NOT REPORTABLE

IN THE NORTH GAUTENG HIGH COURT. PRETORIA /ES

(REPUBLIC OF SOUTH AFRICA)

CASE NO: 72499/2011

DATE:30/03/2012

IN THE MATTER BETWEEN

ZTE MZANZI (PTY) LTD	APPLICANT
AND	
TELKOM SA LIMITED	1st RESPONDENT
HUAWEI TECHNOLOGIES AFRICA (PTY) LTD	2nd RESPONDENT
ALCATEL-LUCENT (PTY) LTD	3rd RESPONDENT

JUDGMENT

PRINSLOO. J

[1] This application for interim interdictory relief was initially enrolled to be heard as an urgent application on 24 January 2012.

[2] The application was removed from the roll and brought before me, on 9 March 2012, as a special motion, presumably because of the voluminous nature of the documentation.

[3] The question of urgency remained in issue on the papers and in terms of the heads of

argument filed, but at the commencement of the proceedings before me, I was informed that it would no longer be argued on behalf of the first respondent that the matter was not urgent. The third respondent never indicated that it was attacking the question of urgency and the second respondent is abiding the outcome of this case and was not represented during the hearing.

[4] Where the case undoubtedly has an element of urgency about it, and where large amounts of money are involved, both flowing from the tender process (forming the subject of this case), and from the work to be done pursuant to the tender process, an attempt will be made to prepare this judgment on an urgent basis.

[5] Before me, Mr Dreyer SC, assisted by Mr Mphaga SC appeared for the applicant. Mr Swart SC, assisted by Ms Chabedi, appeared for the first respondent and Mr Vetten appeared for the third respondent.

Introduction and background

[6] According to allegations made in the founding affidavit, the first respondent ("Telkom"), through the years, developed a specification for two-wire analogue
Plain Old Telephone Service ("POTS") services. The specification is generally referred to as Telkom Spec 1607 version 4.1 ("Telkom Spec"). The specification was developed especially for Telkom, and consists of certain characteristics including those applying to pay phones, normal phones and so-called "loop impedance".

[7] The telecommunication infrastructure and technology of Telkom has over the years been overtaken by the advances in telecommunication technology when compared to its peers

locally and worldwide. Telkom's infrastructure has aged and cannot be of more use in creating new and advanced telecommunication services and products for its current and future customers. In order to compete with other local and international telecommunication service providers, Telkom experienced the need to upgrade and standardise its telecommunication infrastructure.

[8] In order to achieve the above-named objective, Telkom issued a so-called Request For Proposals ("RFP") in about July 2011 with closing date in August 2011. A first RFP was cancelled and replaced with another one. Nothing turns on this.

[9] RFP 0328/2011 was accompanied by all the necessary specifications and requirements to enable interested Bidders to submit their proposals in order to enter into a service level contract to render the required services. The particular services required go under the name of Technical Specification for Multi-Service Access Node ("MSAN").

[10] The relevant documentation includes the Standard Terms and Conditions, RFP conditions for RFP no 0328/2011 (volume 1 part 3), information schedule for RFP no 0328/2011 and the RJFP conditions for the first RFP, no 0323/2011 were also attached to the founding affidavit. However, the relevant documentation and conditions are those relating to the second RFP, no 0328/2011, dated July 2011. The closing date for this second RFP was 8 August 2011.

[11] The applicant lodged its bid timeously.

[12] On 21 November 2011 Telkom informed the applicant in writing that its bid was unsuccessful.

[13] On 25 November 2011 the applicant's attorney wrote to Telkom challenging the applicant's disqualification and asking Telkom to undertake not to proceed to allow "those that are regarded as successful Bidders" to conclude laboratory tests and also not to allow such Bidders to demonstrate their solution in the Telkom network in order to achieve Technical Operational Readiness until such time as an envisaged arbitration process to decide the correctness (or lack thereof) of the applicant's disqualification had been finalised.

[14] The undertakings were requested to be provided by 1 December 2011 failing which this application for interim relief would be launched.

[15] On 8 December, Telkom wrote to the applicant declining to furnish the undertaking and advancing an argument that the proposed arbitration proceedings were not available to the applicant, as the procedure was not applicable to the non-acceptance of a Bidder's submission.

[16] This application for urgent interim interdictory relief pending fmalisation of the arbitration process relied upon by the applicant was launched at the end of December 2011 and served on or about 3 January 2012. As I have pointed out, the application was removed from the roll on 24 January 2012 and came before me as a special motion on 9 March 2012.

