



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

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Status: Immediate

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Tyte Security Services CC v Western Cape Provincial Government and Others (Case no 479/2024)
[2024] ZASCA 88 (7 June 2024)

Today the Supreme Court of Appeal (SCA) dismissed with costs an appeal by Tyte Security Services CC (Tyte) against a judgment of the Western Cape Division of the High Court, Cape Town (the high court).

The first respondent, the Western Cape Provincial Government (the Provincial Government), contracts with security companies for the provision of essential security services in respect of property belonging to it that was especially vulnerable to unlawful occupation and vandalism. Each contract typically endures for two years. On 25 March 2021, the tender for the services in question, following a state procurement tender process, was first awarded jointly to Tyte and Seal Security (Seal) (the first contract). Red Ant Security Relocation and Eviction Services (Pty) Ltd, an unsuccessful tenderer, applied, successfully, to the high court to review and set aside the decision to award the first contract jointly to Seal and Tyte.

On 21 April 2021, the Provincial Government invited fresh bids for a new 24-month contract. On 31 May 2023, it awarded the tender to, and concluded a contract to commence immediately (the second contract) with, the fourth respondent, Royal Security CC (Royal). On 15 June 2023, Seal brought an urgent application for an order that, pending the final determination of a review application (the review application), the Provincial Government be interdicted from implementing or giving effect to its decision to award the tender to Royal. By way of a counter application, Tyte also sought the review and setting aside of the award. On 27 June 2023, Francis J, in issuing directions in respect of the further conduct of the review application, ordered that Seal and Tyte would continue to render services in terms of the first contract, pending the outcome of the review application.

The review application, heard by Gamble et Wille JJ was dismissed and the award of the tender to Royal upheld (the main order). In essence, the main order directed that Royal shall take over and commence the operations required under the tender contract within one calendar month and that Tyte and Seal shall hand over such operations to Royal and do everything necessary to enable Royal to commence with the required security services within the stipulated timeframe.

On 28 February 2024, Tyte applied for leave to appeal the main order. On 7 March 2024, Royal applied urgently in terms of s 18(1), read with s 18(3), of the Superior Courts Act 10 of 2013 (the Act) (the s 18 application), for an order seeking, essentially, that the main order be implemented immediately pursuant

to the provisions of s 18 of the Act, and not be suspended pending the hearing of any application for leave to appeal and the final determination of any appeal against the main order.

The high court heard the s 18 application and Tyte's application for leave to appeal the main order on 22 April 2024. On 24 April 2024, the high court dismissed Tyte's application for leave to appeal and delivered judgment in the s 18 application four days later, holding that the operation and execution of the orders granted in the review application are to be implemented pending the outcome of any appeal process by Tyte or until another court otherwise directs (the execution order). On 3 May 2024, Tyte filed an application with the SCA for leave to appeal the main order. Exercising an automatic right of appeal under s 18(4)(a)(ii) of the Act, Tyte filed a notice of appeal in respect of the execution order with the SCA on 8 May 2024. The matter was thereafter enrolled, in accordance with s 18(4)(a)(iii), as one of urgency for hearing on Monday 27 May 2024.

Before the SCA, Tyte, argued that it was for an applicant for an execution order (in the position of Royal), to establish three separate, distinct and self-standing requirements, namely: *first*, exceptional circumstances (the *first*); *second*, that it will suffer irreparable harm if the order is not made (the *second*) and, *third*, the party against whom the order is made (in this case Tyte) will not suffer irreparable harm if the order is made (the *third*).

The SCA reasoned that it was important to recognise that the existence of 'exceptional circumstances' was a necessary prerequisite for the exercise of the court's discretion under s 18 of the Act, and that if the circumstances were not truly exceptional, that was the end of the matter and the application should fail and be dismissed. It further stated that the *second* and *third* could not be approached as isolated enquiries, as this may well strip a court of any discretion that it may possess or that it could give rise to a manifestly inequitable conclusion, which could serve to undermine the rule of law and disregard entirely the rationality, reasonableness and proportionality yardsticks that have become important jurisprudential touchstones.

The SCA held that, not only had Tyte had the benefit of a two-year contract that was set aside as having been unlawfully awarded to it, but by the time the matter came to be heard in the SCA, Tyte would have continued to reap the rewards of that contract for an additional year, thus denying Royal the benefit of at least one year of the second contract, which the high court had found, in the review application, to have been lawfully awarded to it. It further held that, inasmuch the second contract was due to terminate in June 2025, there was every prospect that by the time the appeal came to be heard and irrespective of the outcome, Royal would be left remediless. In the circumstances, the SCA found that there was little room for Tyte to argue before it that exceptional circumstances do not subsist or that Royal will not suffer irreparable harm. The SCA also agreed with the high court that Tyte would not suffer any judicially cognisable harm if the main order were implemented pending the appeal.

In the result, the SCA issued an order dismissing the appeal with costs, including those of two counsel where so employed.

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