

**IN THE HIGH COURT OF SOUTH AFRICA  
EASTERN CAPE DIVISION, GRAHAMSTOWN**

**CASE NO: 1231/2021**  
**Date heard: 13 May 2021**  
**Date delivered: 01 June 2021**

In the matter between:

<b>MONOCEROS TRADING 135 (PTY) LTD t/a SECURE SMART RISK SOLUTIONS</b>	First Applicant
<b>SILVER SOLUTIONS 1522 CC</b>	Second Applicant
<b>KHANYA SECURITY SERVICES CC</b>	Third Applicant

and

<b>ESKOM HOLDINGS SOC LIMITED</b>	First Respondent
<b>QUICK SAVE SECURITY SERVICES CC</b>	Second Respondent
<b>RELIABLE GUARDS SECURITY AND CLEANING CC</b>	Third Respondent

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**JUDGMENT**

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**LOWE, J:**

**INTRODUCTION**

[1] Applicants seek confirmation of a rule *nisi* which issued as a matter of urgency on 30 April 2021 as follows:

"Having heard Adv. Paterson (SC), Counsel for the Applicants and having read the Notice of Motion and other documents filed of record:

**IT IS ORDERED THAT:**

1. A rule nisi do hereby issue calling upon the Respondents to show cause why the following order should not be made:
  - 1.1 That, pending the final determination of the review application set out in Part B of the Notice of Motion ("the review application");
  - 1.2 The first Respondent be interdicted from allocating any sites pursuant to the award of Tender No ETW5867;
  - 1.3 In the event that the sites have already been allocated at the time of filing of these papers and/or any order having been issued by this Honourable Court, the First Respondent be interdicted from concluding agreements with the Second and Third Respondents, alternatively implementing any agreements already concluded with the Second and Third Respondents;
  - 1.4 Directing that the Applicants shall continue to provide security services to the First Respondent under tender CORP4117EC, on the same terms and conditions as it is currently doing;
  - 1.5 That the costs of this application be determined as part of the review application.
2. The order set out in paragraph 1 above operate as an interim interdict pending notice to the Respondents and compliance with the procedures set out below.
3. The notice of motion and this order be served by sheriff and/or e-mail on the Respondent.
4. The Respondents file any notice to opposed and/or answering affidavits by noon on 6 May 2021;
5. The Applicants file any replying affidavits by noon on 10 May 2021;
6. Heads of Argument be filed:
  - 6.1 by the Applicants by noon on 11 May 2021; and
  - 6.2 by the Respondents by noon on 12 May 2021;
7. The rule nisi be enrolled by the Registrar for hearing on 13 May 2021 at 9.30 am or so soon thereafter as counsel may be heard.

BY ORDER OF COURT

S. KLEU  
REGISTRAR  
WR&C"

- [2] The matter involves a tender bid ETW5867 for the provision of security services at various sites in the Eskom Eastern Cape operating units (the tender).
- [3] The evaluation was in three stages: Stage 1 – Commercial Requirements; Stage 2 – Functionality; and Stage 3 – Finance.
- [4] Applicants submitted their respective tenders on the closing date, 10 November 2020, with a tender validity period of 90 days expiring thus on 12 February 2021, then extended until 31 March 2021.
- [5] It was only on 19 April 2021 that First Respondent notified Applicants of the tender outcome to the extent that they had been unsuccessful. This was "appealed" on 20 April 2021. At the same time Applicants sought documentation in respect of the award and an undertaking that this would not be implemented.
- [6] This was not provided.
- [7] It was thus that Applicants proceeded urgently to seek relief in a Part A and Part B Notice of Motion. Part A (now before me) seeks interim relief by way of an interim interdict preventing First Respondent from allocating the tender ETW5867, or interdicting it from concluding agreements of allocation, and ordering that Applicants will continue providing security services to First Respondent under order CORP4117EC, this all pending relief under Part B,

being the Main Review Application, declaring the tender award ETW5867 invalid and this to be reviewed and set aside.