[17] In their heads of argument, counsel for the applicant pointed out that the tender was still in a pilot phase which is part of the tender evaluation process. The second and third respondents, as "successful short-listed Bidders" are still required to demonstrate their solution. Should they fail to achieve readiness within the time scales, this will afford Telkom

the right to instruct the second and third respondents to remove their equipment and to restore the site to its original position at their own cost and risk. This much appears to be supported by documentation attached to the opposing affidavit filed on behalf of the third respondent.

I add that during the proceedings before me. I was informed by counsel for the third respondent that a service level agreement had in the meantime been entered into. No details were provided, neither were any details mentioned in the opposing papers or in the heads of argument submitted on behalf of any of the respondents.

The last formal allegation on the subject as contained in the opposing affidavit of the third respondent, dated 13 January 2012. and with reference to the supporting documentation which I mentioned, reads as follows:
"... the first respondent has already invited the third respondent to proceed with the pilot project ... the third respondent has already invested time, money and personnel and would be severely prejudiced if this process is to grind to a halt if the relief is granted to the applicant."

The relief sought

[18] The relevant paragraphs in the notice of motion read as follows:
"2. That the first respondent be interdicted and restrained from implementing tender and/or request for proposal 0328/2011 forthwith, in any manner whatsoever, including concluding any service level agreements with the second and third respondents. 3. That prayer 2 shall operate as an interim interdict with immediate effect pending the finalisation of the dispute resolution process that has been commenced by the applicant in terms of clause 43.3 and 43.4 of the Standard Terms and Conditions (volume 1 part 4) read with clause 1.2.2 of the

RFP 0328/2011."

[19] There is also a prayer for costs against any party opposing the application.

[20] The relief sought is not aimed at obtaining final relief amounting to tenders awarded to the second and third respondents being set aside and awarded, instead to the applicant. The interim relief sought is aimed at ultimately succeeding in a dispute resolution process resulting in the applicant's disqualification from the tender process being reversed so that the applicant can compete further with the view to ultimately achieving success as a tenderer.

The central issue between the parties

[21] The central issue is whether or not the relief sought by the applicant is legally competent. Differently put, whether or not the dispute resolution process which the applicant wishes to embark upon whilst protected by the interim interdict sought, is available to the applicant and can lawfully be implemented under these circumstances.

[22] It is convenient to quote the provisions of clause 43 of the Standard Terms and Conditions mentioned in prayer 3 of the notice of motion: "43. Dispute resolution

43.1 If any dispute arises out of or in connection with this Agreement, or related thereto, whether directly or indirectly, the Parties must refer the dispute for resolution firstly by way of negotiation and in the event of that failing, by way of mediation and in the event of that failing, by way of arbitration. The reference to negotiation and mediation is a pre-condition to the Parties having the dispute resolved by arbitration.

43.2 A dispute within the meaning of this clause exists once one Party notifies the other in writing of the nature of the dispute and requires the resolution of the dispute in terms of this

clause.

43.3 Within 10 (ten) business days following such notification the Parties shall seek an amicable resolution to such dispute by referring such dispute to designated representatives of each of the parties for their negotiation and resolution of the dispute. The representatives shall be authorised to resolve the dispute.

43.4 In the event of the negotiation between the designated representatives not resulting in an agreement signed by the parties resolving the dispute within 15 (fifteen) business days thereafter, the Parties must refer the dispute for resolution by way of mediation in accordance with the then current rules of the Arbitration Foundation of Southern Africa ('AFSA').

43.5 In the event of the mediation envisaged in 43.4 failing in terms of the rules of AFSA, the matter must, within 15 (fifteen) business days thereafter, be referred to arbitration as envisaged in the clauses below.

43.6 The periods of negotiation or mediation may be shortened or lengthened by written agreement between the parties.

43.7 Each party agrees that the Arbitration will be held as an expedited arbitration in Sandton in accordance with the then current rules for expedited arbitration of AFSA by 1 (one) arbitrator appointed by agreement between the parties, including any appeal against the arbitrator's decision. If the parties cannot agree on the arbitrator or appeal arbitrators within a period of 10 (ten) business days after the referral of the dispute to arbitration, the arbitrator and appeal arbitrators shall be appointed by the Secretariat of AFSA.

43.8 The provisions of this clause shall not preclude any party from access to an appropriate court of law for interim relief in respect of urgent matters by way of an interdict, or mandamus pending finalisation of this dispute resolution process for which purpose the parties irrevocably submit to the jurisdiction of a division of the high court of the Republic of South Africa.

43.9 The references to AFSA shall include its successor or body nominated in writing by it in its stead.
43.10 This clause is a separate, divisible agreement from the rest of this agreement and shall remain in effect even if the agreement terminates, is nullified or cancelled for whatsoever reason or cause."

