IN THE HIGH COURT OF SOUTH AFRICA

REPUBLIC OF SOUTH AFRICA

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GAUTENG DIVISION, PRETORIA

13/5/16

Case no: 28952/2016

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

SIGNATURE 13/5/2016 DATE

In the matter between:

DIMENSION DATA (PTY) LTD	First Applicant
NAMBITI TECHNOLOGIES (PTY) LTD	Second Applicant
YOTTA ZETTA (PTY) LTD	Third Applicant

and

STATE INFORMATION TECHNOLOGY AGENCY (SOC) LTD	First Respondent
EOH MTHOMBO (PTY) LTD	Second Respondent

Reasons for **JUDGMENT**

AC BASSON, J

Order:

[1] On 6 May 2016 the following order was handed down:

"1 Pending the final determination of the relief sought in Part B of the Notice of Motion, the first respondent is interdicted from:

1.1 further implementing the award of RFB 1221/2014 ("the tender");

1.2 taking any steps to procure any goods or services pursuant to or as envisaged in the tender.

2 The first respondent is directed to provide the first applicant with copies of the following documentation within 15 days of this order:

2.1 a copy of any advisory opinion, written view, letter or report received by the first respondent from the Competition Commission regarding the competition issues raised in respect of the tender or tender process adopted by the first respondent;

2.2 copies of all correspondence and communication between the first respondent and the Competition Commission, including emails, notes of meetings with the Commission and details of any views conveyed to the first respondent by the Commission regarding competition law issues in respect of or in connection with the tender.

3 The first respondent is ordered to pay the first applicant's costs, on an attorney and client scale, including the costs of two counsel."

Reasons

[2] This was an urgent application for an interim interdict pending the finalisation of a review of a decision to award a tender for the provision of IT networking services to various government departments.

[3] This application is brought in two parts. Part A is the urgent application that served before this court. The first applicant is seeking urgent interim relief to

prevent the implementation of the awarding of the tender pending the outcome of its application under Part B to review and set aside the decision made by the first respondent to issue the invitation to bid (under number RFB1221/2014), to award the so-called CISCO tender and the decision to disqualify the Akona consortium's response to the CISCO tender of which the first applicant was informed by letter dated 29 January 2016.

Parties

[4] The first applicant is Dimension Data (Pty) Ltd (hereinafter referred to as "the applicant"). The applicant was the main member of a consortium named the Akono Consortium (hereinafter referred to as "the consortium"). The consortium members were the second applicant - Nambiti Technologies (Pty) Ltd (hereinafter referred to as "Nambiti"), the third applicant - Yotta Zetta (Pty) Ltd (hereinafter referred to as "Zetta") and the second respondent - EOH Mthombo (Pty) Ltd (hereinafter referred to a "EOH").

[5] The consortium was not a separate legal entity and was formed for the sole and exclusive purpose of formulating and submitting a bid in response to the tender in respect of CISCO OEM products ("the tender").

[6] Initially three entities namely Dimension Data, Nambiti and Zetta, were cited as applicants. In the founding affidavit the deponent states that due to the urgency of the matter, it was not possible to properly engage with EOH (the second respondent) in respect of the contents of the application. The deponent states that he had discussion with Nambiti and Zetta who have both joined issue with first applicant (Dimension Data).

[7] When the matter was argued the court was, however, informed that both Nambiti and Zetta have withdrawn their support for the urgent application because they have found themselves in a conflicted situation and did not wish to jeopardize their relationship with SITA who is still the purveyor of billons of rands worth of IT government work: The government is by far the largest customer for networking and other IT services in the industry.

Because only one applicant remains before court (namely the first applicant), I will refer to it as "the applicant".

[8] The first respondent is the State Information Technology Agency (SOC) Ltd (hereinafter referred to as "SITA"). SITA is mandated in accordance with section 7(g) of the State information Technology Agency Act[1] to render information and communications technology services to government departments and to act as the procurement agency of government. The second respondent (EOH Mthombo (Pty Ltd) also conducts business as a network installer. I have already pointed out that EOH was a member of the Akono consortium.

[9] The consortium responded to a Request for Bids (hereinafter referred to as the "RFB") issued by SITA. I have already referred to this bid in paragraph [3]. It is this bid that is the subject matter of this urgent application.

[10] The consortium bid was unsuccessful as it was disqualified because Zetta did not, according to SITA, comply with certain technical requirements set out in the tender. (I will return to these requirements herein below in more detail.)

[11] Before I turn to the merits of this application, I must point out that the papers that served before the court were voluminous. Oral argument also took up an entire day. Because of the urgency of this matter I intend to give only brief reasons for my order.

Non-Joinder

[12] I have already briefly referred to the fact that Nambiti and Zetta withdrew their support for the relief sought in the Notice of Motion notwithstanding the fact that both were initially cited as applicants in this application. On behalf of SITA it was submitted that the applicant ought thereafter to have joined them as respondents in this application.

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[1] 88 of 1988.

