FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No : 1111/2013

In the matter between:

EASYPAY (PTY) LTD Applicant

and

MANGAUNG METROPOLITAN MUNICIPALITY First Respondent

CENTLEC (SOC) LTD Second Respondent
(Registration Number: 2003/011612/07)

MUNICIPAL MANAGER OF THE MANGAUNG METROPOLITAN MUNICIPALITY Third Respondent

ITRON METERING SOLUTION SOUTH AFRICA (PTY) LTD Fourth Respondent
(Registration Number: 1999/017764/07)

SMARTECH TECHNOLOGY (PTY) LTD Fifth Respondent
(Registration Number: 1969/002835/07)

ROBS INVESTMENT HOLDING (PTY) LTD Sixth Respondent
(Registration Number: 2004/019370/07)

CIGICELL (PTY) LTD Seventh Respondent
(Registration Number: 1998/023249/07)

DAJO TECHNOLOGIES (PTY) LTD Eighth Respondent
(Registration Number: 2009/018258/07)

JUDGMENT: DAFFUE, J

HEARD ON: 28 MARCH 2013

DELIVERED ON: 4 APRIL 2013

INTRODUCTION

[1] Applicant seeks an *interim* interdict as a precursor to review proceedings in the following terms:

> "Pending finalisation of Part B of this application, interdicting and/or restraining the first, second and third respondents from any furtherance of the evaluation and/or adjudication process in respect of bid number RFP12/2012 for pre-paid electricity vending services (the "Tender"), or executing and/or fulfilling and/or giving effect to any award made in relation to the Tender or any agreement concluded pursuant to such award."

[2] Costs are also sought against such respondent or respondents that may oppose the application.

THE PARTIES

[3] Applicant is Easypay (Pty) Ltd, a private company with registered address in Johannesburg, Gauteng. First and third respondents are the Mangaung Metropolitan Municipality and its municipal manager respectively. Second respondent is Centlec (SOC) Ltd ("Centlec"), cited as a state owned company, registered in terms of the laws of the Republic of South Africa with registered address situated at 30 Rhodes Avenue, Oranjesig, Bloemfontein. The fourth to eighth respondents are private companies and shortlisted bidders in respect of the tender under Bid number RFP 12/2012.

THE BACKGROUND TO THE PRESENT APPLICATION

[4] During October 2012 Centlec who describes itself in its call for bids as a municipal entity distributing electricity in Mangaung and other Municipalities, invited suitably qualified

service providers to submit proposals for pre-paid electricity vending services. The invitation is referred to as a request for proposal ("RFP").

[5] Applicant and others submitted proposals whereupon it and fourth to eight respondents were shortlisted.

[6] On 15 February 2013 Centlec invited applicant via e-mail to make a presentation at 09h30 on the 22nd February 2013. It appears from Centlec's answering affidavit that similar presentations were scheduled for 21 and 22 February 2013 in respect of the other shortlisted bidders. The relevant parts of the invitation e-mailed to applicant reads as follows:

> "Please note that the presentation must cover the attached evaluation criteria, it must be structured in such a way that its (sic) guided by the evaluation forms attached. The presentation should cover every channel you proposed on.
>
> NB. Please note that <u>you will be expected to **demonstrate** your system</u> and each channel you are bidding for. Centlec would ideall (sic) like to exchange a token with your system and your system prints it and is tested in a meter, you will be notified in time if this is going to be done. …
> The presentation allocation time is 1 to 1.5 hrs depending on the demos.
> Your presence will be highly appreciated." (emphasis added)

[7] Between 18 February 2013 and 21 February 2013, both dates included, a number of e-mails were sent between applicant and Centlec. On 18 February 2013 Centlec communicated certain details to applicant and presumably other shortlisted bidders to deal with "… *a couple of questions*

(that) cropped up on our email send (sic) to the bidders." It was *inter alia* clearly stated that bidders were expected to "… ***demo*** *all the channels they have proposed on*." (emphasis added) On 20 February 2013 Centlec reported to applicant that information on "interfacing" which was required for **demonstrations** would be sent later that day. The same day applicant received documentation under the heading "PowerNet Vending System: Third-party Interfaces" as promised as well as certain meter numbers on the 21st. On 21 February 2013 several more e-mails were sent out, the majority on behalf of applicant to Centlec. In short, applicant complained that it was not provided with the necessary technical specifications required by it to prepare for the presentation. At 17h28, after normal office hours, applicant's Me Sanna sent an e-mail to Mr Ben Tseka of Centlec as a follow-up to their telephonic conversation, the material portion which reads as follows:

> "Our operational manager will provide you with a list of questions which we would appreciate your response to.
>
> As discussed we have not received the technical assistance which we have tried on numerous occasions to obtain. We have contacted your offices, left messages and send (sic) numerous emails relevant to the presentation tomorrow.
>
> You have confirmed telephonically that we need to ensure the development is done as without this we will not be in able (sic) to present as this is an integral part of the presentation tomorrow.
>
> As you are aware we have not done the development as we have not had the opportunity to discuss the technical solution with you due to unavailability. We will forward you our questions

however we are unable to do the development without the assistance required.

It is imperative a (sic) extension is granted in order for us to deliver a solution.

This is putting us in a very unfortunate position and we urgently require feedback. You have advised that you will assist via email after hours tonight however you are unable to assist telephonically.

