IN THE HIGH COURT OF SOUTH AFRICA,
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: 743/19P

In the matter between:

KHUSELANI SECURITY AND RISK MANAGEMENT (PTY) LTD Applicant

and

KWAZULU-NATAL PROVINCIAL TREASURY Respondent

ORDER

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1. The First Order in the Notice of Motion dated 6 February 2019, is refused;
2. The applicant is liable for the costs of the opposed application on 27 February 2019, including those costs reserved on 12 February 2019

JUDGMENT

Chetty J :

[1] The applicant, which carries on business as a security company, launched an urgent application on 7 February 2019 seeking an order interdicting and restraining the respondent from acting upon a decision on 30 January 2019, to cancel a security

the respondent from acting upon a decision on 30 January 2019, to cancel a security contract for the provision of armed security officers at the Trizon Towers Building, Chief Albert Luthuli Street, Pietermaritzburg. It further sought that in the event of the respondent having concluded a new contract with a third party for the provision of the armed security officers, that the respondent be interdicted from implementing such agreement. The interdictory relief is sought pending an application to review and set aside the decision to cancel the contract. The matter became opposed and was adjourned to 27 February 2019 for argument on the interim relief sought.

[2] Mr Potgieter SC, who appeared with Mr Pretorius for the applicant, submitted that the essence of the enquiry was whether the respondent lawfully terminated its contract with the applicant. The applicant contends that the decision to cancel the contract is an 'administrative action', as envisaged in the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'), in that the grounds advanced by the respondent for the cancellation of the contract were based on the exercise of a public power, more precisely Treasury Regulations 16A.9.1(f) (GN R8189, *GG* 27388, dated 15 March 2005, as amended), which was later changed to reg. 16A.9.2(a). The respondent on the other hand contends that the cancellation was based on contract, that the matter is not urgent and that if the applicant feels aggrieved, it has a remedy for damages.

[3] A brief background to the matter is that the need for armed security officers to protect Treasury officials arose from an incident in October 2018, when the offices of the KZN Provincial Government were stormed by a group of persons, who sought to disrupt a meeting of the officials involved in the Supply Chain Management. This intrusion was aimed at advancing the interests of 'radical economic transformation', and those involved demanded access to tenders in government. In the interests of the safety of its officials, the respondent called for quotations for the provision of armed security guards. The applicant complied with all the requirements of the tender process for the present contract, including a declaration of interest of its past supply chain management practices.

[4] The tender was awarded to the applicant to provide guarding services from 24 January 2019 to 31 March 2019, at a monthly rate of R75 708.01. The applicant duly complied and posted its guards in accordance with the contract. On 30 January

2019 the applicant received a letter from the respondent's Chief Financial Officer informing it that subsequent to the awarding of the tender, it had come to the attention of the respondent that 'serious fraudulent allegations' had been laid against the applicant by the Special Investigating Unit ('SIU') in respect of the applicant's contracts with the uMsunduzi Municipality. The respondent cited the provisions of Treasury Regulations 16A.9.1(f) in its letter of cancellation.

[5] On 1 February 2019 the applicant's attorneys wrote to the respondent in which they denied the allegations of fraud and pointed out that reliance on regulation 16A.9.1(f) was erroneous as no impropriety had been attributed to the current contract which the respondent had cancelled. In any event, the applicant denied allegations of serious fraud as being untrue and untested, and considered the termination of the contract as premature and unlawful. The respondent refused to retract its cancellation and demanded that the applicant remove its guards from the Treasury offices.

[6] The applicant received no response from the respondent, causing it to launch the present application on 7 February 2019. The applicant denies that the respondent is entitled to rely on a contractual ground for the cancellation and submits that it was obliged to follow the procedure set out in PAJA. Counsel for the applicant correctly pointed out that the Treasury regulations cited by the respondent in its letters have no application to the cancellation of the present guarding contract as it is not alleged that there has been any impropriety in the awarding of the guarding contract. This however is not the respondent's case. It relies on allegations of serious fraud attributed to the applicant's contracts with the uMsunduzi Municipality, resulting in prejudice to the municipality in an amount of approximately R477m.