[13] There is no merit in this submission: Nambiti and Zetta are fully aware of this application. Neither have filed any papers indicating that they in fact oppose any relief sought on behalf of the applicant. To now join them as respondents would serve no purpose and would only result in a delay in bringing this matter to finality. (I will point out herein below why the matter is considered to be urgent.)

[14] In the answering affidavit the point is also raised that the applicant had to join the successful bidders as well as all those bidders who responded to the invitation to tender and participated in the tender process, but were unsuccessful. According to SITA the successful bidders as well as those who were unsuccessful all have a direct and substantial interest in the relief sought by the applicant and should therefore be joined before the relief which the applicant seeks is even entertained. Furthermore, various government departments (*inter alia* the South African Police Service) have already placed orders with the successful bidders for various goods and services. These departments have not only placed orders, some departments have already received some of the goods and services that were ordered by them and have in some instances already paid the successful bidders for the goods and services received by them. They should therefore all be joined as parties to this application.

[15] In considering the merits of the argument in respect of non-joinder, it is necessary to have regard to the facts that preceded the launching of this urgent application. At the time when the applicant drafted the founding affidavit, the applicant was unaware as to who the successful consortium bidders were as no information had been furnished to the applicant despite numerous requests to be furnished with this information. In fact, the applicant had requested to be furnished with the identity of the winning consortia and details of any orders placed in correspondence dating as far back as 18 March 2016. Further letters were also dispatched to the applicant when the information was not forthcoming. SITA was therefore expressly requested to provide the applicant with information regarding the identity of

the departments that placed orders, when the orders were placed and with which consortia the orders were placed. The information was simply not forthcoming.

[16] According to the applicant, it had requested this information from SITA prior to the launching of this application precisely in order to avoid there being a problem with non-joinder.

[17] The applicant was therefore not in a position at the stage of the drafting of the papers to join the successful consortia nor was the applicant furnished with any information regarding any orders that were placed and by whom. In the founding affidavit SITA was also expressly requested by the applicant to furnish it with the particulars regarding the members of the winning consortium and was further specifically requested to give the members of the winning consortium notice of this application and to invite them to intervene in this application.

[18] SITA initially simply refused to disclose the information to the applicant on the basis that it was "confidential". Why the information was initially regarded as confidential is not apparent from the papers especially in light of the fact that the outcome of a public procurement process can hardly be regarded as confidential.

[19] It was only after the founding affidavit had been filed that the applicant was informed that the tender was awarded to a consortium led by Business Connexion (Pty) Ltd ("hereinafter referred to as "the winning consortium").

[20] The fact that the applicant had pertinently sought relevant information from SITA regarding all parties that may have an interest in the outcome of these proceedings prior to the launching of the application can therefore not be ignored. It also cannot be ignored that the applicant has in the founding affidavit pertinently invited SITA to inform all interested parties of this application. Only in the answering affidavit did SITA finally disclose the details regarding the successful bidders and other interested parties.

Simultaneously with the disclosure of this information SITA also raised the defence of non-joinder.

[21] I am in agreement with the submission that it would have been a simple matter for this information to have been provided to the applicant before the launching of this application. To raise the defence of non-joinder at this stage and especially after several after attempts have been made to obtain this information smacks, in my view, of *mala fides*. I have already referred to the fact that SITA had refused to disclose the information because it was "confidential" yet it was willing to disclose the information in its answering affidavit.

[22] I am of the view that in these circumstances it is not open to SITA to now complain about the non-joinder of these parties. The applicant was forced to launch the application without confirmation as to who the winning consortium bidders were and what their interest was.

[23] I should also point to a further fact why I am of the view that the defence of non-joinder was proffered in bad faith. In the answering affidavit SITA raised the point that, in any event, SITA has already spent the bulk of the R 1 billion budget: Only some R 300 million remains available to spend "in the next few weeks". If this court therefore postpones the matter in order to allow the applicant to join all the relevant parties (only now identified in the answering affidavit) this application would be rendered academic.

[24] I am therefore in agreement with the submission made on behalf of the applicant that a negative inference can be drawn from the fact that SITA only raised the issue of non-joinder in the answering affidavit. This type of conduct is not acceptable and is frowned upon by our courts: SITA is a state organ and should not be seen to act in a manner which is bound to prevent a court from granting a remedy. See in this regard *Gauteng Gambling Board*

and Another v MEC for Economic Development, Gauteng[2] where the court held as follows:

> "[49] There are two further aspects that require brief attention. First, it is necessary to say something to demonstrate the court's displeasure at the manner in which the MEC behaved, over and above the manner in which she terminated the membership of all the members, more particularly her conduct subsequent to the litigation being launched....
> [50] More than a century ago Mason J in *Li Kui Yu v Superintendent of Labourers* 1906 TS 181 said the following (at 194):
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> > 'That being so, it is impossible for me to pass over without some notice what is, I consider, an offence of a serious kind, namely that of interfering with the administration of justice by taking an action which is bound to prevent the Court granting a remedy.'
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> .....
> [52] Our present constitutional order is such that the state should be a model of compliance. It and other litigants have a duty not to frustrate the enforcement by courts of constitutional rights. In *Tswelopele Non-Profit Organisation and Others v City of Tshwane Metropolitan Municipality and Others* 2007 (6) SA 511 (SCA) in para 17 this court stated the following:
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> > 'This places intense focus on the question of remedy, for though the Constitution speaks through its norms and principles, it acts through the relief granted under it. And if the Constitution is to be more than merely rhetoric, cases such as this demand an effective remedy, since (in the oft-cited words of Ackermann J in *Fose v Minister of Safety and Security*) "without effective remedies for breach, the values underlying and the right entrenched in the Constitution cannot properly be upheld or enhanced":
> >
> > "Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those

[2] 2013 (5) SA 24 (SCA).

> occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated.'"
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> .....
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> [54] In the present case the best that can be said for the MEC and her department is that their conduct, although veering toward thwarting the relief sought by the board, cannot conclusively be said to constitute contempt of court. However, that does not excuse their behaviour. The MEC, in her responses to the opposition by the board, appeared indignant and played the victim. She adopted this attitude while acting in flagrant disregard of constitutional norms. She attempted to turn turpitude into rectitude. The special costs order, namely, on the attorney and client scale, sought by the board and Mafojane is justified. However, it is the taxpayer who ultimately will meet those costs. It is time for courts to seriously consider holding officials who behave in the high-handed manner described above, personally liable for costs incurred. This might have a sobering effect on truant public office bearers. Regrettably, in the present case, it was not prayed for and thus not addressed."

[25] I will return to this issue herein below where I consider the issue of costs.

Urgency

[26] The urgency of this application was also strongly disputed on behalf of SITA. More in particular, it was submitted that the urgency in this matter was self-created.

[27] Both parties submitted lengthy arguments in respect of the urgency of this matter. I do not intend dealing with these submissions in detail. Suffice to point out that I am not persuaded that urgency has been self-created. In this regard the court was informed that the applicant only received the letter informing it that the Akono bid was unsuccessful on 8 February 2016. On 12 February 2016 the applicant wrote to SITA and requested a formal debriefing. SITA only responded to the request on 24 February 2016 and

scheduled the debriefing for 3 March 2016. On 9 March 2016 the applicant sought access to relevant information about the tender process including a copy of an opinion furnished to SITA by the Competition Commission. On 18 March 2016 the applicant requested further information, including the identity of the winning consortium and information in respect of whether any agreements had been concluded between SITA and the winning consortium and government departments. By 22 March 2016 no response had been received from SITA and further letters were dispatched to SITA. On 30 March 2016 the applicant sent a comprehensive letter of demand to SITA requesting it to furnish the applicant with an undertaking that the tender would not be implemented pending a review. On 1 April 2016 SITA responded by stating that it refused to furnish such an undertaking. As already pointed out SITA also refused to disclose the identity of the winning consortia.

[28] This application was launched on 11 April 2016. Service was affected on SITA by email and was followed up by physical service on 12 April 2016.

[29] On behalf of the applicant it was submitted that it had no choice but to launch this application particularly in light of SITA's obstruction and lack of transparency in allowing the applicant access to material information and documents: As already pointed out, SITA refused to disclose the identity of the winning consortium, refused to disclose whether orders had been placed with the winning consortium and refused to disclose whether SITA had concluded Service Level Agreements ("SLA") with the winning consortium.

[30] It should also be pointed out that, on SITA's own version, some R300 million or 30% off the budget of R1 billion allocated remains unspent and that there is an intention (on SITA's own version) to spend the remaining budget within the next few weeks. If that is so, any relief sought by the applicant would in any event soon be academic.

[31] I am therefore persuaded on the papers that the matter is urgent. I am also persuaded that the applicant had attempted to avoid approaching this court

by seeking an undertaking from SITA not to implement the tender pending a review on expedited time frames. I can therefore find nothing dilatory in the efforts of the applicant to engage SITA in an attempt to avoid rushing off to court.

Is the matter academic?

[32] I have already mentioned that SITA made an allegation that the matter is now academic as the bulk of the allocated budget had already been spent and that the remainder of the budget will be spend in the next few weeks.

[33] Before I deal with this submission I should point out that, apart from the fact that this allegation in fact substantiates the urgency of this matter, SITA is not particularly forthcoming in the answering affidavit in respect of details regarding spending.

[34] In March 2016 the applicant sent a letter to SITA requesting it to furnish it with an undertaking that the contested bid awards would not be implemented pending the outcome of a review. On 1 April 2016 SITA refused to furnish such an undertaking. As already pointed out this resulted in the applicant being compelled to launch these proceedings on 11 April 2016 without the requested information. In light of SITA's own version that some R300 million or 30% of the budget remains unspent, it can hardly be argued that the matter is "academic".