- [8] It is common cause that the fundamental basis upon which the interim relief is sought is that First Respondent is alleged to have awarded the tender to Second and Third Respondents on a date beyond the extended validity period. The tender period expired on 31 March 2021, Applicants contending that the award was made on or about 15 April 2021, whilst Respondents contend this was in fact on 25 March 2021.
- [9] It is this crisp issue that in fact underpins the entire matter, but both counsel were of the view that I should nevertheless decide this only on an interim basis and as Part A of the relief sought.

#### INTERIM RELIEF

- [10] In order to succeed in an application for an interim interdict, Applicants would ordinarily be required to establish, firstly, a *prima facie* right to the relief sought, even if it is open to some doubt; secondly, a well-grounded apprehension of irreparable harm, if the interim interdict is refused and the ultimate relief is ultimately granted; thirdly, that the balance of convenience favours the granting of an interim interdict; and fourth, that Applicants have no other satisfactory remedy.

- [11] A *prima facie* right need not be established beyond reasonable doubt, but need be only *prima facie* established although open to some doubt.
- [12] The parties are in effect agreed that in this regard the date of the tender award is conclusive as to the *prima facie* right issue.
- [13] This is correct as the applicable principle is simply that as soon as the validity period of the tender has expired, without the award thereof, the tender process is complete and the tender may no longer be awarded in that process, and the parties relevant are not permitted to simply negotiate or enter into a contract outside that period. Put otherwise the offer to tender and the invitation period has expired<sup>1</sup>.
- [14] It is thus common cause that once this central issue is established this will establish *prima facie* the existence or otherwise of the right required at the interim stage.
- [15] Mr Gajjar, in my view, correctly for First Respondent, addressed only the above and did not contend that the remaining elements required for interim relief could be decided in Respondents' favour.

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<sup>1</sup> *Joubert Galpin Searle Inc v RAF* 2014 (4) SA 148 (ECD) at [66] to [70]; *Telkom SA Ltd v Marid Training (Pty) Ltd and Others* [2011] ZAGPPHC 1; *Ethekeweni Municipality v Mantengu Investment CC* [2020] ZAKZDHC 11.

## THE FACTS RELEVANT TO A PRIMA FACIE CASE

- [16] The basic facts and dates have already been set out above, it being common cause that the tender period expired on 31 March 2021, the issue being simply on what date the tenders were awarded to Second and Third Respondents by First Respondent.
- [17] In summary it is Applicants' case that the tender award was, on First Respondent's version, at some time between 15 and 19 April 2021. First Respondent contends however that in fact the decision to award the tender was taken on 25 March 2021 at a meeting of the Tender Committee, approving the award of the contract on certain conditions to be met – these being, so it goes, no more than contractual requirements and not part of the evaluation criteria.
- [18] On the papers the following appears:
- [18.1] From an extract of the minutes of the "*Tender Committee of the Eastern and Western Cape Operating Unit*" it appears that the said committee held a virtual meeting dealing with tender ETW5867, and considered and discussed (relevant to Second and Third Respondents) a "*submission*" dated 09 March 2021 by Thembakazi Wellem (the deponent to the First Respondent's replying affidavit and a Procurement Officer in First Respondent's Supply Chain Management Structure for the Eastern Cape Operating Unit).

[18.2] The minutes then state:

**"Decision required**

Approval is requested to award a contract to Quick Save Security Services and Reliable Guards Security & Cleaning, who submitted commercially, technically and financially acceptable offers for the provision of the supply of security services at various sites in the Eskom Eastern Cape Operating Unit.

The estimated contract values for the four zones for a 365 month contract amounts to R159 755 702.10."

[18.3] This decision, it appears, relates to Second and Third Respondents.

[18.4] The minutes then state:

"The committee approved the awarding of the contract on condition that the companies meet the safety requirements.

The committee approved the awarding of the contract to Reliable Guard Security & Cleaning on condition that they meet the safety requirements. The awarding to this company is due to the fact that they meet the requirements in terms of PSIRA rates.

Quick Save Security Services awarding is based on the fact that feedback are received from Policy Department (R&G) on whether we can award the contract to this supplier with the lower rates. If feedback is received and it states that we cannot pay less than the PSIRA rates, team to revert back to the Committee for adjudication."