[7] It is not necessary for me to make any definitive finding as to whether the grounds for cancellation of the contract are good in law. The applicant intends to pursue an application to review and set aside the cancellation. Counsel for the respondent submitted that PAJA plays no role in the cancellation of the contract for services relying on the dictum in *Cape Metropolitan Council v Metro Inspection Services (Western Cape) & others* 2001 (3) SA 1013 (SCA). It was contended that

the basis of the termination is to be found in the applicant failing to comply with a Declaration of Interests, which required the applicant not to have "*abused the institution's supply chain management; committed fraud or any other improper conduct ... or failed to perform on a previous contract*". The applicant denies having flouted these provisions. On the respondent's own version, the SIU's report related to contracts with the uMsunduzi Municipality and made no reference to the applicant's dealings with the respondent. The respondent's stance is that in the interest of clean governance, once the allegations of fraud against the applicant came to its knowledge, as an organ of state it was compelled to act immediately to disassociate itself from doing business with the applicant. As I understood the argument, the respondent takes the view that the failure of the applicant to disclose the existence of the allegations and investigations by the SIU were in breach of the Declaration of Bidder's Past Supply Chain Management Practices (annexure 'MN3' to the papers) and at variance with the duty of transparency when dealing with an organ of state. The respondent's continued dealing with the applicant posed the risk that it could be interpreted as condoning a violation of the supply chain management prescripts and the basic values which underpin the conduct of organs of state, found in s 195 of the Constitution. Once these fraud and corruption allegations presented themselves, the respondent regarded these as a material breach of contract, entitling it to cancel immediately.

[8] Mr Potgieter submitted that no regard should be had to the letter dated 21 June 2018 from the SIU, and the allegations of fraud and corruption levelled against the applicant as these are uncorroborated by any confirmatory affidavit and are untested. Taking into account that this is an urgent application and informed by the dictum in *S v Ndlovu* 2002 (6) SA 305 (SCA) at para 15, I am satisfied that having regard to the interests of justice, the contents of the letter should not be excluded from consideration in this application. The allegations are serious and carry a high probative value. It is also noteworthy that in its letter to the uMsunduzi Municipality, the SIU instructed that the applicant be placed on a 'restricted suppliers database' in terms of the Municipal Finance Management Act, to ensure that government should not be a party to contracts with those having committed or being involved in fraud and corruption. It suggested that the respondent adhere to PAJA in doing so.

[9] To the extent that the applicant intends launching a review application premised on the grounds that the respondent was obliged to follow PAJA in cancelling the contract, in assessing the balance of convenience at this stage, this court should have regard to the applicant's prospects of success on review. Those prospects, I consider to be weak. In my view, once a tender is awarded, the relationship between the parties is thereafter governed by the contractual provisions, with a right to cancel in the event of a material breach. *Cape Metropolitan v Metro Inspection Services (Western Cape) & others (supra)* at para 17 held that 'whether or not conduct is "administrative action" would depend on the nature of the power being exercised. . . . Other considerations which may be relevant are the source of the power, the subject matter, whether it involves the exercise of a public duty and how closely related it is to the implementation of legislation' (the court making reference to *President of the Republic of South Africa & others v South African Rugby Football Union & others* 2000 (1) SA 1 (CC) at paras 141 and 143). The Court went on to state at para 18 that

> 'The appellant is a public authority and, although it derived its power to enter into the contract with the first respondent from statute, it derived its power to cancel the contract from the terms of the contract and the common law.'

[10] I find the dictum in *Cape Metropolitan* to be instructive in answering the question whether the decision by the respondent to cancel the guarding contract amounted to administrative action. This conclusion is fortified if regard is had to the views of Brand JA in *Government of the Republic of South Africa v Thabiso Chemicals (Pty) Ltd* 2009 (1) SA 163 (SCA) where he says the following :

> '[18] What remains are observations originating from comments by the court a quo which seem to support the notion that the contractual relationship between the parties may somehow be affected by the principles of administrative law. These comments gave rise to arguments on appeal, for example, as to whether the cancellation process was procedurally fair and whether Thabiso was granted a proper opportunity to address the tender board in accordance with the *audi alteram partem* rule prior to the cancellation. Lest I be understood to agree with these comments by the court a quo, let me clarify: I do not believe that the principles of administrative law have any role to play in the outcome of thedispute. After the tender had been awarded, the relationship between the parties in this case was governed by the principles of contract law (see eg *Cape Metropolitan Council v Metro Inspection*

