

IN THE KWAZULU-NATAL HIGH COURT, DURBAN  
REPUBLIC OF SOUTH AFRICA

Case No : 16428/08

In the matter between :

**KINGSGATE CLOTHING (PTY) LTD**

Applicant

and

**SECTION HEAD: ACQUISITION  
MANAGEMENT, MGP & SERVICES, SOUTH  
AFRICAN POLICE SERVICE**

First Respondent

**THE DIVISIONAL COMMISSIONER : SUPPLY  
CHAIN MANAGEMENT OF THE SOUTH  
AFRICAN POLICE SERVICE**

Second Respondent

**THE NATIONAL COMMISSIONER OF THE  
SOUTH AFRICAN POLICE SERVICE**

Third Respondent

**THE MINISTER OF SAFETY AND SECURITY**

Fourth Respondent

**THE GOVERNMENT OF THE REPUBLIC OF  
SOUTH AFRICA**

Fifth Respondent

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**J U D G M E N T**

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**NICHOLSON J**

[1] The applicant is a company carrying on business as a clothing manufacturer in Durban. The various respondents are government officials and include the Minister of Safety and Security and the Government of the Republic of South Africa.

[2] The applicant concluded six written contracts with the South African Police Service (SAPS) during September 2009 for the provision of clothing for SAPS personnel for a three year period.

[3] The applicant alleges that on 6 November 2009 at Durban representatives of the SAPS purported to repudiate the said contracts, which repudiation the applicant does not accept and to date has not accepted.

[4] As a result of the said alleged repudiation the applicant brought an urgent application, the substantive relief being as follows :

- "1. This application be heard as one of urgency and the usual rules relating to service and/or *dies* be dispensed with.
2. It be and is hereby declared that the written contracts for the manufacture and supply of goods, concluded between the Applicant and the First Respondent on or after 22 September 2009, in respect of tender numbers SAPS 007 (10/13), SAPS 008 (10/13), SAPS 023 (10/13), SAPS 24 (10/13), SAPS 026 (10/13) and SAPS 028 (10/13), are valid and enforceable at the instance of the Applicant.

3. It be and is hereby declared that the Respondents are obliged to honour their obligations under those contracts.
4. The Respondents are directed to pay the costs of this application, such costs to include those consequent upon the employment of two counsel."

[5] The applicant was represented by Mr Moosa SC with Mr Boulle. The respondents were represented by Mr Govindasamy SC with Mr Mkhize and Miss Jikela.

[6] The applicant and its groups of companies has supplied SAPS with clothing since 1994 and for the financial year of 2009 more than R46 million was involved.

[7] During April 2009 tenders were again invited for SAPS clothing for the years 2010 - 2013 and were advertised in the Government Tender Bulletin. Mr Ayub Desai ("Desai") submitted the necessary tender documents by the closing date 28 May 2009.

[8] The applicant was informed in writing on 17 September 2009 that all the bids were successful and the value was some R175 million. Subsequently on or about 29 September 2009 contracts were duly signed in respect of each of the bids in question.

[9] The contracts were to be effective from 1 April 2010. The applicant then commenced placing orders for fabric and trimming to ensure that these contracts were carried out from 1 April 2010. The demise of the textile industry in South Africa has meant that expedition and initiative is required to ensure due performance by the applicant.

[10] The fact that the applicant was the successful bidder in the said contracts was made known to the public at large in the Government Tender Bulletin of 9 October 2009.

[11] On 6 November 2009 Yusuf Vahed ("Vahed") a director of the applicant attended a meeting at the request of second respondent with him, Commissioner Mokoena, the first respondent, a director of the SAPS, Mr Mashika and Adv Bouwer at applicant's offices in Durban.

[12] At this meeting the applicant was informed that the tenders that preceded the conclusion of the contracts were "technically incorrect" in view of the fact that they were advertised without taking into account the Expanded Public Works Programme (EPWP) and might accordingly have to be tendered all over again. As can be imagined this communication caused consternation in the ranks of the applicant.

[13] As a result of the meeting and the report to the applicant, on 10 November 2009 the applicant sent a written submission to second respondent. Applicant maintains it had no obligation to send the said submission, which explained why applicant has in fact complied with the EPWP, but that applicant did so to resolve the matter amicably without having to resort to Court proceedings.

