



Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

**IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY**

Case No: **992/2022**
Heard: **27/05/2022**
Date available: **31/05/2022**

In the matter between:

MASICEBISE BUSINESS SOLUTIONS

Applicant

and

**THE MEC: COOPERATIVE GOVERNANCE HUMAN SETTLEMENT &
TRADITIONAL AFFAIRS NC PROVINCE**

1st Respondent

DEFENSOR ELECTRONIC SECURITY (PTY) LTD

2nd Respondent

JUDGMENT

Mamosebo J

[1] On 16 April 2021, the department of Cooperative Governance Human Settlement and Traditional Affairs, Northern Cape Province, (COGHSTA) published an invitation to tender for the appointment of a service provider rendering security services to the Department over a three-year period. The closing date for submissions was 07 May 2021. It is common cause that the tender was subsequently awarded to the applicant, Masicebise Business Solutions (Pty) Ltd (Masicebise). The second respondent, Defensor Electronic Security (Pty) Ltd (Defensor), challenged the awarding of the tender to the applicant by lodging an urgent review application. The applicant

and the Member of the Executive Council: Cooperative Governance Human Settlement & Traditional Affairs NC Province (MEC) were served with the founding papers for the review application and only the MEC opposed the application.

[2] On 15 November 2021, Nxumalo J and Erasmus AJ, sitting in the review court, granted an order in favour of Defensor to this effect:

- “1. This application is heard as an urgent application in terms of the provisions of Rule 6(12) of the Uniform Rules of Court and that the necessary condonation is granted to the applicant in respect of the non-compliance with the prescribed time limits, forms and service.
2. The decision of the first respondent to disqualify the applicant in respect of Tender NC/06/2021: Appointment of a service provider to render security services for the Department COGHSTA in the Northern Cape Province (“the Tender”) is declared constitutionally invalid, reviewed and set aside.
3. The decision of the first respondent to award the tender to the second respondent is declared constitutionally invalid, reviewed and set aside.
4. The applicant’s bid is hereby remitted to the respondent to be evaluated on price.
5. The first respondent is hereby ordered to pay the costs of applicant which should include costs consequent upon employment of two counsel.”

[3] Notwithstanding the aforementioned order, the applicant continued to render security services to COGHSTA. Defensor launched a further urgent application, which was aborted because the MEC addressed a letter dated 26 April 2022 to the applicant informing the applicant that its last day on site would be 31 May 2022. Ms Nxumalo, who appeared for the MEC in these proceedings, submitted that pursuant to the review court’s order, the department reconsidered the bid and awarded the tender to Defensor.

[4] The applicant approached this Court on an urgent basis seeking *interim* interdictory relief in Part A pending the finalisation and adjudication of the review in Part B of the application. Part A seeks

to stop or prohibit the impugned appointment of Defensor meant to take effect on 01 June 2022. The MEC and Defensor oppose the application on the grounds that it is neither urgent nor meets the requirements for the granting of an interim interdict.

[5] There are both procedural and substantive questions for determination. The procedural questions are whether the application for interim relief is urgent, should the court find that it is, whether the relief sought in terms of paragraph 2 of the notice of motion in which the applicant is seeking interim relief should be granted. The substantive question pertains to the interpretation of the order granted by the review court on 15 November 2021.

[6] On the aspect of urgency, Mr Korf, appearing for the applicant, made the submission that the applicant only became aware that the tender was awarded to Defensor during an informal discussion with a representative of the Department on Tuesday 10 May 2022. The applicant immediately contacted its legal representatives to seek legal advice and a consultation was arranged with its attorney and counsel on Friday 13 May 2022. Following the consultation and still on 13 May 2022, the applicant sought an undertaking from the MEC and Defensor before 14:00 on Monday 16 May 2022 that:

6.1 pending final determination of a review application for the setting aside of the award, to be instituted within 30 days, the decision will not be implemented;

6.2 no further contracts pertaining to this matter will be concluded; and

6.3 no contracts already concluded will be implemented.

The MEC and Defensor did not furnish the requested undertakings.

