IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case Number: 7102 / 2022

In the matter between:

DC SECURITY (PTY) LTD t/a DC SECURITY	Applicant
and	
WESTERN CAPE PROVINCIAL GOVERNMENT	First Respondent
THE ACTING DIRECTOR	
(SUPPLY CHAIN MANAGEMENT)	
WESTERN CAPE PROVINCIAL GOVERNMENT	Second Respondent

THE ACCOUNTING OFFICER

(THE DEPARTMENT OF FINANCE)

WESTERN CAPE PROVINCIAL GOVERNMENT Third Respondent

THE HEAD OF DEPARTMENT

(DEPARTMENT OF HEALTH)

WESTERN CAPE PROVINCIAL GOVERNMENT Fourth Respondent

IMVULA QUALITY PROTECTION (PTY) LTD Fifth Respondent

Coram: Wille, J

Heard: 12th of April 2022

Delivered: 22nd of April 2022

JUDGMENT

WILLE, J:

INTRODUCTION

[1] This is an opposed application for an interim interdict pending the delivery of a judgment in a review application. While generally, the law in connection with applications, such as these, remains relatively uncomplicated, the facts in this matter (which are mostly common cause) are both complicated and very unfortunate.[1]

[2] The applicant company is a security company which has historically provided security services to the fourth respondent. This at a government hospital.[2] There are approximately (3) to (4) dozen security guards employed at this location from time to time. The first respondent is an organ of state and accordingly when it contracts for goods and services it is obliged to do so in accordance with certain standards which are, *inter alia*, equitable, transparent, competitive, and cost-effective.[3]

[3] The applicant was one of the parties who submitted a bid for the supply of certain security services to the first respondent.[4] Certain other parties (including the applicant) who had submitted bids, were dissatisfied with several of the decisions made by the first respondent in the adjudication and implementation of this tender process. No doubt, this triggered the institution of the review proceedings. These various review applications were consolidated and were argued in the middle of September 2020.[5] Judgment was reserved and has yet to be delivered. I mention that the fifth respondent took no active role in opposing this interim application.

---

[1] A review application was heard more than (19) months ago. The judgment remains outstanding in this connection.
[2] Situated in Paarl.
[3] This in terms of section 217 of the Constitution of the Republic of South Africa, 1996 ('the Constitution').
[4] This during 2017 (Under Bid Reference Number WCPT-TR01/2017/2018) - ('the Transversal Tender').
[5] The 'main' application.

[4] The domino effect of this delayed judgment hindered the awarding of any further 'security services' contracts in accordance with the tender process. As it remained necessary to provide these security services, the applicant continued to provide these security services in terms of yet another discrete agreement.[6] The applicant had previously provided these services in terms of a tender awarded to it, some (2) years prior.[7]

[5] One of the core issues to be determined in the main application, relates to a decision to exclude the applicant from the award of any 'security services' contracts within a certain geographical area.[8] Notwithstanding this factual position, the applicant received a notification from the first respondent advising it that the fourth respondent was concluding a process to appoint a new security service provider at the hospital.[9] The applicant was advised that its short-term (month-to-month) contract would terminate at the end of the month, following the notice month.[10]

THE APPLICANT'S CASE

[6] The applicant seeks an order preventing it from being excluded from the rendering of security services at the subject hospital until such time as the judgment in the main application has been delivered. The first respondent contends that the application is misconceived because the applicant was not awarded the hospital contract

---

6 A service level agreement (the 'SLA'). Concluded in May 2017.
7 This tender was awarded during 2015.
8 The 'Cape Winelands' area.
9 The notification was dated the 28th of February 2022.
10 The applicant's contract would terminate on the 31st of March 2022.

(under the tender), because of its internal ranking on a certain panel[11] and, not because it was excluded from the subject geographical region (as submitted by the applicant).

[7] By contrast the applicant accepts that the court (in the main application), will decide whether the decision to exclude the applicant from the rendering of 'security services' of certain sites within the subject geographical area, is reviewable or not. Put in another way, if the applicant succeeds on this issue (on review), then the applicant will be considered as only one of the parties to whom the hospital contract should be awarded in terms of the tender process.