[14] No response was received to the submission sent by the applicant on 10 November 2009.

[15] On 16 November 2009 applicant's attorneys sent a letter to third and fourth respondents in which the above events were recorded and in which confirmation was sought within seven days of receipt of the letter that the said contracts remained intact and that the SAPS had no intention of cancelling the said contracts.

[16] This letter was hand delivered and no response has been received by applicant.

[17] The applicant in its founding affidavit then sets out a number of factual and legal reasons why the omission to comply with the EPWP does not render the tenders and contracts invalid, including case law relevant thereto.

The founding papers also include facts as to why the application was urgent and sundry other matters including costs.

[18] The respondents have filed an answering affidavit by the Divisional Commissioner, the second respondent Mr Matthews Siwundla ("Siwundla") who has taken a number of points *in limine* being that the applicant had no cause of action, secondly it was not shown that those present at the meeting had the authority to repudiate the said contracts, the doctrine of election in that because of the failure to accept the repudiation the contracts continue, urgency and that the matter might have to be referred for mediation. I will deal with these points where necessary.

[19] On the merits of the application the respondents have set out the facts upon which they rely relating to the EPWP in great detail. It is important to record them in full because they illustrate what must have been said at the meeting. Only after considering these facts can the Court gauge how strongly the respondents were putting their case that the tenders were irregular.

"

26.

Although the applicant has referred to the EPWP in its papers I wish to set out certain details in respect thereof for a proper understanding of the purpose of our meeting.

27.

The Government has recognised that unemployment is one of the most critical problems facing our society currently. There are literally millions of people who are poor and who cannot provide for themselves or their families simply because there is no employment. According to available statistics approximately forty percent of working age citizens do not have formal employment. Even more startling is that approximately seventy percent of young men and women remain unemployed.

28.

One of the reasons for this situation is that the economy does not grow fast enough to create enough jobs for all the unemployed.

29.

During 2003 the Government convened a Growth and Development Summit ("GDS") at which various role players gathered to address the problems leading to unemployment. At that summit Government, business, labour and community organisations agreed to take a number of steps to deal with the crisis. It was agreed at that summit that a Government led works programme (the EPWP) would be one of the effective steps to be taken.

30.

At that summit the role players agreed that in addition to the EPWP led by Government other social partners would commit themselves to the creation of more and better jobs as well as decent work through *inter alia* :-

- a. Public-Private Investment Partnerships;
- b. Development Growth, Employment and Empowerment Strategies;
- c. Private Sector Investment;
- d. Support for the Proudly South African Campaign; and
- e. Strengthening support to co-operatives, Small Enterprises and Local Economic Development.

31.

The programme was adopted by cabinet in November 2003 with the Government committing itself to creating one million jobs within a period of five years.

32.

The target was achieved during 2008.

33.

During 2008 the EPWP unit embarked on a second phase. The second phase was approved by cabinet in June 2008.

34.

The aim of the second phase was to create two million full time jobs between April 2009 and March 2014. It has been estimated that the programme has to grow approximately four and a half times the size of the first phase to achieve that target.

35.

After inauguration the current president of the Republic of South Africa, the cabinet intensified its efforts to ensure that it committed itself firmly to the creation of job opportunities so as to give meaningful effect to the declaration of intent articulated in the second phase of the EPWP.

36.

I should record that I have gleaned much of the statistical information above from various government publications which is easily accessible on the internet.

37.

At the meeting of the 6th November 2009 we discussed the contract generally and the EPWP more specifically.

38.

I was accompanied by the First Respondent, Director Mashika and Advocate Dirk Bouwer. The Applicant was represented by Vahed, one Chetty and certain other persons whose names I cannot recall.

39.

After initial pleasantries I commenced explaining to Vahed that we were there at the behest of SAPS. I mentioned that the Third Respondent has expressed concern that the contracts did not include the EPWP. I was about to mention that the omission of the EPWP would cause the government to lose a vital opportunity for creating job growth.

40.

At that point Vahed interrupted the discussion and he began by explaining that the Applicant was a reputable company and elaborated on the contribution of the company towards the training and upliftment of the historically disadvantaged communities.