[7] The applicant makes a submission that it will not receive substantial or adequate redress should this application be heard in the normal course of motion proceedings. The applicant contends that should interdictory relief not be granted, it stands to suffer

immense financial prejudice and its employees would lose their employment.

- [8] The MEC contended that the applicant brought this application in a situation of self-created urgency. In substantiation of this contention, the MEC stated that the department notified the applicant by letter dated 26 April 2022 that its last day on site would be 31 May 2022. Although the applicant was in a position to institute these proceedings from 26 April 2022, a period of almost three weeks lapsed before the applicant decided to launch the present application seeking to interdict the MEC from implementing the award in favour of Defensor.
- [9] Defensor argued that the grounds of urgency are contrived. Its counsel intimated that since the tender that was awarded to the applicant was set aside by the review court on 15 November 2021, the applicant forfeited its right to be on site effective from the date of the order. Therefore, it was not the letter that the applicant received on 26 April 2022 that terminated the applicant's rights, but the order of Court on 15 November 2021, so the argument went. Defensor ought to have instituted proceedings earlier.
- [10] Mr Els submitted that had the applicant opposed the urgent review application it would have been entitled to seek leave to appeal the order, which would have the effect of suspending the order. Now that it did not oppose the application despite having been served with the papers, it is seeking to achieve the same result by launching the current application for interdictory relief. This, argued counsel, is clearly abuse of the court process. Mr Els argued further, that while the applicant is seeking to challenge the decision by the MEC to appoint Defensor after it evaluated its tender on price as directed by the review court, the applicant has

not listed a single ground for review in terms of the Promotion of Access to Justice Act (PAJA)¹.

[11] Rule 6(12)(b) of the Uniform Rules of Court provides:

“In every affidavit or petition filed in support of any application under para (a) of this subrule, the applicant shall set forth explicitly the circumstance which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course”.

[12] In *Luna Meubel Vervaardigers (Edms) Bpk v Makin and Another (t/a Makin’s Furniture Manufacturers)*², Coetzee J held the following with reference to Rule 6(12)(b):

‘Mere lip service to the requirements of Rule 6(12)(b) will not do and an applicant must make out a case in the founding affidavit to justify the particular extent of the departure from the norm, which is involved in the time and day for which the matter be set down.’

[13] The principle on urgency was developed further in *Mogalakwena Local Municipality v The Provincial Executive Council, Limpopo and Others*³ where the Court held:

“It seems to me that when urgency is an issue the primary investigation should be to determine whether the applicant will be afforded substantial redress at a hearing in due course. If the applicant cannot establish prejudice in this sense, the application cannot be urgent. Once such prejudice is established, the other factors come into consideration. These factors include (but are not limited to): Whether the respondents can adequately present their cases in the time available between the notice of the application to them and the actual hearing, other prejudice to the respondent’s and administration of justice, the strength of the case made by the applicant and any delay by the applicant in asserting its rights. The last factor is often called, usually by counsel acting for the respondents, self-created urgency.” See also *Luna Meubel*

¹ 3 of 2000

² 1977(4) SA 135(W) at 137F

³ (2014) JOL 32103 (GP) at paras 64; [2014] 4 All SA 67 (GP)

*Vervaardigers (Edms) Bpk v Makin's (t/a Makin's Furniture Manufacturers)*⁴.

[14] The applicant has missed, in my view, opportunity when it presented, to challenge the matter. I have not discerned its reasons for not opposing Defensor's urgent review application and stating its version in that regard. It is inexplicable why it would only learn about the appointment on 10 May 2022 when, not only was it served with the letter dated 26 April 2022, but was already served with the review papers and ought to have followed up on the outcome. Because the MEC's letter gave the applicant a deadline of 31 May 2022 to vacate the site, I will treat the matter as urgent, though the urgency was self-created. I now proceed to consider whether the applicant has met the necessary requirements for an interim interdict.

[15] The Constitutional Court in *National Gambling Board v Premier, Kwazulu-Natal and Others*⁵ remarked:

"[49] An interim interdict is by definition 'a court order preserving or restoring the status quo pending the final determination of the rights of the parties. It does not involve a final determination of these rights and does not affect their final determination.'

