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**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 30256/2018

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE:	YES / NO.
(2) OF INTEREST TO OTHER JUDGES:	YES / NO.
(3) REVISED:	✓
DATE	16/05/2018
SIGNATURE	

In the matter between:

**GIDEON NAPOLEON SAM N.O
IN HIS CAPACITY AS TRUSTEE OF
THE SA RED CROSS AIR MERCY SERIVES**

Applicant

**THE NATIONAL MINISTER OF FINANCE,
NATIONAL TREASURY DEPARTMENT**

First Respondent

**PERTER MTHOMBENI N.O: CHIEF DIRECTOR
CONTRACT MANAGEMENT-NATIONAL
TREASURY**

Second Respondent

**MEC FOR HEALTH FOR
LIMPOPO PROVINCE N.O**

Third Respondent

**HEAD OF DEPARTMENT OF HEALTH:
LIMPOPO PROVINCE, DR NP KGAPHOLE**

Fourth Respondent

JUDGMENT

DAVIS, J

[1] Introduction

This is an application for the implementation of the unexpired portion of a tender awarded to the Applicant by the First Respondent for the rendering of National Aero-Medical Services to the State. It came before me yesterday in the urgent motion court and it is opposed by the First and Second Respondents.

[2] Parties

The Applicant is the duly authorised trustee of the SA Red Cross Air Mercy Service Trust (the “SA Red Cross”), being the successful tenderer. The First Respondent is the National Treasury and the Second Respondent is its Director: Fleet Management who is the Acting Chief-Director: Transversal Contracting. The Third Respondent is the MEC for Health for the Limpopo Province and the Fourth Respondent is the Head of the Department of Health, Limpopo Province.

[3] Factual Matrix

Before dealing with the relief claimed, it is apposite to sketch the factual matrix which is, by and large, common cause:

- 3.1 On 31 August 2015 the National Treasury accepted the SA Red Cross' bid in tender RT 79-2015 for the rendering of a national aero-medical service to the State for the period 1 September 2015 to 31 August 2018. The letter of acceptance issued by the National treasury constituted a binding contract (and expressly stated this to be the position) but no delivery would be effected until written orders had been placed.
- 3.2 Hereafter the rendering of aero-medical services took place and were rendered, in particular in the two provinces which featured in the application, namely Mpumalanga and Limpopo.
- 3.3 On 31 May 2016 the National Treasury summarily cancelled the contract with 30 days notice, citing as reasons deficiencies in the bid adjudication process.
- 3.4 On 5 July 2016 the SA Red Cross obtained a "reinstatement order" from this court, the relevant part of which reads as follows:

"The first, second and/or third respondents and/or any of the remaining respondents, jointly and severally are interdicted and restrained from implementing the purported

cancellation of contract RT79-2015, for the rendering of a National Aero-Medical Service to the State for the period 1 September 2015 to the 31 August 2018 from 30 June 2016, pending finalisation of the review application referred to in part B hereof”.

3.5 The respondents to the aforesaid order, which included the current Respondents as well as their respective counterparts from the Mpumalanga Province appealed the order, which appeal, after having heard counsel was struck off the roll by the Supreme Court of Appeal on 10 November 2017.

3.6 Pursuant to a subsequent meeting between the SA Red Cross and National Treasury on 6 December 2017, the Second Respondent herein wrote to “All User Departments” on 18 December 2017, informing them of the occurrences in the SCA and advising them as follows:

“We wish to advise that the cancellation of the contract is temporarily uplifted and that your province may continue to utilise the service of the SA Red Cross pending the finalisation of the review application.

Based on the above, it should be noted that the interim arrangement as previously communicated is no longer applicable and departments are advised to immediately make use of the contract until further notice”.

- 3.7 After some correspondence in the ensuing months between the attorneys for the SA Red Cross and National Treasury and the State Attorney regarding the fact that, despite the above letter the Limpopo and Mpumalanga provinces were still not implementing the contract, Mpumalanga apparently started using the SA Red Cross aero-medical services from 1 April 2018 and it was envisaged that Limpopo Province would do the same.
- 3.8 In apparent eventual compliance with the National treasury’s advices, the Fourth Respondent thereafter on 14 March 2018 requested the SA Red Cross in writing to avail its services from 1 April 2018 “in line with the current contract (RT79-2015)”. As this request was at short notice, the inception date was, by way of correspondence moved to 1 May 2018. In the meantime, the SA Red Cross expended costs and procured the necessary emergency

response helicopter and acquired the services of pilots, emergency medical personnel and ground staff.

