

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, Bisho)**

CASE NO: 250/2018

Matter heard on: 23/08/2018

Judgment delivered on: 23/10/2018

In the matter between:

**STATE INFORMATION TECHNOLOGY AGENCY
(PTY) LTD**

Applicant

and

**PREMIER, EASTERN CAPE PROVINCIAL
GOVERNMENT**

First Respondent

LIQUID TELECOMMUNICATIONS SOUTH AFRICA

Second Respondent

**MINISTER OF TELECOMMUNICATIONS AND
POSTAL SERVICES**

Third Respondent

MINISTER OF FINANCE

Fourth Respondent

JUDGMENT

SMITH, J

- [1] The State Information Technology Agency (Pty) Ltd ("SITA") seeks an order reviewing and setting aside a contract for the roll-out of broadband services awarded by the Eastern Cape Provincial Government to Liquid

Telecommunications South Africa (Pty) Ltd) ("Liquid Telecoms") on 11 October 2017.

- [2] It is common cause that the contract was not awarded to Liquid Telecoms pursuant to competitive bidding system, but purportedly in terms of Treasury Regulation 16A6.6 which allows an accounting officer of a department to participate in a contract concluded by another organ of state pursuant to a fair, transparent, and competitive bidding process. The only requirement being that the approvals of the relevant organ of state and the service provider must be obtained.
- [3] SITA was established in terms of the State Information Technology Agency Act, No. 88 of 1998 ("the SITA Act"), and its primary purpose is to provide information technology services to other organs of state. The Premier of the Eastern Cape is the first respondent. Liquid Telecoms is the second respondent and the successor-in-title to Neotel (Pty) Ltd ("Neotel"), the service provider who was appointed by SITA pursuant to an open bidding process to provide broadband services to the Western Cape during May 2014. The other two respondents namely, The Minister of Telecommunications and Postal Services and the Minister of Finance, did not oppose the application.
- [4] The procurement process which resulted in Neotel's appointment was undertaken by SITA acting as agent for the Western Cape Government. SITA and Neotel thereafter concluded a Service Level Agreement in terms of which the latter would provide broadband and related information technology goods

and services to the Western Cape Government.

[5] Since the issue as to which organ of state was required to approve the Eastern Cape Government's participation in the Western Cape contract is an important one in the context of the case, it is perhaps crucial that I mention a few of the important features of the Service Level Agreement. They are, *inter alia* that:

- a) SITA and the Neotel were the only parties to the contract;
- b) the services provided for in the contract were stipulated to be rendered to SITA;
- c) SITA was authorised to agree to a contract value ;
- d) SITA was responsible for ensuring the due and proper execution of the works;
- e) SITA bore the contractual obligation to compensate Neotel for services rendered; and
- f) Neotel was not allowed to sub-contract any portion of the works without the prior written consent of SITA.

[6] There are numerous other features of the Service Level Agreement which clearly indicate that SITA was the main implementing agent on behalf of the Western Cape Government and that all aspects relating to the execution of the works were within its control.

[7] During February 2016 the Eastern Cape Government wrote to SITA requesting it to provide broadband connectivity services to 560 schools in the Eastern Cape. SITA was subsequently also requested by the former to provide various government buildings with broadband connectivity. There thereafter followed a series of meetings and extensive correspondence between the provincial

government and SITA in respect of the former's request for the roll-out of broadband services.

[8] It appears that the Eastern Cape Government was not happy with what it perceived to be a lack of urgency on the part of SITA, and during November 2016 it commenced with a process intended to result in its participation in the Western Cape agreement in terms of Treasury Regulation 16A6.6.

[9] The Eastern Cape Government has set out the history of its negotiations with SITA in great detail in its answering papers. This was obviously done in support of its contention that the latter was either unable to perform the services, or simply not committed to ensure that the roll-out of broadband connectivity was undertaken expeditiously. Exactly whose fault it was that they could not reach agreement in this regard is in my view not germane to the issue which falls for decision in this matter, namely whether the Eastern Cape Government duly obtained the approvals required for its valid participation in the Western Cape contract

[10] The Eastern Cape Government's contentions in this regards are that:

- a) since SITA was only acting as the implementing agent for the Western Cape Government in concluding the Service Level Agreement with Neotel, the agreement was essentially one between the latter and Neotel, and the approval of SITA was accordingly not required ;
- b) it was advised by the Western Cape Government on 21 November 2016 that the latter had no objection to its participation in the contract, but had referred it

to SITA and Liquid Telecoms as "the main parties to the Master Service Agreement";