[18.5] It is clear from this extract that:

- [18.5.1] Both Second and Third Respondents' "award" was conditional upon each meeting the "safety requirements" this in respect of Third Respondent the award "is due to the fact that they meet the requirements in terms of PSIRA rates".
- [18.5.2] Second Respondent's "award" was clearly one requiring "feedback" on whether the contract could be so awarded "with lower rates" and required, in terms, that the "team" was to revert back to the "committee for adjudication".
- [18.6] It is not clear at all from the answering affidavit that this particular tender committee was in fact the required bid adjudicating committee, nor is this set out.
- [18.7] To add to this the "Procurement Manager: Procurement and Supply Chain Management: Eastern Cape Operations Unit", in a letter dated 15 April 2021 and addressed to Applicants' Attorney stated as follows:

"Dear Sirs

**THE PROVISION OF THE SUPPLY OF SECURITY SERVICES AT VARIOUS SITES IN THE EASTERN CAPE OPERATING UNIT (THE SERVICES) – TENDER NUMBER: ETW 5867**



Your letter dated 15 April 2021 pertaining the subject matter has reference.

I hereby confirm that the tender award for the Eastern Cape security services has not been finalised. The outcome of the tender will be published on the platforms on which the invitation to tender was listed.

Unfortunately I'm not in a position to confirm whether your client Dikha Security and Cleaning Services CC was successful in the bidding process.

Eskom Eastern Cape is planning to publish the final outcome of the tender by latest Monday, 19 April 2021.

Yours Faithfully

(Signed)

**R.R. Muller**

**PROCUREMENT MANAGER**

**PROCUREMENT & SUPPLY CHAIN MANAGEMENT**

**EASTERN CAPE OPERATING UNIT**

[18.8] Whilst this is certainly not the final word on the award or its date, as this is a legal decision on the true facts for the Court to decide, at this stage of proceedings it is certainly indicative of the fact that a senior procurement manager was, as at 15 April 2021, of the view that the *"tender award .... [had] not been finalised"*.

[18.9] At this stage of the proceedings, insofar as is relevant on the case put up by First Respondent, it not only fails to establish that a decision was taken by the true bid adjudication committee, but further that on its very own documentation this was at best, in respect of Third Respondent, conditional (this *"condition"* still to be

established), and clearly in respect of Second Respondent had to be further considered on the issue of the "lower rate", a matter still to be considered by Second Respondent. Further there is the clear view of the Procurement Management himself that this was not finally awarded.

[18.10] On First Respondent's own papers it has failed to establish the necessary to defeat a *prima facie* case made out by Applicants in the sense and to the extent required. Put differently Applicants have established the necessary *prima facie* case sufficient for the establishment of that requirement as to the first leg of the enquiry.

[18.11] In any event and in addition to the above I agree with Mr Paterson SC that it is not possible for the tender committee to "award" a contract on a condition which materially impacts on whether a required and relevant part of the tender has been, or will be, met. The award must be made in consideration of the fact that all material conditions have been met, and not whether a "condition" may be satisfied post award.

[19] I should say that Mr Gajjar referred to the note on page 12 of the tender document. This in fact makes it clear that "*proof that the highest ranked tenderer is able to meet the contractual requirements, must be submitted prior to contract award*".

[20] In my view, this too supports the conclusion I have reached as set out above.

### **CONCLUSION**

[21] In the result Applicants have established a *prima facie* right to the relief sought.

[22] They have also established a well-grounded apprehension of irreparable harm, if the interim interdict is refused and the review is ultimately successful.

[23] The balance of convenience clearly favours Applicants and the likely prejudice to Respondents is not demonstrated, if the grant of the final relief shows this to be wrong, further the stronger the *prima facie* right the less the emphasis on other requirements.

[24] Clearly Applicants do not have any other satisfactory remedy.

[25] In the result the rule issued by Roberson J falls to be confirmed.

### **ORDER**

[26] The following order issues in the result:

1. The Rule *nisi* issued on 30 April 2021 is confirmed as to Part 1.1, 1.2, 1.3 and 1.4 thereof.

2. The costs of the interim relief both before Roberson J and herein are reserved for the Review.

  
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M.J. LOWE  
JUDGE OF THE HIGH COURT

Obo Applicants:

Adv T J M Paterson SC

Instructed by:

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Obo First Respondent:

Adv G J Gajjar

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