IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case No: 74192/2003

In the matter between

22/7/2016

AFRISAKE NPC — First Applicant

AFRIFORUM NPC — Second Applicant

CORNELIUS JANSEN VAN RENSBURG — Third Applicant

And

THE CITY OF TSHWANE METROPOLITAN MUNICIPALITY — First Respondent

Second to Ninth Respondents are respondents linked to the First Respondent.

PEU CAPITAL PARTNERS (PTY) LTD — Tenth Respondent

TOTAL UTILITY MANAGEMENT SERVICES (PTY) LTD — Eleventh Respondent

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Reasons for JUDGMENT

BAM J

Appearences:

Applicants: Adv C Puckrin SC and Adv Q Pelser SC.

First to Ninth respondents: Adv W Mokhari SC, Adv K Tsatsawane and Adv P Managa.

Tenth and Eleventh respondents: Adv JP Daniels SC and Adv JB Currie.

INTRODUCTION

1. On 5 July 2016 the applicants, by way of an urgent application, applied for the extension of an interdict restraining the First Respondent, *"CoT"* from paying certain monies to the Eleventh Respondent, and *"TUMS"*, pending finalization of a review application concerning the validity of a terminated agreement called *Master Services Agreement, "MSA"*, between *CoT* and Tenth Respondent *"PEU"* which agreement had been ceded to *"TUMS"*. The application was opposed by all the respondents.

2. When the matter came before me I deemed it expedient, and in the interests of justice and the parties, that the matter should be finalised on the same day. Fortunately I have had sufficient time and opportunity to peruse the papers beforehand, despite the more than 40 other applications also on the urgent roll. Accordingly, and after having heard counsel, I was satisfied that the interdict had to be granted as prayed for in prayers 1, 2, 3 and 4 of the Notice of Motion, but with an amended costs order. I added that the applicants should approach the Deputy Judge President for a preferential date for the hearing of the pending review application. Due to time constraints, however, I did not deliver a reasoned judgment at the time.

REASONS

3. On 6 June 2013 *CoT* and *PEU* entered into the *MSA* for the installation of a smart electric meter system in the city. On 30 October 2013 *PEU* ceded the *MSA* to *TUMS.* It was common cause that subsequently about R1 Billion had already been paid by *CoT to PEU/TUMS.* On 12 August 2015, after about 1200 smart meters of the more than 400 000 had been installed, the *MSA* was terminated by *CoT.* On 20 August, however, *CoT* entered into another agreement, the *"Interim Services and Termination Agreement", "ISTA",* with *TUMS.* In terms of the latter agreement *TUMS* agreed to sell the pre-paid smart meter system, awarded in terms of *MSA,* to *CoT* for the amount of R950M. *CoT* has agreed to pay that amount to *TUMS* by 15 July 2016. Pending payment of this amount, *TUMS* further agreed to continue maintaining and operating the prepaid smart meter system at a service fee of 9.5 cents per Rand. (*CoT* intends selling the system to a new service provider, who has agreed to purchase the system for the same amount.)

4. The main issue between the parties turns upon the validity of the initial contract, *MSA,* and, directly flowing from that agreement, according to the applicants, payment of the purchase price of R950M by *CoT* to *TUMS* for the purchasing of the system. In this regard the applicants have lodged a review application which is pending. One of the applicants' concerns, addressed in the present application is the payment of the R950M. The termination of the *MSA* and the agreement that *TUMS* should, in the meantime, proceed to operate the system, are not at stake.

5. Although the matter concerning the challenged validity of the *MSA* has a history, the applicants stated that it was only at the end of May 2016 that they became aware of the payment of the first amount to the two respondents in terms of the *MSA.* The applicants then attempted to seek information from *CoT* concerning that payment. *CoT,* however, according to the applicants, did not respond, but, instead, on 13 June 2016, the attorneys of *PEU/TUMS* informed the applicants that a further amount of almost R950M was earmarked by the *CoT* to be paid to their clients.

6. At the time the applicants were aware that the infrastructure of the project in terms of the *MSA* was incomplete and that that agreement had been terminated by *CoT.*

7. When the applicants were informed that the payment of the R950M to *TUMS* was imminent, they lodged an urgent application to prevent it. This application came before Tuchten J. On 15 June 2016, upon an agreement between the parties, an interim order was made which included a temporary interdict - effective up till 5 July 2016 – stopping the payment of the amount in question. It is this interdict that the applicants sought to have extended.

8. The Applicants contended that the *MSA* is constitutionally invalid, and that any payment in terms of that agreement is flawed. The respondents, on the other hand, contended that the *MSA* was lawful and valid. It was also contended by the respondents that the proposed second payment of R950M is unrelated to the issue of the validity of the *MSA.*

9. Taking into consideration all relevant facts, including that the City of Tshwane Municipality bears a huge responsibility towards the residents, and that the issues are of *"extreme importance to the residents of Tshwane"* (as submitted by the applicants) I was convinced that the application was indeed of sufficient urgency justifying its adjudication.

10. From what follows it should appear clearly that the applicants, in my view, complied with all the formal requirements pertaining to an interim interdict.

11. It is trite that the applicants were obliged to show that they had a *prima facie* right, that they may suffer irreparable harm if the interdict was to be refused, and that the balance of convenience favoured the granting of the application. See *SOUTH AFRICAN INFORMAL TRADERS FORUM AND OTHERS vs CITY OF JOHANNESBURG AND OTHERS* 2014(4) SA 371 CC.

