



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

Not Reportable  
Case No: 801/2023

In the matter between:

SAMEX CONSULTING (PTY) LTD

Applicant

and

DEPARTMENT OF ROADS AND PUBLIC  
WORKS: NORTHERN CAPE

First Respondent

HEAD OF THE DEPARTMENT  
NORTHERN CAPE

Second Respondent

MEC: ROADS AND PUBLIC  
WORKS: NORTHERN CAPE

Third Respondent

KVS AND ASSOCIATED

Fourth Respondent

ISIBUKISO HOSPITAL DESIGN  
GROUP TRADING

Fifth Respondent

MEKAN ENGINEERING SERVICES

Sixth Respondent

MVD KALAHARI

Seventh Respondent

CITIES STUDIO AFRICA (PTY) LTD

Eighth Respondent

UM CONSULTANTS

Ninth Respondent

QUAM QUANTITY SURVEYORS

Tenth Respondent

KAGO BUILT ENVIRONMENT CONSULTANTS	Eleventh Respondent
PREMIER OF THE NORTHERN CAPE	Twelfth Respondent
MINISTER OF FINANCE	Thirteenth Respondent

**Neutral citation:** *Samex Consulting (Pty) Ltd v Department of Roads and Public Works, Northern Cape and Others* (Case no. 801/2013) (15 June 2023)

**Heard:** 16 May 2023

**Delivered:** 15 June 2023

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## Judgment

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Phatshoane DJP

[1] Samex Consulting (Pty) Ltd (Samex), the applicant, approached this Court on an urgent basis in terms of s 18(3) of the Superior Courts Act 10 of 2013 (the Act) for an order to effect the immediate operation and implementation of an order I issued under case no 2101/2021 on 28 October 2022 pending the outcome of the Department of Roads and Public Works' (the department), the first respondent, appeal to the Supreme Court of Appeal (the contempt order). This shall, for convenience, be referred to as the principal relief.

[2] Samex further sought an order that the contracts of service entered into between the department and certain specified contractors be suspended; It also sought a further order interdicting the implementation of the contractors' appointments and any actions performed pursuant to the appointments including: (a) the making of any claims for payment by any of the respondents following their appointment and (b) the placing of any orders by the department and the Head of the Department,

the second respondent, on third parties in relations to services to be rendered under the contracts concluded. This shall be referred to as the secondary relief.

[3] The application contains Part B in respect of which leave is sought that it be determined at a later date. Under this part Samex seeks an order that the fourth to the 11<sup>th</sup> respondents' letters of appointment be declared invalid and accordingly, set aside. Further ancillary relief in respect of costs is also sought. The respondents are also called upon to show cause, at a later stage, why the decisions captured under Part B of the Notice of Motion should not be reviewed and set aside.

[4] The contempt order antecedent to the s 18(3) application for its immediate operation, pending the appeal, is set out in these terms:

- '1. The Department of Roads and Public Works, Northern Cape, the first respondent, is to comply with the consent order of this Court handed down on 23 November 2021 under Case No: 2101/21 within 30 days from the date of this order.
2. Should the first respondent not comply with para 1 of this order, the applicant may, if so advised, approach this court on same papers, duly supplemented where necessary, for any appropriate relief including but not limited to an order declaring the respondents, including the current serving HOD, to be guilty of contempt.
3. The first, second, third, fifth and sixth respondents shall, jointly and severally, the one paying the other to be absolved, pay the costs of this application including the costs occasioned by the postponement of 22 July 2022 on attorney and client scale.
4. A copy of this judgment and order is to be served upon all the respondents including the current Head of the Department of Roads and Public Works,

Northern Cape, and/or his/her successor in accordance with the uniform rules of this Court.

5. The Registrar of this Court is directed to forward a copy of this judgment and order to the Premier of the Northern Cape Province.'