- c) on 21 August 2017 the Eastern Cape Government wrote to SITA seeking its approval to amend the Western Cape agreement so as to allow the former's participation in terms of Treasury Regulation 16A6.6;
- d) on 18 September 2017 SITA approved the participation of the Eastern Cape Government's participation in the Western Cape contract for a number of sites, stipulating that the remainder of the sites should be serviced pursuant to an open tender process;
- e) based on this implicit approval, the Eastern Cape Government informed the National Treasury on 20 September 2017 of its decision to participate in the Western Cape contract; and
- f) the Eastern Cape Government subsequently appointed Liquid Telecoms in terms of Treasury Regulation 16A6.6 to roll out broadband services to 2700 sites in the Eastern Cape.

[11] Before I consider the merits of these contentions, I must first deal with a number of preliminary points raised by the respondents. They are the following:

- a) SITA has no *locus standi* to bring the proceedings ;
- b) SITA has unduly delayed in bringing the application ; and
- c) SITA has failed to comply with the provisions of the Intergovernmental Framework Relations Act, No.13 of 2005 ("the Framework Act"), and the Court is thus precluded from deciding the matter.

- [12] I do not think that any of these points can be upheld. In terms of the SITA Act, a department that wishes to procure a service contemplated by that Act must acquire such service from SITA. If SITA is unable to provide the service, the department must acquire the service through SITA.
- [13] Although the SITA Act does not contemplate that SITA is entitled to award tenders or conclude contracts on behalf of departments, it is SITA that must facilitate the acquisition of technology services by government departments. (*SAAB Grintek Defence v South African Police Service and others* [2016] 3 All SA 669 (SCA)).
- [14] The SITA Act is nevertheless unambiguous regarding the role of SITA where a government department wishes to acquire technological services, and Treasury Regulation 16A 6.3 (e) provides that contracts relating to information technology must be procured in terms of the SITA Act and Regulations. There can accordingly be little doubt about SITA's standing to challenge any attempt by a government department to acquire technological information services without its involvement and in contravention of the SITA Act. Thus it matters not whether the Eastern Cape Government attempted to acquire the services pursuant to an open tender process or by "piggybacking" on an existing contract concluded by another organ of state: it is precluded by the provisions of the SITA Act from doing so other than through SITA. I am accordingly of the view that SITA does have the necessary *locus standi* to bring these proceedings.

[15] I also do not think that the undue delay point is a good one. The Eastern Cape Government informed SITA of its decision to appoint Liquid Telecoms on 11 October 2017. The application was launched on 12 March 2018, some five months after the impugned decision was taken. In my view this is not an unreasonable delay in the context of the case. It is common cause that SITA was not idle during this period. It has, for example, attempted to secure the intervention of the National Treasury which culminated in a meeting between the parties during December 2017. And during February 2018, SITA attempted to persuade the office of the Auditor-general to investigate the matter. The respondents were in any event not able to show that they have suffered any prejudice in the conduct of their defences as a result of the five months' delay. I am accordingly of the view that the delay was not unreasonable.

[16] The respondents' argument regarding SITA's alleged failure to comply with the provisions of the Framework Act is founded on the assertion that the latter's failure to declare a formal dispute and attempt to settle the dispute in terms of section 41 of that Act, precludes the Court from exercising its discretion to decide the matter.

[17] While it is so that the legal proceedings in this matter were instituted without a formal dispute being declared in terms of section 41 of the Framework Act, the Court has a discretion to overlook non-compliance with the Act. In *Merafong City v Anglogold Ashanti* 2017 (2) SA 211 (CC), at par 64, Cameron J said the following in this regard: "So although the principle of inter-governmental cooperation negates recourse to court of law until every avenue has been

exhausted, when this point has been reached, the constitution may require responsible governmental citizens to take recourse to the Law". And in *City of Cape Town v Premier Western Cape and others* 2008 (6) SA 345 (CPD) Swain J said that the provisions of the Framework Act must be interpreted consistently with sections 41 (3) and (4) of the Constitution, which vest in Courts a discretion to decide disputes between organs of state even if all other remedies have not been exhausted. (See also: *Minister of Police and Others v Premier of the Western Cape and others*, 2014 (1) SA 1 (CC).