[8] The 'geographical' reviewable issue in dispute is a relatively simple issue. This according to the applicant. The government respondents contend that the subject hospital does not fall within the 'Cape Winelands' area. They say it falls within the 'Cape Metro' area. This against the factual backdrop that the subject hospital is factually geographically situated within the 'Cape Winelands' area.

[9] The government respondents raise a shield with reference to certain legislation defining specified minimum wage determinations.[12] The applicant counters this argument by pointing out that the differentiation of wages (in the various areas listed in such determinations), are primarily there because the living costs and market-related wages, differ from area to area.

---

[11] The 'Urban' Panel

[12] This terms of the Labour Relations Act and certain Sectoral Wage Determinations (Issued in 2017)

[10] Significantly, this argument is fortified by the tender itself which divided the security services called for into no less than (6) different geographical areas. This is precisely because it was envisaged that such services could be more efficiently rendered, if separated into specific different geographical areas.

[11] Moreover the applicant avers that the shields raised by the government respondents are diametrically opposed to the reasons given in the 'now' notice of termination. Most significantly, the termination notice itself in terms records that the subject hospital indeed is located within the 'Cape Winelands' area. The point is also made that in accordance with the prior tender process the subject hospital constituted part of the 'Cape Winelands' area. This, even before the wage determination legislation upon which the government respondents seek refuge was promulgated.

[12] Finally, a term of the short-term contract which found application for at least the last (19) months (whilst awaiting delivery of the review judgment), indicates that the applicant is appointed as a service provider for the rendering of security guard services for the 'Cape Winelands' area. Most importantly, the fifth respondent was not one of the service providers chosen to render services in this geographical area (under the current tender). By contrast, the successful bidder for the subject geographical area (under the current tender) was a discrete 'security services' provider.[13] The fifth respondent was also not one of the successful bidders for the subject geographical area during the prior tender process.

---

[13] 'Ensemble Trading'.

[13] The government respondents purported appointment of the fifth respondent to render guarding services at the hospital in question is seemingly also in violation of certain constitutional procurement obligations.[14] It too, ignores the hotly contested issue of the geographical area debate chartered for in terms of the 'wage determination' legislation argument.

THE CASE FOR THE 'GOVERNMENT' RESPONDENTS

[14] The government respondents make the argument that the papers in support of the interdict were issued before the deadline afforded by the applicant in their letter of demand had expired. The applicant says that this was precisely done to give the government respondents some advance knowledge of the contents of the founding papers, so that the opportunity of responding thereto could be maximised.

[15] A letter from applicant's attorney calling upon the government respondents to reconsider their stance was written on the 4th of March 2022. The government respondents were thereafter afforded until the 11th of March 2022 to reconsider their position in this connection.

[16] Accordingly, the complaint here is not that the applicant delayed in the launching of the application, but rather that the application was launched before the expiry of the deadline set in the letter of demand. The government respondents' final argument on this

---

[14] In terms of Section 217 of the Constitution of the Republic of South Africa,1996.

score now seemingly rather goes to the issue of some wasted costs incurred in and by the initial hearing of this matter.[15]

[17] Further, the government respondents contend that the non-variation clause (contended for by the applicant) finds no application with reference to the month-to-month extensions of these security services since this short-term contract has already expired. With this, I agree.

[18] Finally, the government respondents argue that the applicant has not shown an absence of an *alternative remedy* and has not shown that the balance of convenience favours the granting of the relief that it seeks by way of an interim interdict. However, it is so that no facts are advanced on affidavit that the fifth respondent stands to suffer any real prejudice should the applicant continue rendering the current security services at the subject hospital. This, at least until the judgment is delivered in the main application.

[19] On a conspectus of the material before me it is, in any event, difficult to discern how the fifth respondent stands to be appointed to render any security services in connection with the subject hospital should the government respondents geographical argument stand to be overturned on review. This, upon the delivery of the review judgment in the main application.

---

[15] On the 16th of March 2022.