[23] It is clear from a general reading of the Standard Terms and Conditions that the dispute resolution process prescribed in clause 43 is intended to find application between parties to a service level agreement, once entered into. This much was also common cause between counsel during the debates before me.

[24] On this basis, of course, the dispute resolution process prescribed in clause 43 is not available to the applicant, who has not concluded a service level agreement with Telkom as a final successful tenderer.

[25] However, one has to have regard to certain provisions to be found in the RFP conditions for RFP no 0328/2011.

[26] Clause 1.2.2 of these RFP conditions (under the heading 'interpretation of requirements') reads as follows:
"1.2.2 Should any dispute arise as a result of this RFP and/or the subsequent contract, which cannot be settled to the mutual satisfaction of the Bidders and Telkom, it shall be dealt with in terms of clause 43 of the Standard Terms and Conditions (volume 1 part 4)."

[27] In my view, clause 1.2.2 ("1.2.2") can and should be interpreted as providing for, inter

alia, the following:

(i) Any dispute arising as a result of the RFP between a Bidder and Telkom, which cannot be settled, shall be dealt with in terms of clause 43 of the Standard Terms and Conditions ("clause 43").

(ii) This is quite apart from any dispute which may arise from the "subsequent contract" which must be the service level agreement and the dispute must then be between the contracting parties, ie Telkom and the service provider.

(iii)The dispute arising as a result of the RFP must, clearly, involve the Bidders, or an individual Bidder on the one side and Telkom on the other side. A Bidder taking part in the RFP is not yet a contracting party.

Where clause 43 provides for the dispute resolution process between the contracting parties, this is clearly a deviation from that provision in the sense that 1.2.2 opens the door for a dispute resolution process conducted along the lines of the clause 43 procedure between Bidders and Telkom and before the "subsequent contract" has been entered into. This must be so, because the dispute here applicable arises from the RFP which is a process conducted well before the "subsequent contract" is entered into.

(iv) In my view, therefore, the only reasonable interpretation to be attached to1.2.2, is that provision is made for two separate dispute resolution procedures: the one flowing from any dispute arising as a result of the RFP between Bidders and Telkom and the other flowing from the subsequent contract between the ultimate service provider and Telkom. Both these processes are to be conducted along the lines and in terms of the time frames to be found in clause 43.

[28] It is against this background that the applicant's attorney wrote a long letter to Telkom on 25 November 2011 within days of having been informed officially by Telkom, on 21 November,

that, regrettably, the applicant "was unsuccessful in this RFP".

[29] In his letter, annexure "TM17" to the founding affidavit, the applicant's attorney described the disqualification of the applicant as "unlawful" and provided a lengthy motivation for making this allegation. I don't propose dwelling on all the details.

[30] Towards the end of the lengthy letter, the applicant's attorney states the following:
"Notification in terms of clause 43 of the Standard Terms and Conditions
39. We hereby advise that, our client hereby declares a dispute, as stated above, and Telkom is hereby notified of the provisions of clause 43.1 of the Standard Terms and Conditions (volume 1 part 4).

40. We further advise that our Mr Temba Langa is the designated person who has the authority to negotiate and to enter into resolution of the dispute, in compliance with clause 43.3 of the Standard Terms and Conditions."

This is the "dispute resolution process that has been commenced by the applicant" as described in prayer 3 of the notice of motion.

[31] In a lengthy letter dated 8 December 2011 Telkom's attorneys defend their client's decision to disqualify the applicant and also, as I have mentioned, declines to furnish the undertakings which I have described. The letter also contains an allegation that clause 43 "is not applicable to the non-acceptance of a Bidder's submission".

[32] In my view it is clear from these exchanges that a dispute ("any dispute" will suffice) has

arisen as a result of the RFP between the applicant as a Bidder and Telkom. In my view, this is a dispute as intended by the provisions of 1.2.2.

I am also of the view that the "dispute" now7 exists because it was duly declared in the letter of 25 November 2011, as I described, in compliance with the requirements of clause 43.2.

[33] It is on this basis that the applicant contends that it is entitled to invoke the clause 43 procedure and also to obtain interim interdictory relief pending finalisation of this particular dispute resolution process as provided for in clause 43.8.

[34] In attacking the applicant's stance that it is entitled to invoke the clause 43 procedure, Mr Swart, firstly, argued that in order to rely on 1.2.2, the applicant's case must necessarily be that there is a contractual relationship between it and Telkom in terms of which the parties are contractually obliged to follow the clause 43 process in the event of a dispute arising between them. He argued that there are only two sources of the right to go to arbitration namely a statutory provision (which does not apply here) or a contract. Mr Swart also referred to the following passage to be found in LA WSA 2nd ed volume 1 para 561:
"Before an arbitral tribunal can have jurisdiction, there must be a dispute covered by a valid arbitration agreement."