3.9 Without warning or explanation, the Fourth Respondent on 20 April 2018 sent a letter to the SA Red Cross, stating the following:

- “1. The Department of Health: Limpopo Province hereby rescinds the letter of 14 March 2018...*
- 2. All further communications and enquiries should be directed to National Treasury’s office of the Chief Procurement Officer...”.*

3.10 Hereafter the urgent application was launched.

[4] Relief claimed

4.1 The SA Red Cross, aggrieved by the Limpopo Province’s rescission (or cancellation) of its implementation of the contract, formulated its relief along the same lines as when the initial cancellation of 31 May 2016 (referred to in paragraph 3.3 above) was attacked, as follows:

- “2. *An order interdicting and restraining the First, Second and/or Third and/or Fourth Respondents, jointly and severally, from implementing the purported cancellation of the agreed reinstatement of Contract RT79-2015, for the rendering of a National aeromedical service to the State for the period 1st September 2015 to the 31st August 2018, from the 1st of May 2018 to the 31st of August 2018, pending finalisation of the main application referred to in Part B hereof and/or a civil action for damages against the first respondent.*
3. *An Order directing the First, Second and Third respondents to provide such reasons as may be appropriate and are envisaged in Rule 53 of the Rules of the above Honourable Court, within five days or such other period as this Honourable Court may determine, in respect of the procedures followed and motivations for arriving at the decision to purportedly cancel the agreed reinstatement of Contract RT79-2015 aforesaid.*

4. *That paragraph 2 (supra) operate as an interim interdict pending the finalisation of the main application referred to in capital part B hereof.”*

4.2 Although couched as interim relief pending a review application, what the SA Red Cross is actually seeking, is, in effect, an order for specific performance for the outstanding period of the contract.

4.3 For this purpose, the National Treasury was cited and Mr Mpofu SC who appeared for the SA Red Cross, vehemently argued that, even if the National Treasury had acted on behalf of other organs of state as it claims, it, as the other contracting party was correctly cited as the liable party.

[5] Basis of opposition

5.1 The Third and Fourth Respondents did not oppose the application and neither of them filed any answering affidavit. The National Treasury and the Second Respondent opposed the application and

the Second Respondent deposed to an answering affidavit on their behalf. In the affidavit, the factual matrix set out in paragraph 3 above was confirmed and, in fact, the Second Respondent confirmed that, since the SCA decision the contract was reinstated and had to be implemented. The National Treasury and Second Respondent however denied having taken any part in Limpopo Province's impugned decision to rescind its implementation letter of 14 March 2018.

5.2 The National Treasury and Second Respondent's defence was stated to be the following:

“25. As the Honourable Court will note that although the letter dated 20 April 2018 makes reference to the National Treasury, it was not authored by the National Treasury. The decision to rescind the letter dated 14 April was not taken by the National Treasury and the National Treasury is not in possession of any record regarding the rescission of that letter.

26. I must emphasise that the extent of the role of the National Treasury in respect of the above agreement

(s) between the Applicant and the end user (s) is facilitative in nature and merely to represent the various end users. By means of example, the role of the National Treasury in the transversal contract is in relation to price adjustments of the contract and informing the parties of special conditions to the contract and intervening in the event of dispute between the parties.

27. *In respect of substantive terms of the agreement, regarding when the services will be required and how the service will be effected, such agreement would have to be reached completely between the Applicant and the end users such as the Limpopo Department of Health, as each province has its own designated powers. The First Respondent and I play no role in such terms of agreement."*

5.3 In argument Mr Gwala who appeared together with Ms Maite for the National Treasury and the Second Respondent also relied heavily on the distinction between the three spheres of government provided for in sections 40 and 41 of the Constitution and as also

explained in Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and others 2010 (6) SA 182 (CC) at [43].

5.4 It was further argued that the provision of the aeromedical services in question falls under section 25 of the National Health Act 61 of 2003 which places the provision of health services in the domain of the provinces and that the National Treasury has no role to play in the administration of the provision of such medical services.

5.5 On this basis, the National Treasury and the Second Respondent argued that, not only should they not even have been cited in these proceedings, but no effective order can be granted against them and they should be recompensed for their costs

[6] Evaluation

6.1 Mr Mpofu SC labelled the National Treasury and Second Respondent's stance as a proverbial 'passing the buck'-argument. Contrary to the position of the National Treasury and Second Respondent who argued that they were merely the 'agents', facilitating the procurement of services for their principals or 'user departments' (being in this instance, the provinces and in particular the Limpopo province) he argued that the National Treasury was in

fact the principal and the so-called end users merely the subsidiary organs of state who implemented the contract.

- 6.2 Before dealing with the issue of any liability of the National Treasury and the Second Respondent, it is clear that the SA Red Cross is entitled to the orders claimed as against the Third and Fourth Respondents. Absent any supervening impossibility or conceivably a critical provincial emergency or any other lawfully justifiable ground for repudiation (of which there was no evidence) the Limpopo province is bound to honour the reinstated agreement (in similar fashion as the Mpumalanga province has eventually done). There can also be no doubt that the SA Red Cross is entitled to reasons for the Limpopo province's conduct.
- 6.3 The outstanding question remaining is whether any relief should (or could) be granted against the National Treasury and the Second Respondent.
- 6.4 Despite doubts expressed by the SA Red Cross about the *bona fides* of the National Treasury and the Second Respondent, there are on these papers no indication that they have taken any part in the Fourth Respondent's impugned decision. In fact, their advice to

the Limpopo province, as one of the “user departments” was to the contrary. The relief regarding the review of the rescinding of the Fourth Respondent’s letter of 14 March 2018 and the reasons for the letter of 20 March 2018 must therefore be directed to and requested from the Fourth Respondent (and the Third Respondent as the responsible MEC).