CONSIDERATION

[20] The requirements for an interim interdict are well established and need not be rehearsed in this judgment. It is further trite law that there exists an inversely proportionate relationship between the prospects of success and the balance of convenience. Put in another way, the stronger the prospects of success, the less the need for the balance of convenience to favour the applicant and *vice versa*.[16]

[21] One of the arguments chartered for by the applicant (with reference to the issue of the balance of convenience) is the issue of the continued employment of the employees currently employed by the applicant. The position adopted by the applicant is somewhat fortified by the fact that simply no reasons are advanced (by the government respondents) as to why it is now significant for the applicant's contract to be summarily terminated, albeit with some haste.

[22[In my view, the potential prejudice to be suffered by the applicant, can by no means be categorized as insignificant, should it have to give up this subject security contract, in circumstances when their position may in the 'not-too-distant' future, be reversed (or remitted for decision) upon the delivery of the judgment by the review court.

---

[16] *Beecham Group Ltd v B-M Group (Pty) Ltd* 1977 (1) SA 50 (T).

[23] The government respondents argue that the order that is sought by the applicant will not promote the objects, spirit, and purport of the Constitution.[17] They say this because if the interim relief is granted, it would prevent the first respondent from exercising its right not to renew the subject hospital contract and it will entrench the applicant's position through month-to-month extensions.

[24] Most importantly, the argument is made, that it will prevent the government respondents from appointing the fifth respondent. The difficulty with this argument is that it is not explained on the papers why the government respondents have not long since implemented the terms of their tender.[18] They seem to be somewhat 'hoisted by their own petard' in this connection.

[25] A further argument is piloted that the applicant does not need the interdict to preserve its review right. It is so that the granting of an interim interdict pending a review is an extraordinary remedy. I am obliged under the circumstances to be cautious so as not to intrude upon the terrain of another arm of government in a manner inconsistent with the doctrine of the separation of powers. Again, the argument is made that should interim interdictory relief be granted the first respondent would be prevented from implementing a tender that had been lawfully procured.

---

[17] *National Treasury & others v Opposition to Urban Tolling Alliance & others* 2012 (6) SA 223 (CC) at para 45.
[18] The 'Transversal Tender'.

[26] That having been said, the circumstances of this case are very different and peculiar. I say this because nothing prevented the government respondents from implementing their tender. Also, the lawfulness of this very tender is under review.

[27] In addition, it is advanced that the right to review the tender has been exercised and that only the 'decision' is awaited. It is argued that this means that the *prima facie* right that falls to be established in this case is not the right to review an administrative decision. I hold the view that the right to review an administrative decision would as a matter of logic, extend until a judgment in respect of that right has been pronounced upon. I find some support in this view by the reasoning adopted in the *Opera House* judgment.[19]

[28] The applicant also advances an argument based on an interpretation of a non-variation clause which appears in the short-term service level agreement. This argument is hard to discern as it clearly finds no application to the month-to-month extensions that occurred, post expiry of the subject tender. Put in another way, the service level agreement has expired. Therefore, it must be so that the month-to-month extensions are done in terms of - *fresh offers and acceptances* - and the non-variation clause therefore finds no application whatsoever to any such new offer.

[29] In order to counter the applicant's arguments of the reasonable apprehension of suffering irreparable harm, the government respondents advance in the main that the

---

[19] *Opera House (Grand Parade) Restaurants (Pty) Ltd v Cape Town City Council* 1986 (2) SA 645 (CPD)

potential harm to be suffered by the employees of the applicant (if they are indeed retrenched) is but merely a commercial consequence of the coming to an end of a contract. They also say that this harm will most probably not occur as the applicant's employees will simply fall to be re-employed.

[30] On this, I disagree because it cannot be assumed as a racing certainty that the employees of the applicant will be re-employed by the fifth respondent. Thus, there is in my view, considering this very peculiar and unfortunate factual matrix, indeed a protectable irreparable harm to be suffered by the applicant (in these circumstances). In my view the applicant has sufficiently demonstrated a *prima facie* right that falls to be threatened by an impending or imminent irreparable harm

[31] By contrast, I do not understand on what basis the government respondents will suffer harm because they argue that they would be unable to implement the subject tender in respect of the hospital. This, because the government respondents have had an inordinate period for this implementation they now so desperately seek as a matter of urgency. No explanation has been advanced as to why this was not done during the not insignificant intervening period.