Brief introductory remarks

[35] Before I turn to the question before this court it is necessary to make a few brief remarks regarding the context within which the merits of his application need to be considered.

[36] At the outset I should point out that I am mindful of the fact that what is before this court is an application for an interim interdict and that, should this court grant the order sought under Part A of the Notice of Motion, the matter will ultimately be fully ventilated in terms of Part B of the Notice of Motion.

[37] I am thus mindful that the applicant only needs to establish a *prima facie* right though open to some doubt (coupled with the other requirements for interim relief). My introductory remarks should therefore be viewed in this context.

[38] Section 217 of the Constitution of the Republic of South Africa[3] sets out the broad legislative framework within which a government procurement process must be implemented:

> "217 Procurement
> (1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.
> (2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for-
> *(a)* categories of preference in the allocation of contracts; and
> *(b)* the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.
> (3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented."

[39] This section therefore makes it clear that, as a minimum requirement for a valid procurement process, the process must be fair, equitable, transparent, competitive and cost effective.

[40] Also critical to the assessment of this process is the provisions of the Preferential Procurement Policy Framework Act[4] (hereinafter referred to as the "PPPFA"). It terms of section 1 of the PPPFA an "acceptable tender

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[3] 108 of 1996.
[4] 5 of 2000.

means any tender which, *in all respects*,[5] complies with the specifications and conditions of tender as set out in the tender document."

[41] In terms of the Preferential Procurement Regulations,[6] a tender is described as "a written offer in a prescribed or stipulated form in response to an invitation by an organ of state for the provision of services, works or goods, through price quotations, advertised competitive tendering processes or proposals."

[42] The requirement for a fair, equitable, transparent, competitive and cost effective procurement process is also reaffirmed in section 51(1)(a)(iii) of the Public Finance Management Act.[7]

[43] When a court is called upon to assess the fairness and lawfulness of a procurement process, a court should be mindful of the fact that this assessment is independent of the (final) outcome of the tender process. Fundamental to this enquire is therefore the fairness of the process and not the substantive correctness of the outcome.

[44] In challenging the procurement process an applicant is entitled to rely on any number of irregularities in the procurement process. In doing so an applicant must set out such facts that would persuade this court that irregularities did in fact occur in the procurement process. Such facts are presented as evidence to establish that any one or more of the grounds of review under PAJA may exist:[8] "The judicial task is to assess whether this evidence justifies the conclusion that any one or more of the review grounds do in fact exist".[9]

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[5] My emphasis.
[6] 2011. Published under GN R502 in *GG* 34350 of 8 June 2011 (with effect from 7 December 2011).
[7] "**General responsibilities of accounting authorities.**—(1) An accounting authority for a public entity— (*a*) must ensure that that public entity has and maintains— (iii) an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective."
[8] *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency, and Others* 2014 (1) SA 604 (CC) ad para [44].
[9] *Ibid.*

[45] Ultimately the assessment of the fairness and lawfulness of the procurement process will be done within the legislative framework of the Promotion of Administrative Justice Act[10] (hereinafter referred to as PAJA"). Fundamental to section 6 of PAJA is the principle that bidders (in the context of this matter) have the right to administrative action "that is lawful, reasonable and procedurally fair."

[46] I should also make a few remarks regarding the importance of transformation and economic redress in the context of the past exclusion of black people from all spheres of our economy. I make these comments against the background of one of the complaints raised by the applicant namely that SITA awarded the tender without price and BEE evaluations. In fact, as will be pointed out herein below, it was common cause that SITA did not do any price and BEE evaluations before the tender was awarded.

[47] In this regard section 217(2) of the Constitution clearly states that a procurement policy may "provide [for] the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination." The PPPFA also provides that a procurement policy may provide for specific goals which may include "contracting with persons or categories of persons historically disadvantaged by unfair discrimination on the basis of race, gender or disability". The Preferential Procurement Regulations explicitly refer to the BBBEE status[11] of a bidder and specifically provides for a process to evaluate not only functionality[12] but also price and BBBEE status.

[48] The importance of the BBBEE status of a bidder can therefore not be overemphasised. This sentiment was succinctly summarized by the Constitutional Court in *Allpay Consolidated Investment Holdings (Pty) Ltd*

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[10] 3 of 2000.

[11] Broad Based Black Economic Empowerment.

[12] Section 1 of the Regulations defines functionality as follows: "functionality means the measurement according to predetermined norms, as set out in the tender documents, of a service or commodity that is designed to be practical and useful, working or operating, taking into account, among other factors, the quality, reliability, viability and durability of a service and the technical capacity and ability of a tenderer."

and Others v Chief Executive Officer, South African Social Security Agency, and Others where the court held as follows:

> "[46] The transformation that our Constitution requires includes economic redress. In the context of the past exclusion of black people from access to mineral resources Mogoeng CJ stated in *Agri SA*:
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> > '(B)y design, the MPRDA is meant to broaden access to business opportunities in the mining industry for all, especially previously disadvantaged people. It is not only about the promotion of equitable access, but also about job creation, the advancement of the social and economic welfare of all our people, the promotion of economic growth and the development of our mineral and petroleum resources for the common good of all South Africans.'
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> [47] Economic redress for previously disadvantaged people also lies at our constitutional and legislative procurement framework. Section 217(2) provides for categories of preference in the allocation of contracts and the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination. Section 217(3) provides for the means to effect this, in the form of national legislation that must prescribe a framework within which the policy must be implemented."

