10] The apprehension of irreparable harm lies therein that Metrofile when in possession of the files will proceed to relocate the records. The set up costs for this Tender is ±R100 million and the review court may well decline to set aside the contract for practical reasons; i.e. to order relocation of the files of 450 boxes a day in nine regions.

[11] If some records had been relocated with some still in the hands of TDW it will lead to chaos prejudicing all the parties concerned and most fundamentally beneficiaries of SASSA grants. This matter thus attracts the public interest to ensure that the record management services be properly and lawfully discharged. TDW will suffer financial losses and profit. If the review court should set aside the Tender it would incur even further costs to relocate the files.

[12] There is no alternative remedy available to TDW.

[13] As for the balance of convenience Metrofile has not commenced implementing the Tender award. Its only inconvenience will be to await the outcome of the review court's decision. On the other hand TDW will suffer irreparable harm by having to release the files. There will be no prejudice to any party if the status quo is retained pending the finalisation of the review application.

SASSA's submissions

[14] On behalf of SASSA it was submitted that the urgency was self-created because TDW did not in the founding affidavit set out when it became aware of SASSA's decision. It fails to set out what it did for the period 18 August 2023 to 4 September 2023. The evidence of the investigations was only attached to the replying affidavit and not the founding affidavit.

[15] TDW cannot rely on financial prejudice because they can never be awarded the Tender because their pricing is R62 541 616.00 more than Metrofile's pricing. Awarding the Tender to TDW would have resulted in irregular or unauthorised and/or fruitless and wasteful expenditure. Furthermore, TDW did not set out how it would not be afforded substantial redress at a hearing in due course.

[16] As for the requirements for an interim interdict, it was argued that TDW did not prove any of the three requirements TDW had no *prima facie* right because it would never have been awarded the Tender. There is no reasonable apprehension of injury because the Tender was awarded legally. In any event, it has an alternative remedy to institute a claim for damages. As for the balance of convenience it favours SASSA and Metrofile because the parties have commenced with negotiations. It would not be constitutionally appropriate to grant the interdict. The granting of this order would unduly extend the Tender of TDW at the expense and inconvenience of SASSA.

Submissions on behalf of Metrofile

[17] It was submitted in the heads of argument that TDW's principal purpose is to obtain further extension of its incumbency for the duration of the interim interdict, which will be two years while the review is finalised. The purpose of the application is self-serving with the advantages TDW would gain being obvious.

[18] On behalf of Metrofile it was also submitted that the review itself did not demonstrate that TDW had a *prima facie* right that needed protection. What is required of TDW is to establish a right quite apart from the right to review. TDW cannot rely on the fact that it will be awarded the Tender if the review is set aside. Its right to obtain the bid is not threatened with any irreparable harm. TDW's Tender price is grossly inflated, while Metrofile has offered a bid price far lower.

[19] Pursuant to being informed that the review date could be expedited to as soon as February 2024 the oral argument was limited to TDW not proving it is threatened by impending or imminent irreparable harm and from that it flows that the application is not urgent. There is no harm because if the review is heard in four months' time there would only have been four months of implementation of the Tender. Metrofile could on that time-frame never submit to the review court that the Tender could not be set aside due to effluxion of time, impractically, or severe disruption.

[20] TDW cannot rely on a duty to ensure that in handing over public records it does so to an entity that will ensure its safe transportation and storage simply because it only had a contractual duty. SASSA has the responsibility to manage and protect its records not TDW.¹ The averment by TDW that 60 million records will have been handed over in that 400-450 boxes per day per region would be collected by Metrofile is immotive.

[21] TDW's reliance on its right not to be subjected to unlawful, unreasonable or unfair discrimination is misplaced as these rights will not be harmed as it can seek a review.