12. The pending review application of the *MSA* appears to involve several material issues. It is mainly contended by the applicants that the *MSA* is *"constitutionally invalid in that it was concluded without a competitive bidding process"*, and that it did not comply with the *"applicable legislation"*. The applicants also pointed out that *PEU* was appointed as consultant, which created a conflict, especially when *PEU* was awarded the contract despite *"warnings from Treasury"*. Another allegation made by the applicants is that here was no *"proper financial feasibility study"*. Although most of these allegations are contested, or explained by the respondents, this court was not called upon to determine whether the applicants will indeed succeed with the review. What had to be considered is whether the applicants have shown a *prima facie* right *"that is likely to lead to the relief sought in the main application"* and that irreparable harm will follow if the interdict would be refused.

13. The issues raised by the applicants are serious in nature, and at the time I made the order I remarked that the more I read the more I became concerned.

14. Concerning the review the applicants' case is that this application is *"a sequel to a review brought by the Applicants to have the decisions and the subsequent award of the tender and the agreements which flowed therefrom, set aside. . ."* which includes the issue of the payment of the R950M to *TUMS.* The applicants aver that the latter fell outside the scope of the recommendation and resolution adopted by the City Counsel.

15. As to be expected, the respondents contended that the proposed review is moot and that the payment of the R950M is not in any way connected or related to the questioned validity of the *MSA.* In this regard it was further pointed out by Mr Mokhari that in view thereof that *CoT* never intended to keep the system but that it was going to sell same to another contractor for the same amount of R950M, there was no prejudice to any party.
Mr Daniels supported these arguments.

16. However, I agree with Mr Puckrin's contention that the R950M, earmarked to be paid to *TUMS,* is interlinked with the *MSA.* It is clear that the relationship between *CoT* and *PEU/TUMS* originated in the *MSA,* and although the *MSA* had been terminated, *TUMS* and the system, for which *CoT* agreed to pay R950M to *TUMS*, are intrinsically linked to the *MSA*. The present relationship between *CoT* and *TUMS,* in terms of *ISTA,* obviously, flowed directly from the *MSA*. It is therefore unescapable, if the review court should find that the *MSA* was indeed unlawful and invalid, that such finding would have a direct bearing on the payment of the R950M to *TUMS.* The fact that the new contractor would be prepared to repay *CoT* has nothing to do with the issue whether the *MSA* was lawful or not. Accordingly it follows that no subsequent re-selling of the system, for whatever amount, would validate the payment to *TUMS.* In any event, in view thereof that *TUMS* has agreed, in terms of *ISTA,* to continue the required services, with which the applicants have no quarrel, it seems that the balance of convenience favours the applicants.

17. It was further emphasised by Mr Mokhari that the applicants, already in February 2014, by way of an interim interdict, failed in their endeavours to stop the initial phase of the project. That application was dismissed by Fabricius J. Mr Mokhari submitted that the present proposed review application is based on the same allegations and submissions considered and ruled upon by Fabricius J, and,

accordingly, that the pending review is doomed to failure. The applicants, on the other hand, submitted that it subsequently transpired that certain vital information, including correspondence between, amongst others, the Minister of Finance and the Executive Mayor of the *CoT*, that was not placed before the Council when the tenders were considered, had not been disclosed to Fabricius J. This information includes advice by National Treasury in a letter dated 15 May 2015 addressed to the municipal Manager, Mr Ngobeni, which reads as follows:
(Page 207 of the founding papers.)
"National Treasury advises you to halt the payment of any settlement amount agreed with the service provider pending the National Treasury's detailed review of the entire procurement process, implementation and the ultimate cancellation of the project."
There is no indication in writing what the *CoT's* response to the Minister was. Instead, it appears that *CoT* actually disregarded the advice. In that regard the following appears in the respondents' answering affidavit signed by Mr Ngobeni:
(Page 434, par 47.1)
"The letter of the Minister of Finance was received after the Council has already approved the tender. However, the municipality was in consultation with Treasury officials throughout the whole process of tender."
(A more vague form of answering the implication that Treasury's letter was ignored, can hardly be imagined.)

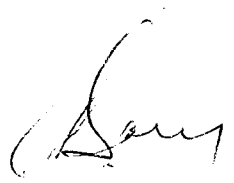
18. In respect of the decision of Fabricius J, Mr Mokhari, reluctantly, conceded that since that application, the *"situation"* has somewhat changed. This concession, in my view, is an understatement. It is clear that the papers before my learned colleague were, to say the least, incomplete.

19. The reference to the letter of Treasury in paragraph 17 was but one aspect that will be addressed in the review application. Others include that a competitive bidding process recommended by Treasury was allegedly not considered, and that *CoT* was paying more than R800M for the installation of about 12000 to 13000 meters. There are several more contentious issues which I do not deem necessary to repeat. They are addressed in the applicants' founding affidavit.

20. In conclusion Mr Puckrin submitted that the applicants have made out a strong case *"in seeking to protect the public's rights and interest"* and that they have established that they have a *prima facie* case in that they sought *"to prevent any further irregularity and unlawfulness."*

Both Mr Mokhari and Mr Daniels vehemently submitted that the applicant's failed to show that they are entitled to the interim relieve sought.

21. For the reasons set out above, I agreed with Mr Puckrin.



AJ BAM JUDGE

22 July 2016