[49] In order to achieve BBBEE it is thus imperative that the BBBEE credentials or employment of prospective bidders be investigated and assessed.

[50] In this regard the Preferential Procurement Regulations provide for a two pronged process: A bid will first be evaluated for functionality. No tender must be regarded as an acceptable tender if it fails to achieve the minimum qualifying score for functionality as indicated in the tender invitation.[13] Once a tender has achieved the minimum score for functionality, such tender must further be evaluated in terms of the preference point system prescribed in section 5 of the Preferential Procurement Regulations. In brief a 90/10

[13] Section 4(4) of them Preferential Procurement Regulations.

preference point system is then applied: A maximum of 90 points are awarded for price and the remaining 10 points are awarded for attaining the required BBBEE status.

[51] The assessment of BBBEE or empowerment must therefore be done during the second stage of the assessment process. Where there is no other competitor left – in other words where only one tenderer advances to the second stage of the assessment process and effectively becomes the winning tenderer – the obligation to assess the winning tenderer's BBBEE credentials becomes even more important. This much was confirmed by the Constitutional Court in *Allpay*:[14]

> "[68] The Procurement Act provides that an organ of state must determine its preferential procurement policy within a preference-point system for specific goals, which may include 'contracting with persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability'. The handling of the tender process by SASSA made this a nullity, in that the black economic empowerment preference points — which were to be assessed in the second stage — played no actual role in the decision because by that stage there was no competitor. An investigation into the propriety of empowerment credentials does not become necessary only after a complaint has been lodged. There was an obligation on SASSA to ensure that the empowerment credentials of the prospective tenderers were investigated and confirmed before the award was finally made. That obligation became even more crucial when there were no other competitors left in the second stage. There is then an even greater obligation for the tender administrator to confirm the empowerment credentials of the winning bidder.
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> [69] Cash Paymaster claimed that its equity partners would manage and execute over 74% of the tender. Its tender did not substantiate this. All it did was to provide particulars of the management capabilities

[14] *Supra.*

of its workforce, which included previously disadvantaged people. On the face of the information provided by Cash Paymaster in its tender it was not possible to determine whether its claimed empowerment credentials were up to scratch or not.

[70] Despite this failure, SASSA did not call on Cash Paymaster to substantiate its claimed empowerment credentials, presumably because by that stage the preference points could not have affected the outcome.

This effectively made the consideration of empowerment an empty shell, where preference points were calculated as a formality but where the true goal of empowerment requirements was never given effect to.

...

[72] Given the central and fundamental importance of substantive empowerment under the Constitution and the Procurement and Empowerment Acts, SASSA's failure to ensure that the claimed empowerment credentials were objectively confirmed was fatally defective. It is difficult to think of a more fundamentally mandatory and material condition prescribed by the constitutional and legislative procurement framework than objectively determined empowerment credentials. The failure to make that objective determination fell afoul of s 6(2)*(b)* of PAJA (non-compliance with a mandatory and material condition) and s 6(2)*(e)*(iii) (failure to consider a relevant consideration)."

Interim relief

[52] The legal requirements for an interim interdict are the following:[15]

(a) a prima facie right, though open to some doubt;

(b) an injury actually committed or a reasonable apprehension of irreparable harm;

(c) the balance of convenience favours the applicant;

(d) the absence of similar protection by any other ordinary remedy.

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[15] Se: *Olympic Passenger Service (Pty) Ltd v Ramlagan* 1957 (2) SA 382 (D) at 383E – F:

Prima facie right though open to some doubt

[53] I will now briefly turn to the question whether this court should grant interim relief. In this regard it needs to be considered whether the applicant has established a *prima facie* right that is likely to result in the relief sought in the main review. Put differently, a prima facie right may be established by an applicant demonstrating prospects of success in the review. This requirement must be weighed up along with the other requirements of irreparable and imminent harm if an interdict is not granted, the balance of convenience and, lastly, whether there is an absence of an alternative and effective remedy.

[54] The applicant relied on the following 5 alleged unlawful irregularities in the procurement process:

(i) SITA did not conduct price and BEE evaluations;
(ii) the 2014 framework constituted unlawful competition;
(iii) the 2014 framework was anticompetitive;
(iv) the AKONO bid was unlawfully disqualified; and
(v) Government departments have unlawfully placed orders directly with the winning consortium instead of ordering through SITA.

[55] I do not intend dealing with each of these grounds in detail as I am of the view that on at least two of these grounds the applicant has established a *prima facie* right to relief sought and has therefore established that it has prospects of success in the main review.