[5] Some factual background would be necessary for consideration of the secondary relief. The department appointed Samex on 9 September 2020 as a service provider for Consulting, Project Management and Implementation of Maintenance in Hospitals and Community Health Care facilities in the Northern Cape Province for a period of three years, which ends on 09 September 2023. On 22 October 2020 Samex and the department entered into a written contract for the consultancy services. It subsequently, on 22 January 2021, directed a letter to the department to establish how its work would be executed. On 11 February 2021 the department notified Samex that it was not appointed for all health facilities but for pre-maintenance contracts on a number of unidentified health facilities in the Northern Cape.

[6] On 31 August 2021, the department informed Samex that its appointment was irregular in that it was too vague as it did not stipulate which facilities were to be maintained. Samex was further advised that in terms of clause 1.6.2 of the contract:

“(T)he client [the department] reserves the right to cancel if instructions, necessary for you to continue with the work after a delay or deferment instructions, are not received from client within 6 months after such instructions were requested by you. Since your appointment there has not been further instructions to you on the project.

There are no funds available to cover the total envisaged expenditure for these services.”

[7] Samex brought an urgent application on 12 October 2021 in which it sought to, inter alia, set aside the termination of its appointment on the basis that it was unlawful. The department did not resist the application but adopted a position in terms of which it would undertake a process of redefining Samex's scope of work for purposes of carrying out its obligation under the contract. On 23 November 2021 the parties agreed to the order that was subsequently issued by Mamosebo J (the consent order) which Samex sought to be enforced through the contempt proceedings. The relevant part of the order is couched in these terms:

"2. The first respondent's [department's] termination of the applicant's [Samex's] appointment as a consultant to provide professional services for the management and implementation of maintenance in hospitals and community healthcare facilities in the Northern Cape Province for a period of three years on turnkey basis is unlawful;

3. The first respondent's termination letter dated 31 August 2021, signed by the second respondent, is set aside;

4. Within 10 days of receipt of this order, the first and second respondent must deliver to the applicant the terms of reference;

5. Within 5 days of receipt of the terms of reference from the first and second respondent, the applicant shall respond to the terms of reference;

6. Once the applicant has responded to the terms of reference as stated in 5 above, the first respondent is directed to perform its obligations in terms of the written agreement concluded between the applicant and the first respondent on 30 November 2020.

7. In the event the parties do not agree on the terms of reference, the respondents are interdicted from appointing another service provider to render the service in terms of the agreement concluded with the applicant on 30 November 2020 pending the agreement on the terms of reference.'

- [8] In light that the department had not implemented the consent order, following some protracted engagements between the parties, Samex approached this Court for an order of contempt. On 28 October 2022 I made an order in para 4 above (the contempt order) that the department must comply with the consent order issued by Mamosebo J. The department successfully sought leave from me to appeal the contempt order which appeal is currently pending before the Supreme Court of Appeal. At present, as already alluded to, Samex is before this Court to enforce the contempt order in terms of s 18(3) of the Act and for secondary relief foreshadowed in para 2 above.
- [9] In the course of this litigation the department applied for the rescission of the consent order and the review of the decision in terms of which an agreement foundational to the consent order was reached. The two applications are still pending.
- [10] Samex contended that the consent order remains valid until varied or set aside. It argued that the department has shown its scorn and contempt towards the consent order through the appointment of the following contractors while the interdict as captured in the consent order was operational: KVS and Associate, Isibukiso Hospital Design Group Trading, Mekan Engineering Service (Mekan), MVD Kalahari, Cities Studio Africa (Pty) Ltd, UM Consultants, Quam Quantity Surveyors and Kago Built Environment Consultants, the fourth to the 11<sup>th</sup> respondents (collectively referred to as the business respondents). In particular, Samex states that on 22 and 24 March 2023 the department had, to Samex's detriment, brazenly violated the terms of the consent order, in particular para 7 thereof, in that it appointed service providers to provide professional services expertise, the work Samex had been appointed to perform. The two appointments which the department made on 22 March 2023 were of KVS and Associates, the fourth respondent, to upgrade pharmacies in various health facilities and Isibukiso

Hospital Design Group Trading, the fifth respondent, to upgrade the laundry at Robert Mangaliso Sobukwe Hospital.

