THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 479/2024

In the matter between:

TYTE SECURITY SERVICES CC	**APPELLANT**
and	
WESTERN CAPE PROVINCIAL GOVERNMENT	**FIRST RESPONDENT**
MEC FOR THE DEPARTMENT OF INFRASTRUCTURE,	
WESTERN CAPE PROVINCIAL GOVERNMENT	**SECOND RESPONDENT**
THE DEPARTMENT OF INFRASTRUCTURE,	
WESTERN CAPE PROVINCIAL GOVERNMENT	**THIRD RESPONDENT**
ROYAL SECURITY CC	**FOURTH RESPONDENT**
SS SOLUTIONS (PTY) LTD t/a SEAL SECURITY	**FIFTH RESPONDENT**

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

Coram: PONNAN, MAKGOKA, MABINDLA-BOQWANA and GOOSEN JJA and COPPIN AJA

Heard: 27 May 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website, and release to SAFLII. The date for hand down is deemed to be 7 June 2024 at 11h00.

Summary: Section 18 of Superior Courts Act 10 of 2013 – leave to execute pending appeal – requirements of exceptional circumstances and irreparable harm considered.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Gamble and Wille JJ, sitting as court of first instance):

The appeal is dismissed with costs, including those of two counsel where so employed.

JUDGMENT

Ponnan JA (Makgoka, Mabindla-Boqwana and Goosen JJA and Coppin AJA concurring):

[1] I observed in *Manong v Minister of Public Works* that 'State tenders have become fertile ground for litigation'.[1] A decade and a half later, this yet again is one such matter, having occupied the attention of our courts for some four years. A challenge to a previous award for the same services came before the Western Cape High Court, Cape Town (the high court) in 2001. Binns-Ward J commenced his unreported decision in that matter (*Red Ant Security Relocation and Eviction Services (Pty) Ltd v The Department of Human Settlements (Western Cape)* (*Red Ant*)) with a reference to Cachalia and Kohn that: 'Tendering has become a verifiably "messy business" and the courts are increasingly drawn into the quagmire in review proceedings. . .'.[2]

[2] 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, which is especially vulnerable to unlawful occupation and vandalism. Each contract typically endures for two years. On

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[1] *Manong & Associates (Pty) Ltd v Minister of Public Works and Another* [2009] ZASCA 110; 2010 (2) SA 167 (SCA); [2010] 1 All SA 267 (SCA) para 1.

[2] R Cachalia and L Kohn 'The Quest for "Reasonable Certainty": Refining the Justice and Equity Remedial Framework in Public Procurement Cases' (2020) 137 *SALJ* 659 at 696 cited by Binns-Ward J in *Red Ant Security Relocation and Eviction Services (Pty) Ltd v The Department of Human Settlements (Western Cape)* WCHC Case No 9370/2021 (*Red Ant*) para 1.

25 March 2021, the tender for the services in question was first awarded jointly to the appellant, Tyte Security Services CC (Tyte), and Seal Security (Seal). The award of the contract (the first contract) followed upon a state procurement tender process.

[3] Red Ant Security Relocation and Eviction Services (Pty) Ltd, an unsuccessful tenderer, applied to the high court to review and set aside the decision to award the first contract jointly to Seal and Tyte. The application succeeded before Binns-Ward J, who, *inter alia*: (i) declared the award of the first contract invalid and set it aside; (ii) suspended the declaration of invalidity, pending the conclusion of an expedited process *de novo* by the Provincial Government to lawfully procure the services, the subject of the tender; and, (iii) directed the Provincial Government to ensure that the process is completed within six months or such further period as may be permitted by the court on application to it.

[4] 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.

[5] The review application was heard by Gamble et Wille JJ from 28 to 30 November 2023. Separate judgments were delivered on 21 February 2024, with Gamble J concurring, for somewhat different reasons, in the order proposed by Wille J. The review application by Tyte and Seal was dismissed and the award of the tender to Royal upheld. The following order issued (the main order):

‘1. The applicant’s [Tyte’s] application and the twenty-second respondent’s [Seal’s] counter application for the judicial review and setting aside the award by the first to ninth respondents of Tender [T002/23] to the tenth respondent [Royal] are dismissed.