SITA did not conduct price and BEE evaluations

[56] I have already referred to the fact that the invitation to bid in this particular case expressly committed the tender process to the 90/10 evaluation system as provided for in the PPPFA. In clause 2.2.4 of the invitation to bid it is stated that the bid "shall be evaluated in terms of the PPPFA".

[57] The bid further specifically refers to the principles of BBBEE as defined in section 1 of the Broad Based Black Economic Empowerment Act. Specific reference is also made to the BBBEE status level of a contributor.

[58] In clause 5.4 2 of the invitation to bid it is also specifically stated that SITA supports BBBEE as an essential ingredient of its business and that SITA insists that the private sector demonstrates its commitment and track record to BBBEE in the areas of ownership (shareholding), skills transfer, employment equity and procurement practices (SMME Development) etc.

[59] A contract must be awarded to the bidder scoring the highest total number of points in respect of price and BBBEEE unless objective criteria justify the tender to be awarded to another bidder.

[60] It therefore follows that an evaluation of price and BBBEE is critical to the 90/10 evaluation system and without prices being evaluated and without BBBEE being evaluated points cannot be awarded. As apready pointed out, where only one bidder advances to the second stage of the process, it becomes even more critical to assess the BBBEE status of such a bidder.

[61] In this instance it is not disputed that SITA did not consider bidders' prices at all. This fact only became known to the applicant when SITA finally disclosed various documents pertaining to the tender process. These documents were disclosed only after SITA was forced by the applicant with the lodging of a PAIA request and only after the applicant had filed its founding affidavit.

[62] Apart from the fact that no price evaluation was done, it was common case that no BBBEE evaluation was done prior to awarding the tender to the winning consortium. (I will return to the failure to evaluate BBBEE herein below.)

[63] Tenderers were not required to bid in rand. They were only required to specify a percentage mark-up according to a published costing model. Apart from the fact that it is common cause that no price evaluation was made, it transpired from the disclosed documents that the awarding of the bid was previously cancelled precisely because no price comparison (using Rand as

a point of departure) could be made. In this regard the documents show that a request was made in April 2015 by SITA's Acquisition Management that the 2014 framework be cancelled. The reason was:

> "The reason for cancellation is that the Price evaluators are unable to conduct price evaluation on a comparative basis since the costing model did not provide for the bidders to indicate their bid price and SCM [Supply Chain Management] is unable to determine a winning bidder."

[64] In April 2015 SITA's own Acquisition Management Department (and Supply Chain Management Department) was therefore of the view that the tender must be cancelled because SITA was unable to conduct a price evaluation. The reason why a price evaluation could not be done was because bidders were only required to include in their bids a proposed percentage mark-up on networking products.

[65] A very different picture emerged a few months later in August 2015. Without there having been any changes to the bids and despite the fact that bidders were still required to submit their bids providing only for a percentage mark-up, SITA concluded that:

> "Each response was analysed to the completeness of the proposed price and to identify possible risks, concerns and additional benefits. The evaluation is based on the Preferential Procurement Policy Framework Act with bidders 'scores calculated using the following formula... The formula applied to calculate the price points is based on the 90/10 preference point system as the lowest acceptable offer under SITA consideration... The formula will be applied per brand for price comparison as required under the published RFP document."

[66] According to what was now stated in August 2015, bids were in fact evaluated according to the 90/10 system meaning that the bids were evaluated with reference to price and scores were awarded. The 90/10

evaluation system was therefore ostensibly applied in the exact circumstances (the same bids and same bid information) that previously in April prompted SITA to conclude that, because a price comparison was impossible, a winner could not be determined.

[67] A further, and again different scenario, presented itself in October and December 2015: Although it was previously expressly stated in August 2015 that SITA had applied the 90/10 system and had scored price according to the price formula, it now stated in October that price evaluations were in fact not done:

> "The price evaluation was not conducted due to bidders were requested to provide mark-up % according to the published costing model. However the price evaluation will be applied during the RFQ stage."

[68] The same statement was repeated in October and again in December 2015. The October and December reports also record that BEE evaluations were not done.

[69] Three different versions therefore emerge out of SITA's own documents: (i) In April 2015 it was impossible to conduct price comparisons and select a winner. (ii) In August 2015 the 90/10 system and the pricing formula were ostensibly applied to bidders and points were awarded even though bidders also did not provide Rand prices. (iii) In October and December 2015 SITA now stated that it did not conduct price evaluations nor BEE evaluations thereby contradicting previous statements.

[70] I am in agreement with the submission on behalf of the applicant that the 90/10 evaluation system is compulsory not only by statute but also in terms of the express undertakings made in the invitation to bid.