Reasons for decision

[22] In *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* (CCT 38/12) [2012] ZACC 18; 2012 (6) SA 223 (CC); 2012 (11) BCLR 1148 (CC) (20 September 2012) [Outa] the majority of the Constitutional Court found the requirements for an interim interdict, set out in *Setlogelo v Setlogelo*² still relevant:

“[45] It seems to me that it is unnecessary to fashion a new test for the grant of an interim interdict. The *Setlogelo* test, as adapted by case law, continues to be a handy and ready guide to the bench and practitioners alike in the grant of interdicts in busy Magistrates' Courts and High Courts. However, now the test must be applied cognisant of the normative scheme and democratic principles that underpin our Constitution. This means that when a court considers whether to grant an interim interdict it must do so in a way that promotes the objects, spirit and purport of the Constitution.”

¹ Regulation 10 of the National Archives and Record Service of South Africa Regulations GNR1458 of 20 November 2002 states that: “(1) The head of a governmental body shall be responsible for ensuring that all records of such body – (a) receive appropriate physical care; (b) are protected by appropriate security measures; and (c) are managed in terms of standing orders of that body and other relevant legislation.”

² 1914 AD 221

The Constitutional Court did however require of a court to when considering the balance of convenience requirement to consider the separation of powers harm:

“[47] The balance of convenience enquiry must now carefully probe whether and to which extent the restraining order will probably intrude into the exclusive terrain of another branch of Government. The enquiry must, alongside other relevant harm, have proper regard to what may be called separation of powers harm. A court must keep in mind that a temporary restraint against the exercise of statutory power well ahead of the final adjudication of a claimant’s case may be granted only in the clearest of cases and after a careful consideration of separation of powers harm. It is neither prudent nor necessary to define ‘clearest of cases’. However one important consideration would be whether the harm apprehended by the claimant amounts to a breach of one or more fundamental rights warranted by the Bill of Rights...”

Does TDW have a *prima facie* right though open to some doubt?

[23] It is true that the Constitution gives everybody a right to fair administrative action that can be tested by means of review proceedings.

“33. Just administrative action

- (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
- (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
- (3) National legislation must be enacted to give effect to these rights, and must –
 - (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
 - (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
 - (c) promote an efficient administration.”

But, that does not imply that the harm that will follow before the review proceedings can be decided must be borne until a review is heard. The purpose of an interim interdict "... by its very nature, is granted *pendente lite* (during litigation) and is intended to protect the rights of an aggrieved party pending an application to establish the respective rights of the litigating parties. Its purpose is to provide the successful party with adequate and effective relief until the finalisation of the main application."³ In this matter there is no misalignment between the interdict and the administrative review sought as in the *Outa*-matter.

[24] TDW must thus show that it has prospects of success or sound reasons for the review and that if the interdict is not granted it will suffer irreparable harm. This Court cannot usurp the powers of a review court and just has to establish that the review grounds have some prospects of success. I am satisfied that the main grounds raised, i.e. that Metrofile did not comply with the Special Conditions of proving intent to lease identified storage facilities for the duration of the contract is arguable and grounds for a review. This is so for at least two of the provinces, but can also be argued for another three provinces. This constitutes 5 of the 9 regions and its span thus could impact severely on the ToR and special conditions of the Tender so awarded. Whether the Price as tendered by TDW is a bar to it being awarded the Tender is not for this Court to decide, but the review court.

[25] The review itself must have prospects of success. The remedy is in the hands of the review court. If the decision to award the Tender to Metrofile is set aside the review court has a discretion pertaining to the remedy or order. The fact that the remedy, as sought, may not be granted does not render the prospects of the success of the review on the merits improbable; another remedy can be granted by the review court. I address the harm TDW could suffer under the next heading.

³ *Economic Freedom Fighters v Gordhan and Others; Public Protector and Another v Gordhan and Others* (CCT 232/19; CCT233/19) [2020] ZACC 10; 2020 (8) BCLR 916 (CC); 2020 (6) SA 325 (CC) (29 May 2020) at paragraph [19]

Did TDW prove it would suffer irreparable harm if the interdict is not granted?