2. The tenth respondent shall take over and commence the operations required under the tender contract within one calendar month of the date of this order.
3. The applicant and the twenty-second respondent shall hand over such operations to the tenth respondent and do everything necessary to enable the tenth respondent to commence with the required security services within the stipulated timeframe.
4. The applicant shall pay the tenth respondent's costs of the review application (including the costs of two counsel where retained).
5. The twenty-second respondent shall pay the tenth respondent's costs of and incidental to the counter application (including the costs of two counsel where retained).
6. The applicant shall pay the tenth respondent's costs of the interdict application brought under case number 9698/2023.
7. There shall be no further orders regarding costs.'

[6] 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 in the following terms:

'. . .

2. That paragraphs 1 to 3 of the order [the main order] handed down by this Court on 21 February 2024 in the main application brought under the abovementioned case number be implemented immediately pursuant to the provisions of section 18 of the Superior Courts Act, No. 10 of 2013, and not be suspended pending the hearing of any application for leave to appeal and the final determination of any appeal against the order, whether in the High Court, the Supreme Court of Appeal, or the Constitutional Court.
3. That the costs of this application be paid by those Respondents who oppose the relief sought.'

[7] On 8 March 2024, Seal and Tyte gave notice of their intention to oppose the s 18 application. The Provincial Government elected to abide. Seal withdrew its opposition on 12 March 2024 and subsequently complied with the deadline fixed by the main order by handing operations over to Royal on 21 March 2024. 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. Four days later, it delivered judgment in the s 18 application. It ordered that

'[t]he operation and execution of the orders numbered 1, 2 and 3 . . . granted on 21 February 2024 . . . are to be implemented pending the outcome of any appeal process by [Tyte] or until another court otherwise directs' (the execution order).

[8] On 3 May 2024, Tyte filed an application with this Court for leave to appeal the main order. Exercising an automatic right of appeal under s 18(4)(ii) of the Act, Tyte filed a notice of appeal in respect of the execution order with this Court on 8 May 2024. The matter was thereafter enrolled, in accordance with s 18(4)(iii), as one of urgency for hearing on Monday 27 May 2024.

[9] This Court has examined the requirements for the implementation of an execution order pending an appeal in *University of the Free State v Afriforum* (*Afriforum*);[3] *Ntlemeza v Helen Suzman Foundation*;[4] *Premier of Gauteng v Democratic Alliance*;[5] *Knoop v Gupta (Knoop)*;[6] and, most recently, in *Zuma v Downer and Another*.[7] Relying, in part, on some of the statements made in those judgments, in particular *Afriforum* and *Knoop,* counsel for 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*).

[10] Whilst there are indeed statements in those judgments that would appear to support counsel's fundamental hypothesis, they seem to have been made in passing. They thus call for closer examination in this matter. An important point of departure, so it seems to me, is that consideration of each of the so-called three requirements is

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[3] *University of the Free State v Afriforum and Another* [2016] ZASCA 165; [2017] All SA 79 (SCA); 2018 (3) SA 428 (SCA) (*Afriforum*).
[4] *Ntlemeza v Helen Suzman Foundation and Another* [2017] ZASCA 93; [2017] 3 All SA 589 (SCA); 2017 (5) SA 402 (SCA).
[5] *Premier for the Province of Gauteng and Others v Democratic Alliance and Others* [2020] ZASCA 136; [2021] 1 All SA 60 (SCA).
[6] *Knoop and Another NNO v Gupta* (*Tayob Intervening*) [2020] ZASCA 149; [2021] 1 All SA 17 (SCA); 2021 (3) SA 135 (SCA) (*Knoop*).
[7] *Zuma v Downer and Another* [2023] ZASCA 132; [2023] 4 All SA 644 (SCA); 2024 (2) SA 356 (SCA); 2024 (1) SACR 589 (SCA).

not a hermetically sealed enquiry and can hardly be approached in a compartmentalised fashion.

[11] It is important to recognise that the existence of 'exceptional circumstances' is a necessary prerequisite for the exercise of the court's discretion under s 18. If the circumstances are not truly exceptional, that is the end of the matter. The application must fail and falls to be dismissed. If, however, exceptional circumstances are found to be present, it would not follow, without more, that the application must succeed.[8] In its consideration of s 17(2)*(f)* of the Act, the Constitutional Court pointed out in *Liesching and Others v S*:

'As with section 18(1), section 17(2)(f) prescribes a departure from the ordinary course of an appeal process. Under section 17, in the ordinary course, the decision of two or more Judges refusing leave to appeal is final. However, section 17(2)(f) allows for a litigant to depart from this normal course, in exceptional circumstances only, and apply to the President for reconsideration of the refusal of leave to appeal.

