

IN THE COURT OF APPEAL OF LESOTHO

C OF A (CIV) 17/2016

Held at Maseru

In the matter between

**SMALLY TRADING COMPANY t/a
SMALLY UNIFORM &
PROTECTIVE CLOTHING**

APPLICANT

and

**LEKHOTLA MATSABA and
TEN OTHERS**

RESPONDENT

HEARD: 25 MAY 2016

DELIVERED: 25 MAY 2016

JUDGMENT

FARLAM AP:

[1] On 25 May 2016 I dismissed with costs an application brought by the applicant under Rule 18 of the Court of Appeal Rules against the respondents for a rule nisi calling upon them to show cause why an interim interdict should not be granted against the first eight respondents, restraining them from performing certain actions in pursuance of a tender, MPPS 05/2015/2016, awarded to the second and fourth respondents, pending the final determination of an appeal brought by the applicant against the dismissal by Chaka-Makhooane J, sitting in the High Court, of an application relating to the tender. The orders sought by the applicant in the High Court included orders setting aside (1) the withdrawal on 7 January 2016 of a tender process for the supply of police uniforms, badges and boots; and (2) the subsequent award on 18 March 2016 of a tender for the supply of the goods mentioned in the withdrawn tender to the second and fourth respondents.

[2] I gave a short oral judgment at the end of the hearing and said that I would file fuller written reasons later. These are the reasons.

[3] In the applicant's founding affidavit it was stated that in October 2015 the eighth respondent, the Ministry of Police and Public Security, invited registered companies to tender for the supply of police uniforms. The applicant, which had previously supplied uniforms to the eighth respondent, bid for the tender,

together with other companies. On 7 January 2016 the tender was withdrawn, allegedly on security grounds. The applicant, having learnt on 4 April 2016 that the tender had been awarded to other parties, launched the application which was dismissed by Chaka-Makhooane J and which is presently under appeal.

[4] It is the applicant's case that the withdrawal of the initial tender process (which was a public one) in January 2016 was invalid and that the subsequent process, which was (according to an affidavit filed on behalf of the eighth respondent) a 'selective' one, with the applicant not being invited to tender, was also invalid. It was the applicant's case further that if the initial tender process had not been withdrawn and it had instead been properly conducted, it, the applicant, would, as it was put, 'have had ample prospects of winning it'

[5] In addition to the orders it sought for the setting aside of the withdrawal of the initial tender process and the award of the tender under the 'selective' process, the applicant also orders restraining the first four respondents from performing any activity in pursuance of the tender pending the appeal and restraining the fifth to eighth respondents from disbursing any funds to the first four respondents pending the appeal pursuant to the awarding of the tender.

[6] The requisites for the grant of an interim interdict which an applicant must establish are dealt with in many cases, both in South Africa and Lesotho. The leading case in this Kingdom is *Attorney-General and Another v Swissbourgh Diamond Mines (No 1)* LAC (1995-1999) 87, in which Steyn JA summarised them as follows:

- (1) a prima facie right;
- (2) a well-grounded apprehension of irreparable harm;
- (3) a balance of convenience in favour of granting the interim relief; and
- (4) the absence of any other satisfactory remedy.

[7] In this case I was not satisfied that the applicant had established that it did not have another satisfactory remedy. In paragraph 6.4 of the founding affidavit it was merely stated that the applicant 'would suffer irreparable harm because damages will not adequately compensate the loss [it] would suffer if the tender is not properly processed'.

[8] I do not agree with this statement. If the applicant is ultimately successful in its attack on the withdrawal of the initial tender process and the award of the tender under the

'selective' process (which excluded the applicant from tendering) and it proves that it would have won the initial tender then it will have no difficulty in quantifying its damages, which prima facie would be the profits it would have made on the contract, something which it should easily be able to prove and recover. It followed that the application had to fail.

I G FARLAM
ACTING PRESIDENT

For Applicant:	Mr Phoofolo KC
For 1st to 3rd Respondents:	Adv Shale
For 4th Respondent:	Adv Potsane
For 5th, 8th and 11th Respondents:	Adv Phafane KC