- [11] On 24 March 2023 the department appointed three more contractors to perform professional services which Samex had been employed to execute. These were Mekan Engineering Services, the sixth respondent, to upgrade the laundry at various health facilities in the Northern Cape; MVD Kalahari, the seventh respondent, in relation to the project management and electrical engineering services for the old boiler house and EMS stations at Kuruman Hospital and Cities Studio Africa (Pty) Ltd, the eighth respondent, to refurbish Steinkopf Clinic in the Namakwa District.
- [12] On the principal relief, Samex contended that failure to grant the immediate enforcement of the contempt order pending the appeal would leave it with an 'empty order'. It further argued that the immediate operation of the order would protect judicial pronouncements and vindicate this Court's authority.
- [13] On the secondary relief, Samex contended that it has a right, which the department unjustifiably infringed, founded on the consent order, to seek an interdict restraining the department from appointing other contractors to render maintenance work in hospitals and other health facilities in the Northern Cape.
- [14] The department gainsaid that it had adopted the position of being continuously obstructive in defying court orders. It submits that the consent order, which is the subject matter of the leave to appeal, is in relation to maintenance services for which Samex was appointed whereas the business respondents were appointed to perform construction work which includes, inter alia, upgrading of pharmacies, upgrading of the laundry, refurbishment of the old boiler into an EMS services and the refurbishment of a clinic. It emphasised that the appointments of the business respondents were for construction and not maintenance service, the two services were different.

[15] Samex countered that the work it was engaged to perform as set out in Section G and annexure A to the main agreement cuts across project management roles, construction and maintenance work. It contended that for all practical purposes the consent order barred the department from appointing any service provider to render construction work which fell within Samex's scope of work in the health facilities within the Northern Cape. The consent order, so it was argued, does not only cover maintenance work but includes project management work from stage 1 to 6 as detailed in the scope of work contained in Section G and annexure A of the main agreement. Insofar as the appointments of the business respondents related to project management, upgrade and refurbishment of facilities, it fell within the scope of work Samex was enjoined to undertake, so the argument continued.

[16] The accepted common law rule of practice is that generally the execution of a judgment is automatically suspended upon the noting of an appeal, with the result that, pending the appeal, the judgment cannot be carried out and no effect can be given thereto, except with the leave of the court which granted the judgment. To obtain such leave the party in whose favour the judgment was given must make a special application. The purpose of this rule is to prevent irreparable damage from being done to the intending appellant, either by levy under a writ of execution or by execution of the judgment in any other manner appropriate to the nature of the judgment appealed from.<sup>1</sup>

[17] More currently, s 18 of the Act addresses the question of suspension of decisions pending the appeal. Section 18(1) provides that unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal. In terms of s 18(3) a court may only order operation and execution if the party who applied to the court for such an

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<sup>1</sup>*South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 544H-545A-F.



order, in addition, proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.

[18] What constitutes exceptional circumstances is not a matter of an exercise of a discretion, but a finding of fact.<sup>2</sup> In *Incubeta Holdings (Pty) Ltd and Another v Ellis and Another*<sup>3</sup> Sutherland J articulates the context relevant to s 18 in which the phrase 'exceptional circumstances' is employed as follows:

'The context relevant to s 18 of the SC Act is the set of considerations pertinent to a threshold test to deviate from a default position, ie the appeal stays the operation and execution of the order. The realm is that of procedural laws whose policy objectives are to prevent avoidable harm to litigants. The primary rationale for the default position is that finality must await the last court's decision in case the last court decides differently — the reasonable prospect of such an outcome being an essential ingredient of the decision to grant leave in the first place. Where the pending happening is the application for leave itself, the potential outcome in that proceeding, although conceptually distinct from the position after leave is granted, ought for policy reasons to rest on the same footing.

Necessarily, in my view, exceptionality must be fact-specific. The circumstances which are or may be 'exceptional' must be derived from the actual predicaments in which the given litigants find themselves...'