In *Ntlemeza*, the requirement of exceptional circumstances is viewed as a "controlling measure". In terms of section 17(2)(f), the President has a discretion to deviate from the normal course of appeal proceedings – such discretion can only be exercised in exceptional circumstances. The requirement of the existence of exceptional circumstances before the President can exercise her discretion is a jurisdictional fact which may operate as a controlling or limiting factor.'[9]

[12] It has long been accepted that it is 'undesirable to attempt to lay down any general rule' in respect of 'exceptional circumstances' and that each case must be considered upon its own facts.[10] In *MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas and Another*, Thring J summarised the approach to be followed. He said that 'what is ordinarily contemplated by the words "exceptional circumstances" is

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[8] See *George Hlaudi Motsoeneng v South African Broadcasting Corporation Soc Ltd and Others* [2024] ZASCA 80 para 13, where this was said in respect of s 17(2)*(f)* of the Superior Courts Act, which provides:

'The decision of the majority of the judges considering an application referred to in paragraph (b), or the decision of the court, as the case may be, to grant or refuse the application shall be final: Provided that the President of the Supreme Court of Appeal may in exceptional circumstances, whether of his or her own accord or on application filed within one month of the decision, refer the decision to the court for reconsideration and, if necessary, variation.'

[9] *Liesching and Others v S* [2018] ZACC 25; 2018 (11) BCLR 1349 (CC); 2019 (1) SACR 178 (CC); 2019 (4) SA 219 (CC) paras 136-137.

[10] *Norwich Union Life Insurance Society v Dobbs* 1912 AD 395 at 399.

something out of the ordinary and of an unusual nature; something which is excepted in the sense that the general rule does not apply to it; something uncommon, rare or different'.[11]

[13] What constitutes irreparable harm is always dependent upon the factual situation in which the dispute arises, and upon the legal principles that govern the rights and obligations of the parties in the context of that dispute. It was accepted in *Knoop* that: 'the need to establish exceptional circumstances is likely to be closely linked to the applicant establishing that they will suffer irreparable harm if the . . . order is not implemented immediately'.[12] The same, I daresay, can be said of its counterpart, the absence of irreparable harm to the respondent. In that sense, the presence or absence of irreparable harm, as the case may be, can hardly be entirely divorced from the exceptional circumstances enquiry. It would perhaps be logically incoherent for a court to conclude, on the one hand, in favour of an applicant that exceptional circumstances subsist, but, on the other, against an applicant on either leg of the irreparable harm enquiry.

[14] The argument, as I have it, is that as the language of s 18(3) is clear – it is for an applicant, in addition to exceptional circumstances, to prove on a balance of probabilities that it will suffer irreparable harm and conversely the other party would not. A court is thus required to undertake what would be in the nature of a tick-box exercise by enquiring into and satisfying itself as to the *first*, then the *second* and finally the *third*, in that order. Unless each box is successfully ticked, the applicant must fail. Here, so the argument proceeds, the high court failed to undertake such an exercise; had it done so, it could not permissibly have ticked the third box, consequently, the s 18 application should have failed. Even accepting that the legislature has employed the words 'in addition [to exceptional circumstances] proves on a balance of probabilities' in s 18(3), it would be passing strange that if an applicant comes short in respect of either the *second* or *third* requirements it would nonetheless still be able to successfully meet the exceptional circumstances threshold. The use of the words 'in addition proves' in s 18(3) ought not to be construed as necessarily enjoining a court

[11] *MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas, and Another* 2002 (6) SA 150 (C) at 156H-J.
[12] *Knoop* fn 6 above para 47.

to undertake a further or additional enquiry. The overarching enquiry is whether or not exceptional circumstances subsist. To that end, the presence or absence of irreparable harm, as the case may be, may well be subsumed under the overarching exceptional circumstances enquiry. As long as a court is alive to the duty cast upon it by the legislature to enquire into, and satisfy itself in respect of exceptional circumstances, as also, irreparable harm, it does not have to do so in a formulaic or hierarchical fashion.