[18] There can be little doubt that SITA has made every effort to settle the matter without the need to resort to legal proceedings. What was clear, however, was that the Eastern Cape Government was adamant that it was entitled to participate in the Western Cape contract without SITA's approval. By the time that SITA had become aware of Liquid Telecoms' appointment, the horse had already bolted, since the Eastern Cape Government had by then already created contractual obligations vis-a-vis a private company, which could not be undone without judicial pronouncement.

[19] I am accordingly satisfied that I do have a discretion to hear the matter and that in the circumstances it is appropriate that I decide the dispute between the parties.

[20] I now revert to what I consider to be the crux of the matter, namely whether the Eastern Cape Government obtained the approval of the relevant organ of state

to participate in the Western Cape contract in terms of Treasury Regulation 16A6.6. That regulation provides as follows: "The accounting officer or accounting authority may, on behalf of the department, constitutional institution or public entity, participate in any other contract arranged by means of a competitive bidding process by any organ of state, subject to the written approval of such organ of state and the relevant contract."

[21] The Director-General of the Western Cape Government responded as follows to the request by the Eastern Cape Government for permission to participate in the contract: "I have no objection to the proposal that the Eastern Cape Provincial Government utilize cooperative procurement. I must however point out that the contract owner for RFB 1161/2013 is the State Information Agency (SITA) as the main parties to the Master Services Agreement are SITA and Neotel (Pty) Ltd. The WCG have entered into a Back-to-Back agreement with SITA, and it is this agreement which serves as the Service Level Agreement for the Broadband Service which have procured."

[22] The letter further states that "it would therefore be necessary for ECBG to approach SITA with this request". This assertion by the Director-General of the Western Cape Government was both factually and legally correct. It is apparent from the provisions of the contract, and in particular those to which I have referred to above, that the contracting parties to the Western Cape agreement were SITA and Neotel. There can thus be little doubt that the relevant organ of state from which the Eastern Cape Government was required to obtain approval for participation in that contract was SITA, and not the Western Cape Government. In the event, the Western Cape Government's declaration that it

had no objection to the Eastern Cape Government's participation in that contract can by no stretch of the imagination be construed to amount to consent as required by Treasury Regulation 16A6.6. The Western Cape Government having been of the view that it was SITA and not itself that contracted with Neotel, the relevant functionaries of the Western Cape Government could not have properly exercised their minds regarding the granting of approval as required by the Treasury Regulation. The Western Cape Government's statement to the effect that it had no objection to the Eastern Cape's participation was thus based on its understanding that it did not have authority to grant such approval.

[23] The communication from SITA which the Eastern Cape government contends constituted approval for its participation in the Western Cape contract was written by the Chief Executive Officer of SITA, Dr Mohapi, and addressed to the Director-General of the Eastern Cape Government, namely Ms Mapina-Mthembu. The relevant portions of that letter read as follows:

"2. This is once more a sincere attempt to provide the best professional advice to the ECPG connectivity programme on the basis of the information available to SITA.

3. We reconfirm our commitment to provide the most cost effective and efficient solution to the ECPG as enjoined by the general principles of good governance and SITA legislative mandate in particular.

4. From this commitment, we wish to reiterate what we have proposed to the ECPG on the 26th of July 2017 (clause 5 of SITA proposal – Attached hereto) with some slight modification on the approach for non-connected sites as provided here below:

- a. All currently SITA managed sites through Telkom SITA MSA be executed as proposed in clause 4 of SITA Proposal. Please note that there are stringent

contractual obligations on these sites as such this execution could not be deviated to for the period of the SITA TELKOM MSA validity.

- b. All non-connected sites be executed through a combination of RFB 1161 and Open bidding process.
- c. A desktop analysis in cooperative procurement on RFB 1161 shows an indication and a possibility of connecting 450 to 500 sites in 6 municipalities (spread at minimum of 40 (10mbps) sites per municipality. This indication is subject to confirmation of design and cost ratification by a service provider.

5. SITA proposes that the Eastern Cape Provincial Government connectivity programme should proceed on the basis of paragraph 4 above and that a confirmation and tasking letter be made to SITA five (5) working days in order to meet the intended timelines."

[24] Mr *Mphaga* SC, who appeared for SITA, has correctly argued that the above mentioned letter could at best for the Eastern Cape Government be construed as conditional approval for participation in the Western Cape contract. The first condition being that the participation in that contract can only be in respect of 450 to 500 sites (in 6 municipalities) and the second that "a confirmation and tasking letter be made available to SITA within five working days". It is common cause that neither of those conditions have been complied with. On the contrary, the Eastern Cape Government has proceeded with the implementation of 2700 sites, which is an even greater number of sites than those serviced through the Western Cape contract.