[71] What appears from the papers to have taken place since August 2015 was a change in SITA's stance as to when price and BEE evaluations would take

place. Whereas it is clear that the required evaluation should take place *before* the awarding of a bid (if the provisions of the PPPFA is taken into account as well as the bid invitation itself), SITA appears to have taken the decision to summarily relocate evaluations on price and BEE to be evaluated only "during the RFQ stage". Presumably this means that price and BEE would only be evaluated once a government department places an order. I am in agreement that this is *prima facie* unlawful.

[72] In respect of the failure to conduct a proper BBBEE evaluation, I am equally of the view that this failure *prima facie* constitutes a serious irregularity in the procurement process. In October 2015 the following was expressly recorded:

> "B-BBEE Points Evaluation Summary
> The B-BBEE evaluation was not conducted and the process will be applied during the RFQ stage."

[73] In the circumstances I am therefore satisfied that the applicant has established a *prima facie* case that an irregularity was committed during the procurement process.

[74] Although not strictly necessary I will also consider one further complaint of procurement irregularity raised by the applicant.

Cancellation of the Akono bid

[75] It was common cause that the Akono bid was disqualified because one of its members (Zetta) did not comply with three tender requirements relating to the experience and technical capacity of consortium members.

[76] The reasons for disqualifying the Akono bid are contained in a document entitled "Functional / Technical Evaluation Report (dated 20 April 2015). Zetta was eliminated and consequently the Akona bid was disqualified for the following three reasons: (i) Zetta did not provide reference letters although every other member has provided such letters. (ii) Zetta did not provide proof of residence although every other member has provided proof

of residence. (iii) Zetta did not provide any letters by an accounting officer or from registered auditors.

[77] In response to these grounds for disqualification the applicant submitted that the disqualification of Zetta (and consequently the consortium) was irregular. This is denied by SITA who submitted that the consortia were indeed expected to have business premises to cover the national footprint and zoning as stipulated in the RFB. SITA would, however, afford a consortium a maximum period of 6 months to establish proper business premises for BBBEE entities.

[78] The applicant maintained that the disqualification of Zetta was irregular: Firstly, it was submitted that the technical requirements did not apply to Zetta because these technical requirements did not pertain to the BBBEE and SMME (small business) members of the consortium. In this regard the applicant further submitted that, in any event, the purpose of the technical requirements was to ensure that the consortium has the necessary technical ability to provide IT services. Consequently this requirement only applied to those members of the consortium that actually would have provided technical services. According to the applicant only the applicant and Nambiti are IT companies and therefore only they would have provided the required technical services if the Akono bid was successful. I pause here to point out that it was not in dispute that they have complied with the technical requirements. Secondly the applicant submitted that Zetta was assigned a very different role in the structure of the consortium and only had a non-technical role: Zetta was a consortium referee and not a technical participant and its role was to manage the spread of work between the other consortium members to ensure that each consortium properly allocate 40% of its share of the consortium's business to small businesses. This, according to the applicant, was made clear to SITA in its Executive Summary where the following was stated:

> "The consortium has chosen to have an administrative head which is independent of the members but each member would have

representation or will participate in a steering forum that will govern the Consortium. In this case, Yotta Zetta is an SMME which will manage and proactively bring external auditors as well to keep track on delivery of the project against the tender milestones and objectives.

We have adopted the Single Service Aggregator model which is designed to overcome the problem of managing multiple supplier relationships by appointing a Single Service Aggregator (SSA) – The administrative agent will have access or integrate to individual consortium member systems and personnel specifically for this project. The Agent will give rise to the Architectural blueprint that will be derived and singed off within an agreed timeframe."

[79] According to the applicant it therefore ought to have been readily apparent from the consortium structure that Zetta was not an accredited networking installer consortium member and that it was only entitled to 5% as a management / administration fee to which it was entitled to in terms of clause 12 of the consortium agreement as well as Annexure A to the consortium agreement. As such it should have been readily apparent to the Evaluation Committee that the consortium included Zetta as a SMMe and that it was included solely to be an administrative agent in the consortium.

[80] In its response SITA merely stated that the reference to the Executive Summary where the role of Zetta is explained does not assist the applicant because it is "inconsistent" with the provisions of the applicant's consortium agreement. To what extent it is inconsistent is not explained by SITA.

[81] There is in my view some merit in the applicant's submission: There is no indication from the documents – especially from the document purporting to set out the reasons for the disqualification of Zetta – that any consideration was given to the fact that the structure of the consortium was that there were only three 20% shareholders (the applicant, EOH and Nambiti) and that they *de facto* were the members who would have been responsible for the technical execution of the bid and that only they therefore ought to have been subjected to scrutiny regarding the mandatory requirements stipulated

in the tender. There is accordingly in my view merit in the submission that had the Evaluation Committee properly applied their minds to the consortium's response to the tender it would have appreciated the structure of the consortium and the explanation that Zetta was included solely to be an administrative agent in the consortium.

[82] In the alternative, it was submitted on behalf of the applicant that SITA should have exercised its discretion and should have condoned Zetta's non-compliance with these requirements especially in light of its stated role in the consortium.