[15] Although it has been postulated that the *second* and *third* are distinct and discrete enquiries, they are perhaps more accurately to be understood as being two sides of the same coin. The same facts and circumstances, which by that stage ought largely to be either common cause or undisputed, will inform both enquiries. The logical corollary of an applicant suffering irreparable harm, will invariably – but not always – be that the other party has not. The enquiry into each can thus hardly be mutually exclusive, particularly because as far as the *third* is concerned, unlike the *second*, the onus cast upon an applicant would be to prove a negative, in accordance with the usual civil standard. This suggests that, as with the exceptional circumstances enquiry, a court considering both the *second* and *third* must have regard to all of the facts and circumstances in any particular case. Insofar as the *third* goes, although s 18(3) casts the onus (which does not shift) upon an applicant, a respondent may well attract something in the nature of an evidentiary burden.[13] This would be especially so where the facts relevant to the *third* are peculiarly within the knowledge of the respondent. In that event, it will perhaps fall to the respondent to raise those facts in an answering affidavit to the s 18 application, which may invite a response from the applicant by way of a replying affidavit.

[16] What counsel's argument boiled down to was that as each of the *second* and the *third* so-called requirements had to be approached as discrete, isolated enquiries, there was accordingly to be no weighing-up of the irreparable harm of the one as against the other. In that regard, reliance was placed on *Afriforum*,[14] which, in turn,

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[13] *MV 'TARIK III' Credit Europe Bank N.V. v The Fund Comprising the Proceeds of the Sale of the MV Tarik III and Others* [2022] ZASCA 136; [2022] 4 All SA 621 (SCA) para 24–34.
[14] *Afriforum* fn 3 above para 10-11.

referred with approval to *Incubeta Holdings and Another v Ellis and Another*, where Sutherland J is reported to have said:

'A hierarchy of entitlement has been created . . . Two distinct findings of fact must now be made, rather than a weighing-up to discern a "preponderance of equities".'[15]

It is not clear what the learned Judge sought to convey by 'a hierarchy of entitlement has been created'. Counsel experienced some difficulty in trying to explain – or support – such a characterisation.

[17] Counsel fared no better in defence of the contention that s 18(3) leaves no room for a 'weighing-up' by the court. As I understood counsel, it was for an applicant, on pain of otherwise failing, to show a complete absence of irreparable harm to the other party. Any irreparable harm (or even the potentiality of irreparable harm) to a respondent, no matter how slight would irredeemably tip the scales against an applicant. It thus would matter not that the irreparable harm of a respondent was relatively slight or inconsequential or that it was significantly outweighed by that of the applicant. The mere fact of irreparable harm in respect of the respondent, irrespective of its nature or extent, would per force non-suit the applicant. In other words, unless there was no (as in 'zero', in the words of counsel) irreparable harm to a respondent the s 18 application had to fail.

[18] Counsel did not shrink from the logical consequence of the contention, namely that such a mechanistic approach, which rested on the supposition that the *second* and *third* had to be approached as isolated enquiries, 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. This approach, if it is to be favoured, would disregard entirely the rationality, reasonableness and proportionality yardsticks that have become important touchstones in our jurisprudence. It likely would also, to all intents and purposes, set the bar so high as to render the remedy illusory. Counsel was however willing to accept that there must always remain a residual discretion. What exactly was meant by a residual discretion or when precisely it was to be exercised remained opaque. However, on the acceptance of a discretion, even a residual one, the argument against a weighing-up evaporates. If the argument were

[15] *Incubeta Holdings and Another v Ellis and Another* [2013] ZAGPJHC 274; 2014 (3) SA 189 (GSJ) para 24.

correct, the court would have no discretion to grant relief under s 18 whatever the consequences or however irreparably disastrous to an applicant.