- 6.5 The National Treasury and the Second Respondent are further correct in their references to the legal, statutory and Constitutional creation of different spheres of government and the distinction between their areas of functionality.
- 6.6 The National Treasury and Second Respondent also deny that, because of the aforementioned delineation, they are able to exert pressure or influence on or over any of the provinces. This much the state attorney as set out in a letter annexed to the Second Respondent’s answering affidavit.
- 6.7 However, what the National Treasury cannot escape, is that it is the other contracting party to the contract with the SA Red Cross. It accepted the bid to render services, on a national scope, ‘to the State’. This clearly included organs of state other than the National

Treasury itself. Where 'the State' contracts with a private service provider, then such service provider should be entitled to expect the State as other contracting party to take all reasonable steps to have the contract implemented. It is settled law that, save for certain public interest issues, once a tender has been awarded, the relationship between the parties was governed by the principles of the law of contract. This would inter-alia entitle a contracting party to claim specific performance. See: Government of the Republic of South Africa v Thabiso Chemicals (Pty) Ltd 2009 (1)SA 163 (SCA) at [18] and Parkscape v MTO Forestry 2018(1) SA 263 (WCC) at [52].

- 6.8 There were anecdotal statements from the bar that the national Treasury had had "some conversations" with officials of the Limpopo provincial government but neither of the detail nor content thereof found its way to the answering affidavit. They were allusions to similar "conversations" with the Mpumalanga provincial government which had, apparently bore fruit as already set out above. It is not clear how far the National Treasury's enabling legislation would empower it as contracting party to take steps to ensure compliance by the 'user departments' with the contract, but it is clear that some coercive steps can (and should)

indeed be taken, be it even at a ministerial or other level. This is evinced by the 'conversations' which the National Treasury had with the Mpumalanga province. Either way, a purely supine attitude would not be in compliance with its obligations under the law of contract.

6.9 It is also trite that a court should take steps to ensure that the orders that it grants have some efficacy. To simply lump the National Treasury and the Second Respondent into the interdictory relief claimed by the SA Red Cross, would not in this case suffice or be effective. They took no part in the impugned decision and to force them to be party to a review thereof would be inappropriate. The 'conversations' which the National Treasury should have with the officials of the Limpopo provincial government, must however be formalised in an order and I intend doing so. As this would result in the enforcement of an existing contract which this Court has already ordered to be implemented, I would not in my view overstep any separation of powers delineation. I would in fact, apart from the contractual obligations of the National Treasury, compel it to perform the functions pertaining to intervention 'in the event of dispute between the parties' referred to in the above

quoted paragraph 26 of the Second Respondent's own answering affidavit.

[7] Costs

There is no reason why costs should not follow the event in respect of Part A of the application, even at this stage, as against the Third and Fourth Respondents. Insofar as the National Treasury and the Second Respondent did not partake in or cause the present non-implementation of the contract, they should not be saddled with costs in respect thereof. Their opposition of the claim for relief against them was reasonable. Insofar as they appear to have *bona fide* believed that they had no further role to play and were wary of encroaching on the constitutionally delineated functionality of a province, I, in the exercise of my discretion, decline to make a costs order against them. The cause of the problem lay elsewhere, they are simply forced to be part of the solution.

[8] Order

1. The Third and Fourth Respondents, jointly and severally, are interdicted and restrained from implementing the purported cancellation of the agreed reinstatement of Contract RT79-2015 for the rendering of Aero-Medical services for the remaining period thereof from the 1st of May 2018 to the 31st of August 2018, pending finalisation of the main application referred to in Part B of

the Applicant's Notice of Motion and/or a civil action for damages against the First Respondent.

2. The First and Second Respondents are ordered to take all reasonable steps to ensure that the Third and Fourth Respondents comply with the National Treasury advices to reinstate the aforementioned contract for the above-mentioned remaining period thereof.
3. The Third and Fourth Respondents are directed to provide such reasons as may be appropriate and are envisaged in Rule 53 of the Rules of this Court, within five days of service on them of this order, in respect of the procedures followed and motivations for arriving at the decision to purportedly cancel or rescind the agreed reinstatement of Contract RT79-2015.
4. The Third and Fourth Respondents are ordered to pay the Applicant's costs of the urgent application for the relief claimed in Part A of its notice of motion including the costs of two counsel, where employed.



N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 15 May 2018

Judgment delivered: 16 May 2018

APPEARANCES:

For the Applicant:

Attorney for Applicant:

Adv. D C Mpofu

Mather Moodley & Associated, East
London

c/o B Ceylon Atoorneys, Pretoria

For the 1st and 2nd Respondent:

Attorney for 1st & 2nd Respondent:

Adv. M Gwala with Ms L M Maite

The State Attorneys, Polokwane

c/o The state Attorney, Pretoria