[32] In addition, it may be so that after the judgment (in the main review application) has been delivered (and the matter is remitted), that the security services for the subject hospital may once again be awarded to the applicant. If the interim interdictory relief is not granted the employment contracts of the applicant's employees may have been terminated for no reason. In this sense, in my view, the balance of convenience also is accordingly in favour of the granting of the relief.

[33] To the contrary, the argument is made that the employees of the applicant will in all probability be employed by the new security service provider and will merely 'change uniforms' so to speak. I remain unpersuaded about the validity in real terms about this argument and in my view, this is 'mere speculation' and not enough to upset the balance of convenience that 'weighs' in favour of the applicant. I am not persuaded by the reasoning adopted in a prior case involving the same applicant.[20]

[34] It also must be so that the government respondents are entitled to an outcome being delivered in the main review application. So too, is the applicant entitled to an outcome in connection with the main review application. Further, in my view, it would be impractical to grant unchecked interim relief pending the handing down of the judgment in the main review application. I say this because the judgment has been outstanding for at least (19) months and there is no clear indication as to when this judgment will be handed down.

[35] I have not canvassed with counsel their availability in connection with what I for the purposes of convenience style the *return date*. Both counsel for the parties, are most likeable senior counsel and both have busy practices. Accordingly, I invite them to contact my registrar to arrange an alternative *return date* suitable to them if the date that I have selected (at random) does not suit them and a further interim order may then be

---

[20] *Distinctive Choice Security 447 CC t/a D C Security and Another v Western Cape Provincial Government and Others* (15236/2019) [2019] ZAWCHC

issued out to satisfy all the parties concerned. I have also decided to request that a copy of this judgment be sent (via email) to the Acting Judge who is concerned with the handing down of the main judgment in the review application. This in the hope that this may encourage him to deliver his judgment in the main review application with some degree of urgency.

[36] Further, if the main judgment in the review application is delivered prior to the return date, the parties are at liberty to contact my registrar to arrange (if necessary), for the further conduct of this matter. This may include an order setting aside the terms of the interim order granted herein (if necessary and applicable).

COSTS

[37] I agree with counsel for the government respondents that the applicant has not sought the protection of the principle expressed in *Biowatch*.[21] No doubt, there is accordingly no constitutional issue. But the enquiry does not end here. I am in essence requested to exercise my discretion *judicially* in connection with an interim application that was piloted precisely because the parties have been waiting for a judgment in the main review application for a period of over (19) months.

[38] I hold the view that to make any order as to costs at this juncture would be premature and ill-advised. It would be more prudent to make a costs order on the return date, alternatively it would be more appropriate to make a costs order (if any) once the

---

[21] *Biowatch Trust v Registrar, Genetic Resources and Others* 2009 (6) SA 232 (CC)

judgment in the main review application has been delivered. However, I do agree that the costs of senior counsel were warranted considering the peculiar nature of this application.

ORDER

[39] In all the circumstances of the matter, the following order is issued out, namely:

1. That pending the return date on the *1st of September 2022 at 10h00* (or so soon thereafter as the matter may be heard), an interim interdict is hereby issued interdicting the government respondents from purporting to terminate any of the contracts under which applicant is currently rendering security services in the 'Winelands Area' and specifically the subject hospital situated in Paarl.

2. That the parties are hereby given leave to supplement their papers (in so far as may be necessary and appropriate) pending the return date, to deal with any further developments regarding the core issues raised in this interim interdict application.

3. That all the costs of an incidental to this application (including costs of senior counsel, where so employed), on the scale as between party and party, as taxed or agreed, shall stand over for later determination.

4. That a copy of this judgment (and order) shall be sent to Acting Judge concerned via email by the Chief Registrar of this Court.

E. D. WILLE
Judge of the High Court
Cape Town