[35] In developing his argument further, Mr Swart referred me to clause 1.1.3 of the information schedule for RFP no 0328/2011 volume 1 part 2 which reads as follows:
"The Bidders accepts that this document and its associated documents do not constitute any contractual relationship between Telkom and the Bidders and the acceptance of any RFP/s by Telkom will not constitute any contractual relationship between Telkom and any Bidders. The

acceptance of any RFP/s will only indicate without any obligations on the part of either Telkom and/or a Bidders, the willingness of such Parties to enter into negotiations, which may or may not result in a contract."

Accordingly, so the argument went, where there is clearly no contract between the applicant and Telkom, the last remaining source for referring a matter to arbitration is absent so that the matter cannot go on arbitration in terms of the clause 43 procedure.

[36] I cannot accept this argument. The RFP information schedule only states the obvious, namely that at RFP stage there is no contract yet between Telkom and any Bidder, neither was such a contract alleged or relied upon by the applicant. The only "contract" or "contractual relationship" applicable is the clear stipulation in 1.2.2 that "any dispute" arising as a result of the RFP which cannot be settled will be dealt with in terms of clause 43. Both Telkom and the applicant, as a Bidder, must be bound by this stipulation or "contract" which, in my opinion, constitutes a valid "arbitration agreement" on which either Telkom or a Bidder in the position of the applicant can base its demand for the matter to go on arbitration (preceded by negotiation and mediation) along the lines of the clause 43 procedure and time frames.

[37] Under these circumstances I cannot agree with Mr Swarfs argument that there is no basis in law to compel Telkom to go the clause 43 route and that, in the circumstances, I should make nothing of 1.2.2 because it is meaningless.

[38] Mr Swart argued that the applicant's remedy is to go on review. There may well be something to say for this submission, but it seems to me that it was the intention of the

authors of 1.2.2 to create a cost effective and speedy dispute resolution mechanism presumably not to unduly delay the whole tender process. Moreover, 1.2.2 is couched in mandatory language where it provides that "any dispute" arising as a result of the RFP shall be dealt with in terms of clause 43.

In any event, I consider it highly unlikely that a court of review will be able to decide this dispute without the benefit of hearing expert evidence: the record contains hundreds of pages of documents brimming with the most technical of subjects which, in my respectful view, will be very difficult for a court of law to digest and understand without the benefit of expert testimony. I refer, for example, to annexures "TM6" to "TM12" on ppl 31-323 of the record.

[39] The second (and alternative) leg of Mr Swart's argument was that if a "limited contract", to coin the phrase used in the heads of argument, came into existence between Telkom and the Bidders (a reference to 1.2.2) such an agreement must be interpreted in the same manner as any other written agreement, namely by following the contextual approach.

[40] It was argued that Telkom is an organ of state, whose award of tenders is governed by section 217 of the Constitution, 1996. This requires the tender procedure to be in accordance with a system which is fair, equitable, transparent, competitive and cost effective. It was argued that 1.2.2 should be interpreted to mean that "the Bidders" referred to are to be seen as a unit and the dispute contemplated in 1.2.2 must be between all the Bidders as a group and Telkom. If it were otherwise, and only a particular Bidder having a dispute with Telkom were to be allowed to embark on the clause 43 procedure it would mean that Telkom and this disgruntled Bidder are at liberty to settle the dispute to their mutual satisfaction, for example, by agreeing that Telkom will retract its disqualification of the applicant's bid and its award of

the bid to the second and third respondents. In my debate with Mr Swart he conceded that the relief sought is not aimed at and will not result in the award of the bid (however far it may have progressed up to now) to the second and third respondents being retracted. It was argued that on the applicant's interpretation of 1.2.2, Telkom and the applicant will be at liberty to seek amicable solutions to their dispute to the exclusion of the other Bidders. I cannot agree with this submission. It seems to me that the other Bidders, as interested parties, ought, and probably will, be allowed to be heard and to make representations in support of their own cause. It was argued that such a state of affairs will fly in the face of the requirements of section 217 of the Constitution. In my view, it is equally arguable that to close the door to a disgruntled bidder who may have a valid complaint, may also offend against the requirements of section 217 of the Constitution.