41.

I must emphasize that we never mentioned or referred to any cancellation of the contracts nor did we convey any repudiation of the contract nor did we convey any such intention.

42.

Vahed then began earnestly telling us about the commitment of the Applicant towards social upliftment. In this regard he was at pains to point out that the Applicant was fully compliant with the requirements of the BBBE and other employment equity initiatives.

43.

Members of my delegation and I advised Vahed that the discussions had been fruitful. Shortly before leaving I requested Vahed to direct a letter to me recording all the initiatives taken by the Applicant as mentioned in the discussions.

44.

It is absurd to suggest that a contract valued at R175 000 000,00 would be repudiated as informally as suggested by the Applicant. I need to point out that the SAPS does not visit contractors to advise them that their contracts are repudiated. SAPS has to comply with the law and in this regard it must follow appropriate procedures and protocols.

45.

I reiterate that the position at this stage is that none of us present at the meeting on the 6th November 2009 repudiated the contract."

[20] What is clear from the above account is that the respondents disavow any intention to repudiate the contracts in question. It is specifically stated that no such attempted repudiation took place.

[21] The National Commissioner Bhekokwakhe Cele has also filed an affidavit in which he says the following :

" 3.

I wish to place the following matters on record that the contract with the Applicant has not been repudiated or cancelled as alleged by the Applicant and currently remains valid and binding.

4.

I was appointed the National Commissioner on the 1st August 2009. Shortly thereafter I learnt that thirty eight tenders valued at hundreds of millions of rands had been concluded with various individuals and companies shortly before and after my appointment. As many tenders appeared to have been hurriedly finalized I became concerned that the correct procedures may not have been followed and that the rules and regulations pertaining to the awards and issuing of tenders may not have been adhered to.

5.

I issued a verbal instruction during a strategic meeting held on the 10th and 11th September 2009 with the management of SAPS that all tenders had to be evaluated in consultation with me before being finalised. On 30th October 2009 I issued a further instruction in a letter addressed to the Deputy National Commissioner regarding tenders over the sum of R500 000,00.

6.

I am considering conducting an investigation into the legality or otherwise of those tenders. Government is committed to the values of the constitution, rule of law and good governance and in my capacity as the accounting officer of the SAPS I have to ensure that the rules and regulations and other prescripts which regulate the award of tenders are and have been fully complied with.

7.

It is possible that the tender which forms the basis of the application may also be investigated by me or on my behalf although I have not yet taken such a decision. If this tender is to be investigated the Applicant will be duly notified.

8.

Should any investigation undertaken by me or on my behalf reveal that a tender was improperly concluded I would be obliged to take steps in accordance with the general conditions of contract governing that tender."

[22] It is abundantly clear from his affidavit as well that by no stretch of the imagination have the contracts been repudiated or cancelled by the respondents.

[23] To complete the factual matrix of the papers the applicant has filed a short replying affidavit by Vahed. This seeks to refute the notion that the urgency is self created.

[24] The affidavit annexes an email from Romatex which illustrates the difficulties of the applicant insofar as its supplies are concerned. The gist of the email is that, in the absence of confirmation of orders the cost has increased by nearly 22%. Other factors are mentioned including their loom

capacity and need to commence yarn spinning. The failure of the applicants to confirm the orders are described as "beyond critical".

[25] Vahed also draws attention to the failure of respondents to inspect and approve samples for the clothing which have been lodged with the South African Bureau of Standards for two months. The inference is that respondents want to play "fast and loose" which I understand implies a reckless disregard for their contractual obligations.

[26] The applicant alleges any attempted repudiation was resisted and not accepted so the question remains whether it should have approached the Court for an order. In their affidavits, the respondents expressly and emphatically disavow any intention to repudiate the contracts.

[27] The problem was that the respondents did not reply to the two letters of 10 November and 16 November 2009. The first such letter indicates that if there is no resolution to the problem the applicant will seek legal recourse as cancellation will prove disastrous to the group.

[28] The lawyers' letter of 16 November 2009 again records the facts and seeks reassurance. The intention to approach the Courts if no confirmation is received within seven days is specifically stated. Mr Govindasamy said the respondents were very busy people who could not be expected to respond to

such a letter. I cannot agree. Large sums of money were involved and it seems clear that once the respondents applied their minds to the matter they filed affidavits indicating that no attempt was made to repudiate the contracts.