[83] The applicant further submitted that, at the very least, SITA ought to have sought clarification from the consortium on Zetta's role and its non-compliance with the technical requirements. This ought to have been done especially in circumstances where SITA had extended an opportunity to another consortium (the Ubuntu consortium) to submit its BBBEE level and tax clearance certificates which were not attached to their bid. This opportunity was extended to Ubuntu in circumstances where the invitation to bid contains a very specific requirement that a bidder must submit a valid and original tax clearance certificate and an original or certified copy of its BBBEE certificate. Bidders are further specifically informed that "such bidder must submit outstanding certificate(s) to SITA tender office within seven (7) week days from the closing date of this tender. Failure to do so may result in SITA rejecting the bidder's response or not awarding claimed BBBEE points." Why such an opportunity was not similarly extended to the Akona consortium is not clear. Clearly SITA was of the view that it had a discretion to depart from insisting on strict compliance with the bid requirements contained in the invitation to bid.

[84] Tenderers have the right to a fair tender process and has this right irrespective of whether the tender is ultimately awarded to them.[16]

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[16] *Logbro Properties CC v Bedderson NO and others* 2003 (2) SA 460 (SCA) at paras [24] and [25].

[85] In the circumstances I am therefore satisfied that the applicant has established a *prima facie* case that an irregularity was committed during the procurement process that ultimately led to the disqualification of the Akona consortium.

[86] With regard to an injury actually committed or a reasonable apprehension of irreparable harm I am equally satisfied that the applicant had established that it has a reasonably apprehension of irreparable harm. Not only was the applicant frustrated in perusing its rights in this court, the applicant has *prima facie* established that it was not treated fairly in the adjudication of the tender bid.

[87] I am equally persuaded that the applicant does not have available any other ordinary remedy: Damages may not be an adequate remedy particularly in light of the fact that it would be notoriously difficult for the applicant in matters such as this to pursue a claim for damages that are purely economic in nature.

[88] Does the balance of convenience favour the granting of the interdict? In this regard a court has a discretion upon a consideration of all the facts. This discretion must be exercised judicially. It is clear from *Olympic Passenger Service*[17] that the balance of convenience is not evaluated in isolation: the stronger the prospects of success in the main proceedings the less need for the balance to favour the applicant and *vice versa*:

> "In such cases, upon proof of a well-grounded apprehension of irreparable harm, and there being no adequate ordinary remedy, the court may grant an interdict — it has a discretion, to be exercised judicially upon a consideration of all the facts. Usually this will resolve itself into a nice consideration of the prospects of success and the balance of convenience — the stronger the prospects of success, the less need for such balance to favour the applicant: the weaker the

[17] Supra at 383E – G.

prospects of success, the greater the need for the balance of convenience to favour him. I need hardly add that by balance of convenience is meant the prejudice to the applicant if the interdict be refused, weighed against the prejudice to the respondent if it be granted.'

[89] On behalf of the respondent it was strongly disputed that the balance of convenience favours the applicant: More in particular SITA referred to the fact that the South African Police Service has already placed orders with the successful bidders and SAPS will not be able to serve the public if the order is not given effect to. In its replying affidavit, the applicant (with reference to documents disclosed by SITA only after the launching of this application pursuant to its request for information in terms of PAIA) states that in any event, these orders were not lawfully placed with SITA as these orders were directly placed by SAPS with the winning consortia and not through SITA as stipulated in National Treasure Practice Note No 5 2009/2010 which requires of government departments to place orders for all networking contracts through SITA. The applicant further stated that SAPS had in any event been required by SITA's inefficiency to wait for its requirements to be satisfied and will not therefore be unduly prejudiced if it has to wait for another few months until the applicant's application is adjudicated.

[90] What is in my view clear from the facts is that, if the applicant is denied an interdict, the matter will be rendered academic. Furthermore, it is in my view in the public interest that this tender be scrutinized under Part B of the Notice of Motion. In these circumstances I am of the view that the balance of convenience (considered together with the prospects of success in he main review) favours the applicant. I can therefore find no proper ground for denying the applicant the relief sought in the Notice of Motion.

Costs

[91] The application is granted with costs on an attorney and client scale. In this regard I have already referred to the views expressed by the court in

Gauteng Gambling Board[18] to the effect that the state should not conduct itself in such a manner that it may ultimately result in this court not being able to grant a remedy.

Application to strike out

[92] SITA also brought an application to strike out in terms of Rule 6(15). I have considered the merits of the application and can find no reason to strike out the founding affidavit. SITA does not, as it was obliged to do, indicate the passages to which objection is taken but instead seeks to strike out the whole of the founding affidavit. In the event the application is dismissed.

AC BASSON
JUDGE OF THE HIGH COURT

Appearances:

For the Applicant	:	Adv A R Bhana (SC)
		Adv S M Wentzel
		Adv J Mitchell
Instructed by	:	Eversheds Inc.
For the 1st Respondent	:	Adv J Peter (SC)
Instructed by	:	Hogan Lovells Inc.

[18] *Supra.*