The dispute in an application for an interim interdict is therefore not the same as that in the main application to which the interim interdict relates. In an application for an interim interdict the dispute is whether, applying the relevant legal requirements, the status quo should be preserved or restored pending the decision of the main dispute. At common law, a court's jurisdiction to entertain an application for an interim interdict depends on whether it has jurisdiction to preserve or restore the status quo. It does not depend on whether it has the jurisdiction to decide the main dispute."

[16] The requirements for an interim interdict are well established. They are (i) the existence of a prima facie right, even though it may be open to some doubt; (ii) a well-grounded apprehension of irreparable harm in interim relief is not granted and ultimate relief

⁴ 1977 (4) SA 135 (W)

⁵ 2002 (2) SA 715 (CC) para 49

is eventually granted; (iii) the balance of convenience favours the granting of the interim interdict; and (iv) the applicant has no other satisfactory remedy.⁶ These considerations are not considered individually as they are interrelated also informed by the applicant's prospects of success

[17] The test to be applied when ascertaining the existence of a *prima facie* right is articulated by the Constitutional Court in *National Treasury and Others v Opposition to Urban Tolling Alliance and Others*⁷ (OUTA) as follows:

“[44] *The common-law annotation to the Setlogelo test is that courts grant temporary restraining orders against the exercise of statutory power only in exceptional cases and when a strong case for that relief has been made out. Beyond the common law, separation of powers is an even more vital tenet of our constitutional democracy. This means that the Constitution requires courts to ensure that all branches of government act within the law. However, courts in turn must refrain from entering the exclusive terrain of the executive and the legislative branches of government unless the intrusion is mandated by the Constitution itself.*

[46] *....[W]hen a court weighs up where the balance of convenience rests, it may not fail to consider the probable impact of the restraining order on the constitutional and statutory powers and duties of the state functionary or organ of state against which the interim order is sought.*

[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*

⁶ *Setlogelo v Setlogelo* 1914 AD 221 at 227; *Webster v Mitchell* 1948 (1) SA 1186 (W) at 1189

⁷ 2012 (6) SA 223 (CC)

the harm apprehended by the claimants amounts to a breach of one or more fundamental rights warranted by the Bill of Rights. This is not such a case.

[50] *Under the Setlogelo test the prima facie right a claimant must establish is not merely the right to approach a court in order to review an administrative action. It is a right to which, if not protected by an interdict, irreparable harm may ensue. An interdict is meant to prevent future conduct and not decisions already made. Quite apart from the right to review and to set aside impugned decisions, the applicants should have demonstrated a prima facie right that is threatened by an impending or imminent irreparable harm. The right to review the impugned decisions did not require any preservation pendent lite.”*

[18] Taking cue from the OUTA-judgment, a strong case would be one in which a right at issue, although established only *prima facie*, and open to a measure of doubt, nevertheless appears to enjoy good prospects of being established in the main proceedings, and also one in which the need for the intervention of an interim interdict is clearly shown if irreparable harm to the applicant is to be averted. Mr Els contended that the applicant’s bid was non-responsive and has failed the functionality test; notwithstanding, the applicant has elected to be tight-lipped despite the allegations of failing to meet mandatory requirements. Mr Els further contended that the review court’s pronouncement in setting aside the decision by the MEC awarding the tender to the applicant as constitutionally invalid, takes away the right that the applicant would have had, without which, there would be nothing to preserve. More importantly, the applicant has not raised any ground of review in its founding affidavit upon which the MEC’s decision is attacked.

[19] Ms Nxumalo, appearing for the MEC, and Mr Els, contended that the balance of convenience favours the MEC and Defensor. A submission was made that the MEC requires continuous security, which the Department cannot be without. If the interim interdict is granted, the MEC will not be able to utilise the services of the applicant or Defensor, so the argument went. In its answering

affidavit, Defensor has maintained that no single security guard employed by the applicant will lose employment when Defensor takes over the contract.