[19] Irreparable harm, it has been said in a somewhat different context, is more than a rationale – it is a critical factor in testing the claim for an interlocutory injunction.[16] The nature of irreparable harm is not easy to define. R J Sharpe points out:

'The rationale for requiring the plaintiff to show irreparable harm is readily understood. If damages will provide adequate compensation, and the defendant is in a position to pay them, then ordinarily there will be no justification in running the risk of an injunction pending the trial. While it is easy to see why this requirement should be imposed, it is difficult to define exactly what is meant by irreparable harm.'[17]

[20] Over a century ago, Innes JA, after referring to Van der Linden's Institutes, where the essentials for an interdict application had been enumerated, had this to say:

'That element [the injury feared must be irreparable] is only introduced by him in cases where the right asserted by the applicant, though prima facie established, is open to some doubt. In such cases he says the test must be applied whether the continuance of the thing against which an interdict is sought would cause irreparable injury to the applicant. If so, the better course, is to grant the relief if the discontinuance of the act complained of would not cause irreparable injury to the other party.'[18]

Interim interdicts (akin to interlocutory injunctions) are regular fare in our courts. They provide a flexible and most useful tool in the aid of justice. Our courts have accordingly come to accept that the remedy should not be granted if there is a danger that it may work an injustice.

[21] In *Hoffmann-La Roche & Co AG and Others v Secretary of State for Trade and Industry*, Lord Wilberforce expressed the view that:

'The object of [an interim injunction] is to prevent a litigant, who must necessarily suffer the law's delay, from losing by the delay the fruit of his litigation; this is called "irreparable" damage, meaning that money obtained at trial may not compensate him.'[19]

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[16] P M Perell 'The Interlocutory Injunction and Irreparable Harm' (1989) 68 *The Canadian Bar Review* 538 at 540.
[17] R J Sharpe *Injunctions and Specific Performance* (1983) at 77. Cited in P M Perell 'The Interlocutory Injunction and Irreparable Harm' (1989) 68 *The Canadian Bar Review* 538 at 540.
[18] *Setlogelo vs Setlogelo* 1914 AD 221 at 227.
[19] *Hoffmann-La Roche & Co AG and Others v Secretary of State for Trade and Industry* [1975] AC 295 at 355; [1974] 12 All ER 1128 at 1146 (HL).

Albeit said in the context of the consideration of a wholly discretionary remedy, and thus not perfectly analogous, the sentiment expressed is not entirely without value here, inasmuch as it echoes precisely the position in which Royal finds itself.

[22] The judgment of Binns-Ward J essentially only concerned the issue of what would be a just and equitable remedy in the circumstances of the case. His order that a fresh tender process be completed within six months was not met and subsequently had to be extended until 31 May 2023. This meant that Seal and Tyte had the full benefit of the entire period of the first contract, notwithstanding the declaration of invalidity and the contract having been set aside. In addition, the effect of the order of Francis J was that Seal and Tyte simply continued to perform services in terms of the tender awarded to them jointly on 25 March 2021.Despite the award having been set aside by Binns-Ward J, by the time the main order came to be delivered on 21 February 2024, Seal and Tyte had the benefit of the award for a further nine months. Thus, not only has 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 this Court, it would have continued to reap the rewards of that contract for an additional year. Conversely, as things presently stand, Royal has been denied the benefit of at least one year of the second contract, which the high court has found in the review application to have been lawfully awarded to it.

[23] Inasmuch as the second contract is due to terminate in June 2025, there is every prospect that by the time the appeal comes to be heard and irrespective of the outcome, Royal will be left remediless. Royal drew attention to the fact that when the review application issued, it had already commenced with the roll-out process, which was well underway. It is not in dispute that, as required by the second contract, it had to provide insurance cover of R5 million per 300 guards, furnish a performance guarantee in an amount equal to 1% of the contract, being R2.8 million and establish sites in six different districts. Royal has also spent in excess of R1 million in respect of uniforms and R7.5 million in respect of an order for tactical response vehicles. As against that, the continued rendering of services in terms of the impugned first contract, has generated in excess of R70 million for Seal and Tyte.

[24] Moreover, it is common ground that the price tendered by Royal was the most favourable to the Provincial Government, being lower than all the others by a significant margin. Royal's bid of R282 million for the 24-month contract was 18.45% below the pre-tender estimate, whereas Seal and Tyte exceeded the estimate by 5.62% and 1.35% respectively. The anticipated windfall to Seal and Tyte of a further turnover of R100 million after the award of the bid to Royal represents 28.16% of the full-term value of the second contract. Apart from illustrating the exceptional nature of this matter, these facts also bear testimony to the extent of the existing and ongoing prejudice to Royal and the public at large. The significance of the public interest was recognised by the high court in the concurring judgment of Gamble J in the review application, in which he said:

'At the end of it all, the approach adopted by the province was in accordance with the touchstone of public procurement – the promotion of competition and cost-effective tendering. Importantly, the exercise resulted in a significant saving for the public purse – around R83m when compared to Seal's price.'

