

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NUMBER: 47725/15

IN THE MATTER BETWEEN:

22/7/2016

THE SOUTH AFRICAN RED CROSS

AIR MERCY SERVICE TRUST

Applicant

And

THE NATIONAL MINISTER OF FINANCE

First Respondent

and 12 OTHER RESPONDENTS

Reasons for JUDGMENT

BAM J

Appearances:

For the Applicant: Adv E van Graan SC.

For the Respondents: Adv B R Tokota SC and Adv M Gwala.

1. On 5 July 2016 the Applicant, by way of an urgent application, applied for an interim interdict, pending a review application, restraining the First Respondent from implementing the cancellation of Contract RT79-2015 between the applicant and the First Respondent and any of the other respondents. I have had sufficient time to peruse the papers beforehand, and, after having heard arguments, I granted the application and made an order in terms of prayers 1, 2, 3 and 4 of the Notice of Motion, and added to prayer 4 that the proposed review application should be filed and served within 15 days of the date of this order. The issue of costs was reserved to be decided upon by the court hearing the review application.

2. There were more than 40 urgent applications on the roll, and due to time constraints I indicated that the reasons for granting of the application will follow. These are the reasons.

3. The applicant is a registered Trust and non-profit organization represented by its Trustees. On 31st August 2015 the applicant's bid for providing certain health related services, referred to as the "*National Aero-Medical Service*", for the province of Mpumalanga, was approved by the Bid Adjudication Committee of the Department and accepted by the first respondent. This contract, ("*the agreement*"), was added to the already existing contracts in respect of the provinces of Limpopo and Kwa-Zulu Natal. The acceptance of the *agreement* by the Department of National Treasury caused the applicant to upgrade its services to be able to comply with the terms of the *agreement*. It included the purchasing of two more helicopters, upgraded machinery, night vision apparatus and the employment of more pilots and staff. It was a costly affair, the helicopters, for instance, cost R50 000 000 each.

4. After about 9 months, during which period the applicant rendered the required services, Third Respondent, (Chief Director Transversal Contracting of the Department of the National Treasury), directed a letter dated 31st May 2016 to the applicant. It reads as follows:

"The award of the bid was unlawful. In the circumstances the National Treasury is not prepared to perpetuate a contract which is unlawful. Accordingly this is to advise you that the National Treasury has decided to cancel the contract effective from thirty days of receipt of this letter. Hope you find this in order."

5. It is clear that the applicant did not find the unilateral cancellation of the agreement "*in order.*"

6. It transpired that the "*unlawfulness*" of the contract turned upon the issue that in respect of the initial bidding the Department failed to include any reference to, by law required, criterion concerning the "*average number of hours*" provided for in Act 5 of 2000 (the Preferential Procurement Policy Framework Act). This was discovered by the Department after having received certain complaints, which resulted in the cancellation of the agreement.

7. The bidding and the acceptance of the successful bid proceeded without the relevant information consistent with the *criterion*. This, according to the respondents rendered the whole bidding procedure unlawful.

8. On behalf of the respondents the following points were raised:

- (i) The citation of the applicant was incorrect. The applicant was cited as a Trust which is not a legal *persona*.
- (ii) The application was not urgent.
- (iii) The cancellation of the *agreement* is not an administrative act which can be reviewed, but a question concerning the law of contract.
- (iv) There are no prospects of success in that the *agreement* is unlawful and a nullity.

9. Ad 8(i). (Citation of applicant).

The respondents had a valid point. However, the applicants applied for an amendment concerning the initial citation of the applicant. This was granted in view thereof that the applicant, in the founding affidavit stated that Mr Lwazi Mboyi, the deponent to that affidavit, acted on behalf of the Trustees and that he was authorised to represent the applicant. The applicant was therefore *ab initio* represented by its Trustees. The amendment was a mere formality.

10. Ad 8(i). (Urgency).

The respondents contended that the applicant already knew as from 31st May 2016 of the cancellation and waited for more than a month before enrolling the matter.

It is correct that there was relatively long period between the date of cancellation and the lodging of this application (it was served on the respondents on 15 June). However, it is clear that the applicants corresponded with the respondents up to the 10th of June – (Email Annexure FA9 to founding affidavit, and the response – p72).

Taking into consideration all relevant facts, including the fact that the respondents represent an organ of State, I was satisfied that that applicants succeeded in making out a case for urgency.

11. Ad 8(iii) and (iv). The issues whether the act of cancellation is reviewable and the prospects of success.

In respect of this issue I was addressed at length by counsel and referred to several decisions. I have no doubt that the issue is contentious and indeed debatable. The review Court, however will eventually also be called upon to adjudicate that point.

I do not agree with counsel for the respondents' contention that the applicant's aim with the review is to remedy something of the past and not to prevent something happening in the future. On the other hand I however agree with the submission on behalf of the applicant that, eventually, a court will have to decide whether the *agreement* was lawful or not. That ruling will surely affect the future relationship between the parties in respect of the *agreement*.

12. In this court the applicant was called upon to show that it has a clear right, that the balance of convenience favours it, and that it has no alternative remedy.

13. I have already indicated above in par 11 that the court dealing with the review will be called upon to decide upon the said issues.

14. After having considered all relevant facts, and the submissions, there are, in my view, indeed certain outstanding matters of concern. They are the following:

(a) The cancellation of the *agreement* was unilateral consequent upon a self-admitted error on the side of the Department. The lawfulness of the cancellation is in question.

(b) The impact of the cancellation on the applicant is serious and comprehensive.

15. Consequently I was satisfied that:

(i) The balance of convenience clearly favoured the applicant.

(ii) The applicant did not have an alternative remedy.

(iii) The applicant will suffer irreparable harm if the application is refused.



AJ BAM

JUDGE OF THE HIGH COURT

22 July 2016