[26] The Tender has been awarded, but not implemented. It is true that if the review hearing is expedited to possibly February, the Tender would only have been implemented for 4 months. The argument that therefore TDW would not suffer irreparable harm, is rejected. If Metrofile in those four months conclude rental agreements for periods of 36 months it would argue to the review court that it will suffer severe losses for obtaining premises and suffer damages for lease payments for three years in more than one region. Even given the short period of effluxion of time, the extent of the work performed by Metrofile and the conclusion of contracts can lead the review court to ask if the relief sought is capable of practical implementation.

[27] Part implementation of the Tender would lead to files being in the hands of TDW and others in the storage facilities of Metrofile. I agree that this can cause prejudice not only to both parties, but also to the beneficiaries of SASSA in locating stored files for the benefit of beneficiaries. It will be costly to retransfer the files if the Tender is set aside before a new Tender is awarded. Not only will TDW suffer harm, but also Metrofile in incurring unnecessary expense.

[28] It is undisputed that TDW has 60 million SASSA files in its possession. It is true that in 4 months not all 60 million files will be transported from TDW to Metrofile, but it is also undisputed that TDW can transport 450 boxes of files out of every region every day. TDW will have to do so as from 31 November 2023 as it would have no right to retain the storage of those files. In terms of SASSA's attached withdrawal plan 4 050 boxes per day can be extracted. If that is multiplied by 80 days then half of all the files will be withdrawn in the four months. This is a significant amount totalling close to 50 % of all the files at cost to all the parties. I am satisfied that TDW will suffer irreparable harm in transferring the files if the Tender is set aside. Even if TDW is not awarded the Tender it will have to store the files safely, upon return to it, until a new award has been made. I am satisfied that TDW will suffer irreparable harm if the interim interdict is not granted.

Does the balance of convenience favour TDW?

[29] The balance of convenience does favour TDW in that Metrofile and SASSA have only started with negotiations and no implementation of the Tender has occurred. Metrofile and SASSA's only inconvenience would be to await the outcome of the review court's decision. TDW will suffer irreparable harm by having to release the files. On that basis the status quo should be retained pending the finalisation of the review application.

No alternative remedy.

[30] The assertion on behalf of SASSA that TDW would have an alternative claim for damages is simply bad in law and is rejected. TDW has no alternative remedy to the interim interdict.

Urgency

[31] In finding that TDW will suffer irreparable harm the urgency speaks for itself. It is true that the 2-week period of investigation by TDW into the premises that Metrofile secured for storage is only in the replying affidavit backed up by evidence through the attached affidavits, but this fact does not negate the urgency of this matter. The date that the awarding of the Tender came to TDW knowledge is the first date that it could have come to its knowledge and is therefore not in dispute. I find the matter to be urgent.

[32] I accordingly make the following order:

- 32.1 The Applicant's non-adherence to this Honourable Court's rules relating to the time periods and service is hereby condoned and the matter is deemed urgent in terms of Rule 6(12) of the Uniform Rules of Court.
- 32.2 The First Respondent is interdicted, pending the final determination of Part B of this Application, from implementing Tender SASSA: 04-23-CS-HO, ("the Tender"), granted in favour of the Second Respondent, and/or

negotiating or concluding any contract and/or service level agreement(s) pursuant thereto;

- 32.3 The First and Second Respondents are ordered to pay the costs of Part A of this application, which will include the costs consequent upon the employment of two counsel.



S. POTTERILL

JUDGE OF THE HIGH COURT

CASE NO: 2023-088251

HEARD ON: 23 October 2023

FOR THE APPLICANT: ADV. N. REDMAN SC

ADV. S. FREESE

INSTRUCTED BY: C De Villiers Attorneys Inc. c/o Friedland Hart Solomon and
Nicolson Attorneys

FOR THE FIRST RESPONDENT: ADV. S.T. SESHOKA

INSTRUCTED BY: State Attorneys Pretoria

FOR THE SECOND RESPONDENT: ADV. J. BLOU SC
ADV. I. CURRIE

INSTRUCTED BY: Elliott Attorneys

DATE OF JUDGMENT: 2 November 2023