[19] It should therefore be considered first, whether Samex demonstrated exceptional circumstances which merits immediate operation of the contempt order pending the appeal. Secondly, it should be determined whether Samex established, on balance of probabilities, that it stands to suffer irreparable harm if the court does not order immediate operation of the contempt order and the absence of

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<sup>2</sup>*MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas, and Another* 2002 (6) SA 150 (C) at 156l – 157C; *Incubeta Holdings (Pty) Ltd and Another v Ellis and Another* 2014 (3) SA 189 (GJ) paras 17-18.

<sup>3</sup>2014 (3) SA 189 (GJ) paras 21-22.

irreparable harm to the State respondents who seek to appeal the contempt order made.

[20] In motivating that exceptional circumstances do exist Samex submitted that the contract between itself and the department would end on 09 September 2023. Sadly, it says, should the contract not be immediately enforced, it would not have derived any benefit flowing from it while the department continues to appoint service providers to perform work it was destined to perform. It submitted that it continues to suffer irreparable harm because it has expended considerable financial and other resources for it to effectively implement the contract. The operation of the contempt order pending the appeal, Samex argues, is the only remedy at its disposal to secure compliance with the consent order. Regard being had to the end date of the contract, it argued, if the contempt order is not immediately put into operation, the consent order and its concomitant contempt order would be rendered otiose.

[21] The potentiality of irreparable harm which is likely to be sustained by either of the parties requires careful consideration. In *Incubeta*,<sup>4</sup> properly construed, s 18(3) was said to mean:

‘(T)hat if the loser, who seeks leave to appeal, will suffer irreparable harm, the order must remain stayed, even if the stay will cause the victor irreparable harm too. In addition, if the loser will not suffer irreparable harm, the victor must nevertheless show irreparable harm to itself.’

[22] Samex submitted that it has good prospects of success in the appeal because the department, notwithstanding clause 7 of the consent order, went ahead to appoint Mekan Engineering Services and other business respondents. Surely it cannot be argued that the appeal by the State respondents is not bona fide. The appeal hinges on, inter alia, the question whether the consent order is supported by a

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<sup>4</sup>Ibid, fn 3 para 24.

lawful substratum insofar as it requires of the parties to agree on the terms of reference. Agreements to agree, such as one contained in the consent order, are generally unenforceable. I had reasoned in the judgment granting leave that 'an appellate court may find that clause 26.1 of the main agreement between the parties did not provide sufficient 'deadlock-breaking mechanism' in the event of an impasse or that the terms of the consent order, insofar as they required of the parties to reach an agreement on the terms of reference, were illusory or unacceptably uncertain and consequently incapable of enforcement'.

[23] Samex and the State respondents made attempts to craft the terms of reference which would define Samex's scope of work as envisaged in the consent order. To date, the issue remains unresolved. To the extent that Samex contends that the contract is near to its end date and has not been able to reap its benefits, it has other alternative civil remedies available to it should the contractual period expire prior to the exhaustion of the appeal process. To my mind, Samex did not demonstrate exceptional circumstances which necessitate a departure from the default position under s 18 of the Act.

[24] It bears repeating that all that the State respondents were required to do, in terms of the contempt order, was to comply with the consent order within the period of 30 days from date of the order. The contempt proceedings have not yet reached the stage where the deprivation of liberties of the State respondents has to be considered. However, it remains important to bear in mind that ordinarily contempt orders attract punishment which may include committal to imprisonment. In *S v Mamabolo (E-TV & Others Intervening)*<sup>5</sup>, the Constitutional Court apropos the open and democratic societies said:

"Such societies also permit committal proceedings, including imprisonment, to be used to compel recalcitrant persons to comply with court orders. What all these species of

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<sup>5</sup>2001 (3) SA 409 (CC), para 72.

contempt of court have in common is the objective of protecting the due administration of justice in actual proceedings. In one way or another they involve sanctions against perverting the course of justice in specific cases."