Services (Western Cape) CC and Others 2001 (3) SA 1013 (SCA) (2001 (10) BCLR 1026) at para 18; *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 (3) SA 151 (SCA) ([2006] 1 All SA 478) at paras 11 and 12). The fact that the tender board relied on authority derived from a statutory provision (ie s 4(1)*(eA)* of the State Tender Board Act) to cancel the contract on behalf of the government, does not detract from this principle. Nor does the fact that the grounds of cancellation on which the tender board relied were, inter alia, reflected in a regulation. All that happened, in my view, is that the provisions of the regulations - like the provisions of ST36 - became part of the contract through incorporation by reference.'

See too *SAAB Grintek Defence (Pty) Ltd v South African Police Service & others* [2016] 3 All SA 669 (SCA) where reference was made to *City of Tswane Metropolitan Municipality & others v Nambiti Technologies (Pty) Ltd* 2016 (2) SA 494 (SCA) where the court held that the decision to cancel a tender was not administrative action and not susceptible to review in terms of PAJA. It would follow, in my view, that the relationship which follows after a tender is awarded is governed by contract, finding no place for the application of administrative action in the event of a cancellation.

[11] In light of my conclusion that the applicant would have slim prospects of success in a review which it intends to bring, I proceed to deal with the requirements for interim relief, that being a prima facie right; the applicant will suffer irreparable harm; the balance of convenience favours the applicant and that there is no other remedy.

[12] At the outset, I posed to counsel for the applicant that this appeared to be a classic example of a case where the applicant would have a claim for damages if it is found that the contract was terminated unlawfully. Those damages are easily calculable and the respondent is an organ of state, not a man of straw. The applicant sought reliance on *Pick 'n Pay Retailers (Pty) Ltd v Liberty Group & others* 2015 (4) SA 241 (GP) for the proposition that if the cancellation were allowed to stand it would suffer unquantifiable loss and irreparable harm, and that an award for damages would not be a suitable remedy in the circumstances. I am not persuaded by this argument. The contract which the applicant entered into was for a fixed amount per month, and for a limited duration. There was no basis for an expectation

that these services would be required for any period beyond 31 March 2019. In fact the respondent states that the guards were required for a '*critical period ... during which bid closures were to take place.*' The applicant acknowledges this in reply, but stemming from some altruistic consideration, it expresses a concern that the respondent would be placing the safety of its officials at risk in the absence of having guards being posted. I find this argument unconvincing.

[13] I am not persuaded that the applicant was able to establish a prima facie right for the reinstatement of the contract or that the balance of convenience favours it above that of the respondent. The interests which I believe the applicant was seeking to protect through the launching the application for an interdict was not so much the reinstatement of a two and a half month contract for guarding services, worth a little more than R159 000.00. Instead it fears that if the cancellation of its contract by the respondent is allowed to stand, its opportunities to do business elsewhere in the public sector are severely dented by the allegations of the SIU. If that is the case, its options lie elsewhere, rather than an urgent interdict against the respondent. I am in agreement with the respondent's counsel that it is of utmost importance that organs of state should conduct their business in a transparent manner, reflective of a clean administration.

[14] The respondent disputed the urgency of the application, whereas the applicant contended that it moved as quickly as possible to have the matter resolved after it received notice of the cancellation. When this failed, it launched the application on the grounds of commercial urgency. In light of there being an alternative claim for damages, which the applicant could have resorted to in the fullness of time, and in the Magistrate's Court (having regard to the quantum), I am not satisfied that the matter was urgent. It also bears noting that in its letter of demand, written a day after the cancellation of the contract, the applicant's attorney made the following concluding remarks in their letter

> '...we remind you that the relevant contract is in any event only for a period of two months and, as such, it would be prejudicial to both our client and yourselves to litigate in this dispute and it is likely that the associated costs could exceed the entire contract amount.'

[15] For the above reasons, I am not persuaded that the applicant has made out a case for the interim relief in the Notice of Motion.

[16] I make the following order :

1. The First Order in the Notice of Motion dated 6 February 2019, is refused;
2. The applicant is liable for the costs of the opposed application on 27 February 2019, including those costs reserved on 12 February 2019.

CHETTY J

Appearances

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Date of Hearing:	27 February 2019
Date of Judgment:	7 March 2019