[25] On a reasonable interpretation of Treasury Regulation 16A6.6, the unequivocal written approvals of the relevant organ of state and the service provider are

required for valid participation in a contract procured by another organ of state through an open tender process. While it is conceivable that the written approval may be conditional, the organ of state seeking to participate in the contract can only do so once those conditions had been complied with. The Eastern Cape Government appeared to have adopted the attitude that SITA was not entitled to put conditions to its approval. It has accordingly impermissibly ignored those conditions, construed the letter as amounting to implicit consent, and appointed Liquid Telecoms on its own terms.

[26] The arguments advanced on behalf the respondents to the effect that SITA was not entitled to make its approval subject to conditions; that those conditions were accordingly *pro non scripto*; and that what remained was the implicit consent of SITA, are fundamentally flawed. Even if SITA were indeed not entitled to make its approval conditional, it would simply mean that it never intended to give unqualified approval as contended for by the Eastern Cape Government. The letter can thus not be construed as constituting approval for participation in the Western Cape contract for the roll-out of broadband services to 2700 sites. I am accordingly of the view that it is manifest that the Eastern Cape Government did not obtain the written approval of SITA to participate in the Western Cape contract in terms of Treasury Regulation 16A6.6, and that the decision to appoint Liquid Telecoms to provide the broadband services is consequently reviewable.

[27] Counsel for the respondents have urged me, in the event of a finding that the decision to appoint Liquid Telecoms is reviewable, to exercise my discretion in terms of section 8 of the Promotion of Administrative Justice Act, No. 3 of 2000

("PAJA"), either to postpone the declaration of invalidity on certain conditions or to grant another just and equitable remedy so as to ameliorate the deleterious consequences that would flow from the abrupt cessation of the services.

- [28] Mr *Mphaga* has conceded that it may well be appropriate for me to exercise my discretion in terms of PAJA to grant some other just and equitable relief. It is common cause that the roll-out of broadband internet connectivity will have many advantages for the people of the Eastern Cape. The positive consequences that the provision of high speed internet connectivity to government departments will have for service delivery are self-evident. So also are the numerous benefits that will flow from the provision of such services to schools, hospitals and clinics throughout the province. It will, *inter alia*, allow educators as well as learners easy access to digitised information and enable distant tutoring to learners in remote rural areas in subjects such as mathematics and science, where expertise is notoriously lacking. The advantages of high-speed internet connectivity for medical institutions are also self-evident. The telemedicine facilities enabled by such connectivity will ensure that patients in remote areas have access to timeous diagnosis by specialists, as well as facilitating proper record keeping and filing. It is a matter of public knowledge that most Eastern Cape hospitals are presently still relying on archaic methods of record keeping and filing systems which have hampered their ability effectively to defend medical negligent claims. The availability of a digitised filing system will thus not only enable the department to manage its

substantial contingent liability in respect of medical negligence claims, but also enhance accountability on the part of medical personnel.

[29] There has not been any suggestion of corruption in the allocation of the contract and it appears that the services rendered by Liquid Telecoms may well be reasonable and cost effective. I am accordingly of the view that simply setting aside the contract may well have deleterious consequences for the citizens of the Eastern Cape and will probably result in unnecessary waste of public funds. It is common cause that Liquid Telecoms has already made significant progress with the planning and implementation of the project. In these circumstances I am constrained seriously to consider whether it would be appropriate for me to exercise my discretion in terms of section 8 of PAJA to grant some other just and equitable remedy.

[30] I am, however, not satisfied that this issue has been properly ventilated in Court, and have accordingly, at the hearing of the matter, indicated to counsel that in the event of a finding that the decision to appoint Liquid Telecoms is reviewable, I would allow them further opportunity to submit written heads of argument regarding the issue of a just and equitable remedy. I shall deal with any other outstanding issues, if any, including those relating to an appropriate costs order, in my final pronouncement after I have had opportunity to consider the parties' additional heads of argument.

[31] In the result the parties are ordered to file additional heads of argument regarding the issue of a just and equitable remedy by the following dates:

- a) the applicant on or before 2 November 2018; and
- b) the first and second respondents on or before 16 November 2018.


J.E SMITH
JUDGE OF THE HIGH COURT

Heard: On the 23/08/2018

Delivered: 23/10/2018

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