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

Case No. 11496/2021

Date of hearing: 16 November 2022
Date of judgment: 18 November 2022

In the matter between:

ALL 4 SECURITY SERVICES CC	First Applicant
SECURITEM (PTY) LTD	Second Applicant
SECURITY SA HOLDINGS (PTY) LTD	Third Applicant

and

THE CITY OF CAPE TOWN	First Respondent
CBRE EXCELLERATE FACILITIES MANAGEMENT (PTY) LTD.	Second Respondent
AFMS GROUP (PTY) LTD	Third Respondent
EXCELLERATE SERVICES (PTY) LTD	Fourth Respondent
METRO CLEANING SERVICES (PTY) LTD	Fifth Respondent

JUDGMENT
(Applications by First and Third to Fifth Respondents for leave to appeal)

BINNS-WARD J:

[1] The City of Cape Town (the first respondent in the principal case) and the successful tenderers in Tender no. 226S/2020/21 (the third, fourth and fifth respondents in the principal case) have applied, separately, for leave to appeal from the whole of the judgment of this court in *All 4 Security Services CC and Others v The City of Cape Town and Others* [2022] ZAWCHC 182 (15 September 2022) ('the principal judgment'). The two applications for leave to appeal were heard together. I shall refer to the parties in this judgment by their roles in the principal case. It was submitted on behalf of all of the forementioned respondents that the contemplated appeal should be allowed to the Supreme Court of Appeal.

[2] The principal judgment declared, at the instance of the second and third applicants, that the City's advertisement of tender number 226S/2020/21 was non-compliant with the provisions of the City s supply chain management policy and the prescripts of s 217(1) of the Constitution, and consequently invalid. Pursuant to that declaration, it determined that the award of the tender contract to a joint venture comprised of the third, fourth and fifth respondents was also invalid, and fell to be reviewed and set aside. The forementioned declarations of invalidity were suspended for a period to allow the City to make such alternative arrangements as it might see fit for the lawful procurement of the services currently being provided in terms of the contract concluded pursuant to the impugned tender.

[3] The applications for leave to appeal fall to be determined in accordance with the test expressed in s 17(1)(a) of the Superior Courts Act 10 of 2013. Accordingly, this court, or the SCA on petition, may grant leave to appeal only if the judge or judges concerned '*are of the opinion (i) that the appeal would have a reasonable prospect of success, or (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration*'. The fact that the successful parties in the principal case elected to abide the judgment of the court in the applications for leave to appeal has no effect on the approach that s 17(1)(a) prescribes must be adopted.

[4] In respect of the first of the forementioned criteria, the appeal court has stated more than once that leave should be granted only where there is '*a sound, rational basis for the conclusion that there are prospects of success on appeal*'.[1] Of the second criterion, Cachalia JA noted, in *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd* 2020 (5) SA 35 (SCA),[2] that a '*compelling reason includes an important question of law or a discrete issue of public importance that will have an effect on future disputes*'. The learned judge of appeal added, however, '[b]*ut here too, the merits remain vitally important and are often decisive*'. He cited *Minister of Justice and Constitutional Development and Others v Southern Africa Litigation Centre and Others* 2016 (3) SA 317 (SCA), where Wallis JA said '*That is not to say that merely because the High Court determines an issue of public importance it must grant leave to appeal. The merits of the appeal remain vitally important and will often be decisive*'.[3]

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[1] See *S v Smith* 2012 (1) SACR 567 (SCA) para 7, endorsed in *Four Wheel Drive Accessory Distributors CC v Rattan NO* 2019 (3) SA 451 (SCA) para 34.

[2] In para 2.

[3] In para 24.

[5] The principal judgment speaks for itself, and therefore it would be inappropriate in this judgment to unduly rehash it. Suffice it to say that the principal issues to be determined were whether the advertisement of the tender provided sufficient information to potentially interested parties concerning the services that the City wished to procure so as to comply with the City's supply chain management policy. The pertinent legislation (the Local Government: Municipal Finance Management Act 56 of 2003 – 'the MFMA') requires every municipality to have a such a policy. The evident object of the requirement is to assist in holding local government true to the enjoinder in s 217 of the Constitution that government procurement must be done '*in accordance with a system which is fair, equitable, transparent, competitive and cost-effective*'.

[6] The second and third applicants are registered private security service providers. Their complaint was that the advertisement, the substantive part of which is quoted in para 2 of the principal judgment, did not serve to alert the reader to the fact that a substantial part of the contract work on offer involved the provision (as distinct from the management of the provision) of security services to certain of the City's public transport facilities. Although the advertisement it placed did not say so, the '*facility management services*' that the City wished to procure included the provision of cleaning services and security services.