The main thrust of this alternative leg of Mr Swarfs argument, if I understand it correctly, is that on his interpretation of 1.2.2 (which I have attempted to briefly illustrate) the clause 43 procedure is also not open to the applicant. For the reasons mentioned, I can also not accept the second leg of the argument. On a general reading of the RFP conditions (which contain 1.2.2) it is clear that reference to "the Bidders" which is found in many clauses, relates primarily to an individual Bidder and not to all the Bidders as a group or a unit. For example, clause 1.4.5 provides that "Telkom may request documentary proof of any information supplied by the Bidders. Failure to comply with request will lead to disqualification." Clause 1.4.6 provides that "Should Telkom consider it necessary, Telkom will visit the Bidder's customer sites." There are many other examples.

[41] I turn briefly to Mr Vetten's argument on this central issue and his proposed interpretation of 1.2.2.

[42] Mr Vetten also, as did Mr Swart, relied on the provisions of clause 1.1.3 (already quoted) of the RFP information schedule which stipulates that the acceptance by a Bidder of the RFP and associated documents does not constitute any contractual relationship between Telkom and the Bidders and the acceptance of any RFP/s by Telkom will not constitute any contractual relationship between Telkom and any Bidders.
I have already dealt with this argument.

[43] The main thrust of Mr Vetten's argument, if I understood it correctly, was that where clause 43 presupposes the existence of a contract between Telkom and a service provider, and where this does not yet exist at RFP stage, a disgruntled Bidder and party to a dispute arising as a result of the RFP cannot invoke the clause 43 procedure.

I have already dealt with this subject when interpreting 1.2.2 as providing for two occasions when clause 43 can be invoked, namely when any dispute arises as a result of the RFP (where no contract is yet in existence) and/or when any dispute arises as a result of the "subsequent" contract which, if I understand the definitions contained in the Standard Terms and Conditions, of which clause 43 forms part, correctly, would be the eventual service level agreement entered into between Telkom and the selected service provider. The reasons for coming to this conclusion, appear from my interpretation, supra, of 2.1.1. In my view, Mr Vetten's approach cannot be reconciled with the provisions of 1.2.2 which allow for clause 43 to come into play should any dispute arise as a result of the RFP on the one hand and/or the "subsequent contract" on the other hand. To me, these are two different situations, the one providing a dispute resolution procedure to solve a pre-contract dispute and the other to solve a dispute arising after the contract has been entered into.

Moreover. Mr Vetten's argument, in my view, contains no explanation for the provision, in 1.2.2, of a dispute between the Bidders and Telkom being referred for resolution in terms of clause 43. The Bidders are clearly not yet parties to the final service level agreement.

[44] In the circumstances, I cannot accept the submissions of Mr Vetten on this central issue.

[45] It follows from the aforegoing that I have come to the conclusion that this central issue is to be decided in favour of the applicant, namely that there is a dispute within the meaning of 1.2.2 which can be referred for resolution in terms of the mechanisms prescribed by clause 43.

[46] At this point it is also convenient to revisit the provisions of clause 43.8 which stipulate that a party to such a dispute may approach a court for interim relief by way of interdict or mandamus pending finalisation of the dispute resolution process.

A prima facie right and "the merits" of the disqualification of the applicant by Telkom which is to form the subject of the dispute resolution process

[47] It was submitted on behalf of the applicant, correctly in my view, that there is a clear, live dispute between the parties as to the merits of the disqualification of the applicant's tender, and whether or not Telkom was justified in so disqualifying the applicant. The existence of such a dispute is not denied on behalf of the respondents.

[48] I also agree with the submission by counsel for the applicant that if it is found that the applicant is entitled to embark on a dispute resolution process as intended by clause 43, it is

for the arbitrator to resolve the dispute and to decide whether or not the disqualification was merited. Counsel for the applicant submit in the heads of argument that it is clear that the merits relating to the disqualification of the applicant's bid deal with complex technical issues which cannot finally or conclusively be decided on these papers, particularly not at interim interdict stage.

[49] In the letter of 8 December 2011 containing Telkom's attempted justification of the disqualification in the face of the applicant's declaration of a dispute in the spirit of clause 43 in a letter of 25 November, Telkom's attorney points out that the tender complied with the commercial Critical Criteria but did not comply with the Technical Critical Criteria as set out in clause 2.1.2 of the RFP conditions.

[50] A mere glance at the wording of clause 2.1.2 reveals the technical nature of the dispute and the need to refer it to a suitably qualified mediator or arbitrator for resolution:
"2.1.2.1 The POTS interface shall conform to the DC feed
Characteristics and input impedance specifications as per SP 2461 paragraph 7.2.2(a)(ii) and (iii). Supporting document needs to be provided. Suitable supporting documentation would include, equipment specifications, equipment manuals or test reports.
2.1.2.2 The MSAN shall support BRI, ADSL2+ and SHDSL point bis interfaces as per SP-2461 paragraph 6.2.1a(ii), 6.2.1a(x) and 7.2.4a. Supporting document needs to be provided. Suitable supporting documentation would include, equipment specifications, equipment manuals or test reports.
2.1.2.3 The EMS must have a single North Bound interface that exposes all functionality; Fault, Configuration. Performance and Security Management of the EMS system as per SP-2066 paragraph 3.2.6. The above criteria shall be supported by the configuration manuals of

the EMS system."