[29] The failure by the respondents to reply and immediately allay the applicant's fears would seem to me to lead to the inference that they were persisting in the allegation of a repudiation of the contracts. See *McWilliam v First Consolidated Holdings* 1982(2) SA 1 AD at 10 D - H.

[30] I have set out in detail the great importance the government attributes to this programme. This seriousness would, no doubt, have come out at the meeting. There are indications that the government will revisit the propriety of the tenders in future. The detailed reasons for the importance of the EPWP programme when considered with the intention to revisit the whole question in the future persuade me that applicant was entitled to infer that respondents' conduct exhibited a deliberate and unequivocal intention no longer to be bound by the contracts. The fact of the visit by such a high powered delegation fortifies me in this view. The care with which the allegations were answered in the first letter by the applicant shows that the message put across was no idle threat. If they did not intend acting on what they said one wonders why the meeting was held at all.

[31] The high ranks of the delegation also persuade me that applicant was misled that they had authority to repudiate the contract. The applicant wrote two letters on the basis that the persons were duly authorised and there was no denial of any such authority. Director Mashika who was part of the delegation was authorised to sign the contracts and must be assumed to have the authority to repudiate them.

[32] Given the mammoth task of enlisting suppliers to prepare the contracts the time until 1 April 2010 was very short. There was therefore an urgent need to approach the Court when respondents failed or declined to give them the necessary reassurance and confirmation of the continued existence of the contracts.

[33] What the Court has to bear in mind is that the respondents have the resources ie the taxpayer's money to litigate *ad nauseum*. Should applicant lose the contracts and the payments are not made, it can face disaster. There was therefore an urgent need to approach the Court.

[34] Mr Govindasamy has relied on clause 27 of the contracts which provides that "if any dispute or difference of any kind whatsoever arises" attempts will be made to resolve it amicably by mediation before there is any resort to litigation.

[35] Clause 27.5 provides that notwithstanding any reference to mediation and/or Court proceedings the parties will continue to perform their respective obligations. The respondents' attitude to the samples at SABS and their views on the tender process do not seem to show much respect for their responsibility.

[36] By suggesting the tender process might have to be commenced again, the respondents themselves were not adhering to the mediation clause themselves.

[37] In any event a dispute or difference had not yet arisen as the respondents agree there was no attempt at repudiating the contracts. What applicant was seeking was an assurance that there was no repudiation and therefore no dispute. Had respondents given such an assurance and confirmed the contracts the need to go to mediation would not have arisen.

[38] Once the respondent have unequivocally asserted that they never intended to nor attempted to repudiate the contracts, is there any need for an order in the terms sought? Perhaps the question can be simplified even further. Is there any prejudice to the respondents if such an order is made? They should have answered the letters and confirmed the contracts. Their response amounts to consent to the order prayed.

[39] It seems to me that the applicant was entitled to bring the proceedings.

[40] They are entitled to a declaration in the terms they sought.

[41] The intimation that respondents may still repudiate the contracts on other grounds does not alter the position. If litigation arises out of that repudiation, different considerations will apply.

[42] The applicant is entitled to a costs order including the costs of two counsel.

[43] In the premises I make the following order :-

1. It is hereby declared that the written contracts for the manufacture and supply of goods, concluded between the applicant and the first respondent on or after 22 September 2009, in respect of tender numbers SAPS007(10/13), SAPS 008 (10/13), SAPS 023(10/13), SAPS 024(10/13), SAPS 026 (10/13) and SAPS 028(10/13), are valid and enforceable at the instance of the applicant.
2. It is hereby declared that the respondents are obliged to honour their obligations under those contracts.

3. The respondents are directed to pay the costs of this application, such costs to include those consequent upon the employment of two counsel.

Date of hearing : 10th December 2009

Date of judgment : 11 February 2010.

Counsel for the applicant : O Moosa SC with A J Boule (instructed by Mundell Inc)

Counsel for the respondent : M Govindasamy SC with M Mkhize and S Jikela (instructed by the State Attorney)