[25] It is a Constitutional imperative 'that a person should not be deprived of liberty, albeit only to constrain compliance with a court order, if reasonable doubt exists about the essentials.'<sup>6</sup> It goes without saying that any punishment to be meted out for the civil contempt, in the event that stage be reached, may lead to irreparable harm being sustained by the State respondents should the SCA find that the agreement was not supported by any lawful substratum. Indeed, the Court would be loath to restrict the personal liberty of the individual in civil contempt cases. It also holds true that if a period of imprisonment in those cases is imposed, it is usually or often suspended.<sup>7</sup>

[26] I have already opined, in the judgment granting leave to appeal, that the State respondents had reasonable prospects of success. While Samex showed that it would suffer irreparable harm should the contempt order not be put into effect pending the appeal, it failed to demonstrate the absence of irreparable harm to the State respondents who seek to appeal the contempt order. Accordingly, its application under s 18(3) of the Act cannot be upheld.

[27] I briefly deal with Samex's secondary relief. To recap, it first seeks an order that the contracts of service entered into between the department and the business respondents be suspended. It further seeks an interdictory relief restraining the implementation of the business respondents' appointments as contractors and any actions performed pursuant to the appointments. It must immediately be said that none of the business respondents participated in the proceedings before Mamosebo J nor the subsequent contempt proceedings. With regard to Um

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<sup>6</sup>*Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) para 20.

<sup>7</sup>*Protea Holdings Ltd v Wriwt and Another* 1978 (3) SA 865 (W) at 872B-C.

Consultants, Quam Quantity Surveyors and Kago Built Environment Consultants, the ninth to the 11<sup>th</sup> respondents, there is no indication on the founding papers that the department appointed any of them to render any service.

[28] Motion proceedings, as stated in *National Director of Public Prosecutions v Zuma*<sup>8</sup> 'are all about the resolution of legal issues based on common cause facts' and 'cannot be used to resolve factual issues because they are not designed to determine probabilities.' A genuine dispute of fact on the affidavits is to be decided on the version of the respondent, unless it is so far-fetched or so clearly untenable that the court would be justified to reject it merely on the papers, or if the denial by the respondent does not create a real or genuine dispute of fact.<sup>9</sup>

[29] There are clearly disputes of fact on the question whether the business respondents had been engaged to perform the same work as Samex was contracted to perform which, in my view, cannot be decided on the papers as they stand. In any event, the determination of the question whether the contractors' services were the same or different would require a detailed analysis and comparison between the business respondents' contracts of service and that of Samex. Save for their letters of appointment, the contracts of service of the respective respondents were not placed before the Court. On the basis of the *Plascon-Evans* rule the State respondents' version should prevail. The corollary of this is that the relief that the business respondents' contracts be suspended and the interdictory relief must fail.

[30] Needless to say, there would be no reason why an order ought not to issue directing that Samex is entitled to approach this Court on the same papers, duly

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<sup>8</sup>[2009] ZASCA 1; 2009 (2) SA 277 (SCA); 2009 (1) SACR 361 (SCA); 2009 (4) BCLR 393 (SCA); [2009] 2 All SA 243 (SCA) para 26.

<sup>9</sup>*Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) ([1984] 2 All SA 366; [1984] ZASCA 51) at 634A.

supplemented on the date to be determined by the registrar for the relief sought in Part B.

[31] What remains is the question of costs. The State respondents sought costs consequent upon the appointment of two counsel. In the premise, I make the following order.

**Order:**

1. Part A of the application is dismissed with costs, including the costs consequent on the employment of two counsel.
2. Leave is granted to the applicant to apply for the relief sought in Part B on the same papers, duly supplemented, on a date to be determined by the registrar of this Court.

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PHATSHOANE DJP

Appearances:

For the applicant:

Instructed by:

Adv MM Rip SC (with Adv L Nyangiwe)

RAMS Attorneys, Johannesburg.

Mkhokeli Pino Attorneys, Kimberley.

For the first to the third respondents:

Adv T Sibeko SC (with Mr L Bomela)

Instructed by:

Gqadushe Attorneys, Kimberley.