[51] The main thrust of the purported justification for the disqualification of the applicant's tender seems to be an argument that insufficient supporting documentation (as required by clause 2.1.2) was supplied by the applicant and test results were not quantified.

[52] In the founding affidavit, comprehensive allegations are made to the effect that the technical criteria were complied with. An example of such an allegation is to be found in 5.19 of the founding affidavit:
"The applicant submitted a comprehensive response to the second RFP which included the requested suitable supporting documentation namely, equipment specifications, equipment manuals and test report from Maroc Telecom Projects Laboratory dated 24 March 2011. attached hereto as annexure TM7. Also included in the submission was a detailed test report of the applicant's equipment which was conducted by one of the leading Telecommunications Multinational Operators, VODAFONE, attached hereto as annexure TM8. This test was conducted at VODAFONE ESPANA in Spain in December 2010. The results clearly show that the applicant's equipment has passed the test and has been certified to be utilised in the VODAFONE group networks worldwide."

[53] Paragraph 5.26 of the founding affidavit reads as follows:
"The class B feed-bridge (7.2.2a(ii)) is required in normal POTS services, so it would have been deemed reasonable for Bidders to provide normal industry-standard responses, like Maroc Telecom and Vodafone test reports. The applicant's proposal was compliant or responsive at submission date because instead of submitting only the equipment specifications, or equipment manuals, the applicant went further by supplying the test reports

from Maroc Telecom and Vodafone group."

[54] After preparing its answering affidavit, Telkom served a rule 35(12) notice on the applicant, specifically requiring the applicant to make available the following documents referred to in paragraphs 5.19 and 5.26 of the applicant's founding affidavit:

1. equipment specifications;
2. equipment manuals.

[55] In a prompt response to this rule 35(12) notice, the applicant duly made these documents available and included same in the record as annexures "D", "E" and "F". These documents are to be found in pages 461 to 759 of the record. They contain matter of the most technical nature. There are tables, configurations and sketches which make the untrained mind boggle.

[56] In a comprehensive replying affidavit, and more particularly in paragraph 11 thereof, the applicant deals with these documents which it was required to provide in terms of rule 35(12). It is not necessary to dwell upon the details of the allegations contained in paragraph 11, other than to observe that there are compelling statements to the effect that the technical criteria were complied with, supporting documentation supplied and test measurements adequately quantified.

[57] The valid allegation is also again made to the effect that the question whether the applicant complied with the Technical Critical Criteria should be the subject-matter of arbitration.

[58] For its part, Telkom also made a series of submissions, of a technical nature, to the effect that the disqualification was justified.

It was confirmed in the Telkom opposing affidavit that the reason for the disqualification (as per the letter of 8 December 2011) is that it was not possible to validate compliance with the Critical Criteria from the supporting documentation furnished by the applicant.

[59] It was then contended in the Telkom opposing affidavit that it was incumbent upon the applicant to indicate in its founding papers which portions of the relevant test reports constituted compliance with the criteria under discussion. The submission was made that the applicant had failed to provide such evidence in its founding papers.

[60] This obviously inspired the applicant to make annexures "D", "E" and "F" [called for in the rule 35(12) notice] part of the record and to deal with extracts from those weighty annexures in the comprehensive replying affidavit. The clear allegation is also made that the required measurements appear from annexure "F" and Telkom should have been able to establish those measurements from that annexure had it read and considered the documents properly.

[61] The third respondent, perhaps wisely and understandably, did not make any allegations in its opposing affidavit aimed at illustrating why the disqualification was justified. The third respondent only makes the sweeping statement that "On the evidence that it has presented in its founding affidavit, the applicant is the author of its own predicament."

[62] Telkom, not to be outdone, even prepared a "second supplementary affidavit" to deal with some of the allegations made by the applicant in the replying affidavit and, more particularly, paragraph 11 thereof. This affidavit was only presented to me during the hearing. It contains even more technical allegations to illustrate why supporting evidence supplied was not

sufficient to establish compliance with the Critical Criteria.

[63] The applicant filed an opposing affidavit to the "second supplementary affidavit" of Telkom. This reached me before the "second supplementary affidavit" reached me during the hearing. This is so, because the latter affidavit was served on the applicant a few days before the hearing whereupon the applicant's prompt opposition thereto was filed before the hearing as well. In this opposing affidavit, the arguments of Telkom were addressed.