[7] Only registered security providers are permitted by law to provide security services; see para 38 of the principal judgment. The tender contract was awarded to a joint venture comprised of three companies: the third respondent company carried on business as a facilities manager, the fourth respondent company as a private security services provider and the fifth respondent company is in the cleaning business. The applicants averred that had they appreciated that the tender contract included the provision of security services, they would have endeavoured to put together a joint venture to tender to provide the bundle of services that the City sought to procure.

[8] Addressing the issue on generally applicable principle, this court held at para 17 of the principal judgment (with reference to reg. 22(b) of the regulations made under the MFMA – which were discussed at para 15-16 of the principal judgment) that '*An advertisement of a tender contract could not possibly satisfy the requirements of s 217 of the Constitution or s 112 of the MFMA if it did not ... convey with adequate clarity the nature of the goods or services*

sought to be procured'.[4] Mr *Jamie* SC, for the third to fifth respondents, argued in the application for leave to appeal that there was a reasonable prospect that on appeal another court would hold that that was incorrect statement of law. He further argued that the import of the statement was of such broad and far-reaching effect as to raise an important question of law, and therefore in any event provided another compelling reason to grant leave to appeal. I found neither leg of the argument persuasive. On the contrary, the appositeness of the observation made in para 17 of the principal judgment seems to me so axiomatic that I could not come near being able to formulate '*a sound rational basis*' to support the required opinion that there is a reasonable prospect another court would hold otherwise.

[9] As discussed in the principal judgment, the term '*facilities management*', in the sense of describing a profession or occupation, is rather vague, and very much dependant for definition on the context in which it is employed. The City's engagement of a professional in the field of '*facilities management*' as a witness to explain the import of the term confirms that it is sufficiently arcane as to deserve characterisation as a 'term of art'. The court treated of the witness's evidence at para 32-39 of the principal judgment.

[10] It was contended in the applications for leave to appeal that this court was misdirected in not wholly accepting the witness's uncontradicted opinion on the meaning of the term in the context it was used in the City's advertisement and how it would be understood by a reader in the applicants' position. I am not persuaded that those contentions would enjoy a reasonable prospect of being accepted by an appellate court. The limitations on the admissibility and relevance of such evidence are frequently overlooked; see *Genticuro AG v Firestone SA (Pty) Ltd* 1972 (1) SA 589 (A) at 616D-618G, with reference to the statement of applicable law by Lord Tomlin in *British Celanese Ltd v Courtaulds Ltd* (1935) 52 R.P.C. 171 at 195 and 198. The authorities are clearly to the effect that such evidence cannot displace the court's function as the arbiter of the proper construction of language, as well as the sufficiency or insufficiency of any specification if such is in issue.

[11] Harms DP observed in *KPMG Chartered Accountants v Securefin Ltd. and Another* 2009 (4) SA 399 (SCA) at para 40, '*The* [expert] *witness may not be asked what the document meant to him or her*'. The learned deputy president went on to endorse the approach taken by Aldous LJ in *Scanvaegt International A/S v Pelcombe Ltd* [1998] EWCA Civ 436, stating

[4] Section 112(2) of the MFMA provides that '*The regulatory framework for municipal supply chain management must be fair, equitable, transparent, competitive and cost-effective.*'

'*Dealing with an argument that a particular construction of a document did not conform to the evidence, Aldous LJ quite rightly responded with "So what?".*'

[12] In the current case, the respondents have argued that this court was bound to accept the evidence of the City's expert witness and that of the City official responsible for placing it as to how the advertisement would or should have been understood by potentially interested parties such as the applicants. The argument flies in the face of well-established appellate court authority.

[13] Mr *Jamie* also submitted that there was a reasonable prospect that another court might find that this court's construction of the advertisement had not sufficiently taken into account the contextual considerations. He submitted that the court had had regard only to the heading to the advertisement (which was quoted in full at para 2 of the principal judgment). There was nothing in the argument. The body of the advertisement contained no additional information about the nature of the services the City sought to procure. It merely gave information concerning matters such as the closing date by when tenders had to be submitted, the amount of the non-refundable tender fee and details of to whom 'technical enquiries' could be addressed. Hence my reference earlier in this judgment to the 'substantive part' of the advertisement having been quoted at para 2 of the principal judgment. Insofar as Mr *Jamie* may have been contending that the detailed tender documentation - part of which (from p. 101 of the documentation) is quoted at para 1 of the judgment - formed part of the relevant context, the argument would miss the point. No-one could be expected to access and examine the detailed and voluminous tender documentation if the content of the advertisement was insufficient to alert the reader that the advertised tender might be one of interest to them. Indeed, that is, centrally, what the whole case was about.