[20] Both Messrs Korf and Els submitted that the interpretation of the review court's order, quoted in full at para 2(above) is paramount. I am mindful of the fact that the review court has not furnished its reasons for the order. In *Natal Joint Municipal Pension Fund v Endumeni Municipality*⁸ Wallis JA, writing for the majority insightfully highlighted the approach to be adopted by the courts when interpreting documents stating that consideration be given to the language used in the light of the ordinary grammar and syntax; the context in which the provisions appear; the apparent purpose to which it is directed and the material known to those responsible for its production. More importantly, context and language to be considered together where one will not dominate the other. See also *National African Federated Chamber of Commerce and Industry and Others v Mkhize*⁹

[21] As the saying goes, the review court was steeped in the atmosphere of the proceedings. The review court is saddled with the responsibility to interpret the context and the language of its own order and I cannot second-guess what its intentions were that informed the order as it was predicated on full argument. Mr Korf contended that by remitting Defensor's bid to evaluation on price only the only logical rationale for the remission would be for Defensor's bid to be evaluated against that of the applicant. Now this submission, in my view, leads to speculation or conjecture, which the courts strongly discourage. Borrowing the phrase from Ponnar JA in *Manong & Associates (Pty) Ltd v Minister of Public Works and Another*¹⁰, without the reasoning of the review court

⁸ 2012 (4) SA 593 (SCA) para 18

⁹ [2015]

¹⁰ 2010 (2) SA 167 (SCA) para 30

where the tender arguments were fully ventilated, *if this were a horse race, the applicant has not made its way out of the starting stalls*. I say so because the applicant's prospects of success are dependent on the *prima facie* right and the consequent irreparable harm if that right is not preserved or restored.

- [22] On the question whether the applicant has established a *prima facie* right or not the approach to be adopted is stated by Smalberger JA in *Simon NO v Air Operations of Europe AB and Others*¹¹ where the Court held:

"The accepted test for a prima facie right in the context of an interim interdict is to take the facts averred by the applicant, together with such facts set out by the respondent that are not or cannot be disputed and to consider whether, having regard to the inherent probabilities, the applicant should on those facts obtain final relief at the trial. The facts set up in contradiction by the respondent should then be considered and, if serious doubt is thrown upon the case of the applicant, he cannot succeed. (Gool v Minister of Justice and Another 1955 (2) SA 682 (C) at 688B - F)."

What stands out in this application are the allegations pertaining to the applicant failing to meet the mandatory requirements for the bid namely, the rates and taxes of its property being in arrears; its operational manager not certified with PSIRA and failing to comply with the functionality requirement. In addition, the failure by the applicant to enlist grounds for review in its founding affidavit in terms of PAJA. It would be prudent for all parties to be *au fait* with the reasoning of the review court.

- [23] In the circumstances I am not persuaded that the applicant has established all the requirements for interim relief. But, even if I can be wrong in this regard, I would still not incline to do so regard being had to the outstanding reasoning of the review court in the matter heard on 15 November 2021.

Costs

¹¹ 1999 (1) SA 217 (SCA) at 228G - H

[24] It is trite that the awarding of costs is in the discretion of the court. Mr Els, invoking *In re: Alluvial Creek Ltd*¹², pressed upon me that the conduct of the applicant amounted to a gross abuse of the court processes, which must be met with the court's displeasure by ordering a punitive cost order in favour of Defensor. Mr Els requested that the application be dismissed with costs on an attorney and client scale. Ms Nxumalo, on different grounds, also sought the application be dismissed with costs on an attorney and client scale. Mr Korf submitted that the MEC is blowing hot and cold which cannot be done. The applicant persists with the prayers in Part A as appearing in the Notice of motion with costs to include costs of two counsel.

[25] I am not persuaded by the submission on behalf of the respondents for costs on a punitive scale. However, there is no reason why costs should not ordinarily follow the result.

[26] In the result the following order is made:

The application for an interim interdict in terms of paragraph 2 of the Notice of Motion dated 19 May 2022 is dismissed with costs.

M.C. MAMOSEBO
JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION

¹² 1925 CPD 532 at 535

For the Applicant:

Instructed by:

Adv. C.A.C. Korf
Adv. Van Schalkwyk
Duncan & Rothman

For the 1st Respondent:

Instructed by:

Adv. R.M. Nxumalo
The State Attorney

For the 2nd Respondent:

Instructed by:

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