[64] In this opposing affidavit, the applicant also makes the following compelling submission: the documents contained in annexures "D", "E" and "F" form part of the applicant's bid documents presented at the outset. The fact that Telkom, surprisingly, called for these documents in terms of rule 35(12) despite them having been submitted at the outset, justifies a reasonable inference that Telkom did not consider these documents for the purpose of determining whether the applicant's equipment and supporting documents complied with the Technical Critical Criteria. It therefore appears as if Telkom adjudicated the bid without considering these annexures and the information referred to in paragraph 11 of the replying affidavit. In the process, the bid was not properly and fully adjudicated upon so that the granting of the interim relief sought becomes even more compelling.

[65] On a general reading of all the papers, and without claiming to understand any of the technical issues referred to, I have come to the conclusion that the applicant has established a prima facie right as intended by the requirements for interim interdictory relief. As it was put by the learned judge in Webster v Mitchell 1948 1 SA 1186 (WLD)at 1189:
"From the Appellate Division cases to which I have referred I consider that the law which I must apply is that the right to be set up by an applicant for a temporary interdict need not be

shown by a balance of probabilities. If it is 'prima facie established though open to some doubt1 that is enough."

[66] Moreover, the prima facie right applicable to this application for interim relief is informed by the question as to whether or not the applicant has made out a case for an entitlement to embark on the dispute resolution process prescribed by 1.2.2 read with clause 43 rather than by the technical "merits" of the case. I have already found in favour of the applicant in this regard and 1 have pointed out that clause 43.8 specifically foreshadows an application for an interim interdict pending fmalisation of the dispute resolution process.

Two applications to strike out

[67] Telkom launched two applications to strike out which I have to briefly deal with.

[68] The first application (which was never handed up during the hearing) was aimed at striking annexures "D", "E" and "F" from the record on the ground that these documents were not dealt with in the founding affidavit and therefore did not become part of the evidence. The attitude adopted by the applicant was that it was entitled to include the documents in the record after they were made available in response to the rule 35(12) request.

[69] This application was not proceeded with on the ground, if I understood counsel correctly, that the issue had become moot.

[70] The second application to strike out was aimed at the striking out of the entire paragraph 11 of the replying affidavit on the basis that "such paragraphs contain allegations that are fresh in nature and ought to have been incorporated in the founding affidavit".

This application was not accompanied by an affidavit setting out Telkom's complaint in respect of all the subparagraphs of paragraph 11 and, in any event, I am of the view that the subjects covered by paragraph 11 were indeed referred to in the founding affidavit, and more particularly paragraph 5 thereof In my view the applicant was entitled to deal with these aspects more fully in the replying affidavit, more particularly after receipt of the rule 35(12) request and the opposing affidavit presented by Telkom.

[71] The issue was in any event overtaken by events when Telkom was allowed to present the "second supplementary affidavit" dealing with the contents of paragraph 11 of the replying affidavit.

[72] Inasmuch as it may be necessary, I order that the applications to strike out are dismissed, costs to be costs in the application.

The balance of convenience

[73] I must weigh the prejudice the applicant will suffer if the interim interdict is not granted against the prejudice the respondents will suffer if it is.

[74] In my view, one of the main considerations is the fact that if the relief is not granted, the applicant will remain disqualified from the process. If the relief is granted, the respondents will not be disqualified as a result thereof.

[75] The third respondent, in its opposing affidavit, suggested that nothing prevents the applicant from tendering for subsequent phases of the project. The applicant counted this in a comprehensive supplementary affidavit by stating that it will not be able to participate in future opportunities that arise from the current tender. The technical reason for this was fully explained in paragraph 5.4 of the supplementary affidavit. The applicant submitted that if Telkom is allowed to conclude the process of awarding the tender to the short-listed Bidders, it would not make sense, both from the technology integration and from a financial implication perspective to award the expansion phase of the project (MSAN to FTTx) to a third supplier such as the applicant. From the technology integration point of view, the same process that Telkom is going through currently in the evaluation of this RFP, will have to be duplicated with any new supplier that it wishes to contract with. Therefore, so the applicant argues, not being part of this tender at the beginning has serious implications in the form of loss of future revenue prospects for the applicant. Considering that the first phase is estimated at R5 billion over three years, increasing to Rl3 billion over five years, the financial implications to the applicant by not being part of the project roll-out are massive compared to that of Telkom.

[76] The applicant also argues that an amount of approximately R4 million already spent on the tender by Telkom would have had to be spent in any event "as it pertains to the lay-out of Telkom's infrastructure". Even if the MS AN solution of the successful Bidder fails in respect of technical operational readiness, Telkom will still remain with its infrastructure network and can still invite other Bidders to supply the MSAN products or solutions which will connect the

system.