[14] Mr *Jamie* argued that another court might hold that the reference in the advertisement to '*the provision of facilities and cash management services in respect of selected public transport facilities including MyCiti and Public Transport Interchanges*' was sufficient to alert private security service providers like the second and third applicants of the opportunity provided by the tender to contract their services. The principal judgment sets out this court's reasoning to the contrary (see para 13 and 27-42). I am not persuaded that there is a reasonable prospect that another court would find material fault with it.

[15] Counsel for the third to fifth respondents intimated at the hearing that the criticism in the notice of application for leave to appeal of this court's treatment of the arguments advanced

by the respondents in the principal case with reference to *Bato Star* and *Jivan and Louw* (see the principal judgment at para 20-25) was not being pressed. The decision was a judicious one in my opinion.

[16] It was argued, however, that the case was a novel one, in that there was no other jurisprudence on the adequacy of an advertisement to tender. It was contended that the issue was of importance to procurement functionaries in organs of state and that this provided a compelling reason within the meaning of s 17(1)(a)(ii) of the Superior Courts Act for granting leave to appeal.

[17] Assuming that there are indeed no other judgments on the issue, it does not seem to me that that affords a compelling reason for the matter to go on appeal. The finding that tender documentation must be clear and readily intelligible by potential tenderers is nothing new. Reference was made at para 13 of the principal judgment in this regard to the pertinent remarks of Schutz JA in *Premier of the Free State Provincial Government v Firechem* concerning tender documentation. No court has ever qualified or differed from them, and I do not believe that there is a reasonable prospect that another court would hold that this court's application of them to the issue in the current matter was misdirected. The adequacy of a tender advertisement is inherently dependent on the peculiar character of the given case, and nothing about the sufficiency or insufficiency of the information of the advertisement in the current case is likely to bear materially on the determination of an equivalent case concerning a different advertisement.

[18] It was also argued that another court might uphold the respondents' contention that the applicants had not established their legal standing to claim the relief that was sought in the principal case. The issue of the applicants' standing was traversed in para 43-47 of the principal judgment. I am not persuaded that there is a reasonable prospect that another court would differ from this court's findings. This court's approach to standing reflected the common law approach described in cases such as *Jacobs en 'n Ander v Waks en Andere* 1992 (1) SA 521 (A) at 533 *fin* -534E, which has been endorsed on numerous occasions by the appeal court, most recently in *Trustees for the time being of the Legacy Body Corporate v Bae Estates and Escapes (Pty) Ltd and Another* 2022 (1) SA 424 (SCA) at para 34, where Makgoka JA noted that '*issues of locus standi should be dealt with in a flexible and pragmatic manner, rather than a formalistic or technical one*'. There is any event the further consideration that in cases in which own interest parties (such as the applicants in the current case) seek to assert constitutional rights (in the current case the right to administrative action that is lawful,

reasonable and procedurally fair) a generous approach is adopted to standing; cf. *Giant Concerts CC v Rinaldo Investments (Pty) Ltd and Others* [2012] ZACC 28 (29 November 2012); 2013 (3) BCLR 251 (CC) at para 41.

[19] The respondents also contend that there is a reasonable prospect that another court would hold that this court erred as to remedy. In answer to my query as to what their contention as to appropriate remedy was, Mr *Oosthuizen* SC, counsel for the City, with whose submissions Mr *Jamie* associated himself, said that because the tender contract is due to expire in 2024 it would have been appropriate for this court merely to make a declaration of invalidity without any effective consequential relief. A similar argument was addressed, and rejected, at the hearing of the principal case. The issue of remedy was dealt with at para 49-51 of the principal judgment. As noted there, the determination of a just and equitable remedy is a discretionary matter. The judgment sets out the basis upon which the discretion was exercised in this case. I am not persuaded that there is a reasonable prospect that an appellate court would hold that this court was misdirected in the exercise of its discretion.

[20] This judgment has traversed the oral arguments addressed by counsel in support of the applications. I have assumed that they addressed what they considered the most salient points of their respective clients'contentions. Suffice it to record that I have also considered all of the grounds set forth in the respective notices of application for leave to appeal and in the written submissions with which the court was favoured in advance of the hearing. Nothing in that material has persuaded me that it would be appropriate to accede to the applications.

[21] As the successful parties in the principal case took no part in the application for leave proceedings, it seems appropriate to make no order as to costs.

[22] In the result, the applications for leave to appeal are dismissed, with no orders as to costs.

A.G. BINNS-WARD
Judge of the High Court