[25] In the circumstances, it was unsurprising that in this Court, Tyte was constrained to accept that there are exceptional circumstances and that Royal will suffer irreparable harm. The argument thus centred on the *third*. However, even were we to approach the matter on the footing posited by counsel, namely that the *third* had to be considered as an isolated edifice, the high court effectively put paid to that in these terms:

'Simply put, the tenth respondent has been losing daily revenue on not being permitted to perform under a lawfully awarded tender. On the other side of the coin, the twenty-second respondent has been benefiting from an unlawfully awarded tender for close to three years and will suffer no judicially cognizable harm whatsoever if the tenth respondent were to perform the services provided in its contract for the remaining little more than one year of its intended duration. The twenty-second respondent does not engage with these factual averments, which are common cause.'

[26] In that, the high court cannot be faulted. In arguing that it will suffer irreparable harm, Tyte takes a rather narrow view of the matter. It focuses on the profits that it will lose going forward, but ignores entirely the windfall that it has received from a contract that was unlawfully awarded to it. It seeks to continue to reap that windfall for an indefinite period well into the future. It does so in the face of a new contract that has

been held by the high court to have been lawfully awarded to Royal. What is more, for as long as Tyte continues to perform in terms of the first contract that has been held to be unlawful, it does so at an inflated cost to the Provincial Government. The windfall, taken together with the inflated costs, is completely dispositive of Tyte's argument that the harm to it is irreparable.

[27] There will obviously be cases in which a litigant may suffer irreparable harm by being forced to abide a decision of a court that is subsequently held to be wrong on appeal. However, even on a most general impression as to the strength of Tyte's case and its ultimate prospects of success, this is not such a matter. The argument is that if Tyte is compelled to now hand over operations to Royal, but ultimately succeeds in having the award of the second contract set aside on appeal, then the rendering of the services would, without more, have to revert to it. Tyte asserts such an entitlement by dint of the orders of Binns-Ward J and Francis J. However, those orders were a temporary expedient and in no way sought to (or could for that matter) resolve the respective rights and obligations of the parties.

[28] Any success by Tyte in the contemplated appeal, would achieve no more than the setting aside of the award of the second contract to Royal. It would not result in the substitution of Tyte for Royal as the successful tenderer – such relief was advisedly not sought. The consequence of the setting aside of the award to Royal on appeal is that the matter must then be dealt with under s 172(1)*(b)* of the Constitution (as it was at the outset by Binns-Ward J in *Red Ant*), pursuant to which courts have the widest possible remedial discretion.[20] It is thus not a foregone conclusion that success in the envisaged appeal will inexorably lead to Tyte replacing Royal. The upshot is that such prejudice as Tyte seeks to rely upon is perhaps more ephemeral than real.

[29] In the result, the appeal must fail and it is accordingly dismissed with costs, including those of two counsel where so employed.

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[20] *Millennium Waste Management (Pty) Ltd v Chairperson of the Tender Board: Limpopo Province and Others* [2007] ZASCA 165; [2007] SCA 165 (RSA); [2008] 2 All SA 145; 2008 (2) SA 481; 2008 (5) BCLR 508; 2008 (2) SA 481 (SCA); *Minister of Mineral Resources and Energy and Others v Sustaining the Wild Coast NPC and Others* [2024] ZASCA 84.

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V M PONNAN

JUDGE OF APPEAL

Appearances

For the appellant:	R van Riet SC and P Tredoux
Instructed by:	De Waal, Grobbelaar, Fisher Inc., Cape Town
	JL Jordaan Attorneys, Bloemfontein
For the first to third respondents:	A Nacerodien (heads of argument prepared by J Newdigate SC and A Nacerodien)
Instructed by:	The State Attorney, Cape Town
	The State Attorney, Bloemfontein
For the fourth respondent:	JC Heunis SC and PS van Zyl
Instructed by:	Ravindra Maniklall & Co., Durban
	Phatshoane Henney Attorneys, Bloemfontein.