[77] In addition, the applicant alleges that it has already incurred expenses amounting to approximately R24,8 million in preparations for a tender which started in about October 2010. These expenses are not refundable. The applicant had to assemble a team of more than ten product specialists from China to assist the local team in making preparations for the tender as well as the presentation and clarification sessions that followed.

[78] Telkom provided figures relating to the total budget for the project. I fail to see how this impacts on the balance of convenience. There may be costs flowing from undue delays but it should not be overlooked that clause 43.7 provides that the parties agree that the arbitration will be held as an expedited arbitration in accordance with the current rules for expedited arbitrations of AFSA.

[79] On a general reading of the submissions on the question of balance of convenience I have come to the conclusion that the balance of convenience favours the applicant, if only because the refusal of the interim relief could eliminate the applicant from the process altogether, including participation in future phases of the tender whereas granting of the relief will not have the same effect on the second and third respondents.

Irreparable harm

[80] For the reasons mentioned in the discussion on balance of convenience, supra, I am of the view that the applicant has made out a case that it will suffer irreparable harm or there is at least a reasonable apprehension that it will do so through continuance of the alleged wrong on which its case is based.

No alternative remedy

[81] I have already pointed out that clause 43 specifically provides for obtaining interim relief pending finalisation of the dispute resolution process. With regard to the suggestion, supra, that the applicant's remedy may lie in a review application, I have also pointed out that 1.2.2 is couched in peremptory language in that it provides that any dispute arising as a result of the RFP shall be dealt with in terms of clause 43. It therefore appears that there is no suitable alternative remedy available to the applicant.

[82] In the result, I have come to the conclusion that a proper case was made out for the interim relief sought by the applicant.

Costs

[83] It was argued by counsel on behalf of both the respondents that, in the event of the application being upheld, it would be inappropriate to grant costs against the respondents at this stage.

[84] In this regard I was referred by Mr Swart to the case of EMS Belling Co of South Africa v Lloyd 1983 1 SA 641 (ECD) at 644G-H where the following is said:

"There are sound reasons for not granting the costs of an interdict pendente lite to a successful applicant in the absence of exceptional circumstances. While it can be said that such an applicant has achieved substantial success, such success is of a limited and temporary nature, often based upon a balance of convenience, and even despite a serious dispute of facts on the papers. It is implicit in an order granting a temporary interdict that such

order, and the relief consequent thereon, will fall away should the applicant be unsuccessful in the trial. It would, in such a case, be unjust to compel the defendant in the trial to bear the costs of an interdict to which the plaintiff may subsequently be shown to have been not entitled."

[85] These observations were quoted with approval in Airoadexpress (Pty) Ltd v Chairman, Local Road Transportation Board, Durban, and Others 1986 2 SA 663 (AD) at 682I-683A.
[86] This is not a case where the relief is to be granted pending the outcome of a trial or an application for final relief, in which event it would be convenient to order that the costs of this application be costs in the cause.

[87] I am reluctant to impose on the arbitrator the duty to decide the question of costs incurred in this court during these preliminary proceedings. It follows, that I will regrettably have to reserve the costs for later adjudication, if necessary, although one would generally be slow to do so. This is the order urged upon me by counsel for both respondents and not seriously contested by Mr Dreyer for the applicant.

The order
[88] I make the following order:
1. The first respondent is interdicted and restrained from implementing tender and/or request for proposal 0328/2011 forthwith, in any manner whatsoever, including concluding any service level agreements with the second and third respondents.
2. The order in paragraph 1 above shall operate as an interim interdict with immediate effect pending the finalisation of the dispute resolution process that has been commenced by the applicant in terms of clause 43.3 and 43.4 of the Standard Terms and Conditions (volume 1

part 4) read with clause 1.2.2 of the RFP conditions for RFP no 0328/2011.

3. The costs flowing from this application are reserved.

WRCPRINSLOO

JUDGE OF THE NORTH GAUTENG HIGH COURT

72499-2011

HEARD ON: 9 MARCH 2012

FOR THE APPLICANT: J H DREYER SC ASSISTED BY M MPHAGA SC INSTRUCTED BY:

LANGA ATTORNEYS

FOR THE 1st RESPONDENT: B H SWART SC ASSISTED BY M P D CHABEDI

INSTRUCTED BY: MATHOPO MOSHIMANE MULANGAPHUMA INC FOR THE 3rd

RESPONDENT: D VETTEN

INSTRUCTED BY: DAVID H BOTHA, DU PLESSIS & KRUGER INC