Unfortunately as per our discussion attending the presentation tomorrow will not be to our advantage as we are unable to **demonstrate** the technical solution.

Please could you advise if you could assist us with this matter" (emphasis added)

That night Mr Tseka responded in two further e-mails and *inter alia* commented as follows by half past seven, without informing Me Sanna that it was agreed with Mr Ndidi that no **demonstration** was expected the next day:

"We provided the web-service for the vending interface. The first step in the exchange is to login, then you can vend. The interface document and example code already provided can teach you how to use interface. By the way, what programme language do you use, we can test with both. C# and java, all is welcome."

The morning of 22 February 2013 and fifty one minutes before the presentation was meant to take place, Centlec provided Me Sanna with the IP link required by the applicant. As applicant felt that it had absolutely no chance to be ready for a presentation (and demonstration) at 09H30 that morning Me Sanna wrote to Centlec stating that applicant wished to take part in the process and present its solution, but that it became a matter of impossibility as it was not furnished with the necessary technical detail. Centlec was asked to postpone the presentation scheduled for that morning until the next week to afford applicant the opportunity to participate.

At 12H50 that afternoon the chairperson of Centlec's evaluation committee, Mr Pobe, sent an e-mail to applicant in terms whereof the following was communicated: *"We therefore are not going to make special arrangements for EasyPay and hence your absence for (sic) the presentation today disqualifies you."* He indicated that all shortlisted service providers had been forwarded the technical interface spec (sic) and numbers. He also confirmed an alleged telephonic conversation with Mr Ndidi of applicant on the 21st to the effect that Centlec was aware that the technical specifications for interface had been forwarded late, and consequently, that the **demonstration** could be presented the next week, although the presentation was to be proceeded with the next day as scheduled. The allegation that the **demonstration** would stand over till the next week is not denied in reply, but it appears to be improbable insofar as such an important aspect was never confirmed in any email. Also, applicant requested time to the following week to present its presentation, but this was not adhered to. The several e-mails on the 21st and applicant's endeavour to receive further information do not support Centlec's version. Mr Pobe's letter of the 22nd is further proof that Centlec was not willing to agree to any special arrangements for applicant. There is thus a serious dispute between the parties whether Centlec's Mr Pobe informed applicant's Mr Ndidi telephonically that the **demonstration** could be presented the following week. This will again be considered *infra.*

[8] Centlec's decision to disqualify applicant as a short-listed bidder led to the present application.

URGENCY

[9] Notwithstanding the decision to disqualify applicant communicated to it by Centlec on 22 February 2013, applicant issued this application on the 19th of March only, thus about a month later. Centlec denies any urgency and alleges that applicant is guilty of creating its own urgency and should not be accommodated. It is alleged that applicant took seventeen working days to prepare and launch its application, but afforded Centlec only three working days to prepare its response. It is furthermore alleged that Centlec is severely prejudiced and could have prepared a more comprehensive answer if afforded a reasonable opportunity.

[10] There is no indication what further investigations Centlec could have done and/or what further evidence could have been placed before the court in support of its opposition of the application. On 7 March 2013 applicant's attorneys sent a letter of demand to Centlec which was replied to in detail by Centlec's attorneys on the 11th. Applicant responded thereto, requiring the names and details of the other

shortlisted bidders as these had to be cited as respondents in the proposed application. On receipt of the information the application was instituted. In my view Centlec received early warning of the intended litigation. In any event the merits were fully canvassed, both in the affidavits and the arguments on behalf of the parties, i.e. the written as well as oral argument.

[11] Bearing in mind the time frames and the fact that Centlec itself needs urgent finality as a new service provider has to be appointed effectively from 1 July 2013, I am satisfied that applicant has not dragged its feet and that there was no undue delay in launching the application. In any event, as stated earlier, the parties have dealt with the merits fully and extensively. Prayer 1 of Part A of the Notice of Motion should therefore be granted.

NON-JOINDER

[12] It is Centlec's case in the answering affidavit that although the decision to disqualify applicant was made by its evaluation committee, neither that committee, nor its chairperson has been cited as a party to the proceedings. Its counsel, adv Snyman, did not make any submissions in this regard in either his written heads of argument, or during his oral address.

[13] Mr Pobe, the chairperson of the evaluation committee, filed a confirmatory affidavit and is obviously fully aware of the litigation. I am not dealing with the review application at this stage and it is unnecessary to make any finding as to whether the evaluation committee or its chairperson should

be joined for purposes of the review proceedings. Applicant seeks an order in terms whereof the procurement process is placed on halt pending finalisation of the review application. The evaluation committee's work has apparently been done. Centlec is in charge of its procurement processes and the further steps to be undertaken in this regard. At this stage I am requested to adjudicate the application for an interim interdict only and it is Centlec and Centlec only who is a relevant party pertaining to the nature of the relief sought herein. There is no merit in the non-joinder defence.

<u>HAS APPLICANT MET THE REQUIREMENTS FOR AN *INTERIM* INTERDICT?</u>

[14] The requirements for an interim interdict are well-known, to wit:

14.1 a clear right, or a right *prima facie* established, though open to some doubt;

14.2 a well-grounded apprehension of irreparable harm if the *interim* relief is not granted and the ultimate relief is granted;

14.3 a balance of convenience in favour of the granting of interim relief; and

14.4 the absence of any other satisfactory remedy.

[15] In order to determine whether or not applicant crossed the threshold in establishing the first requirement, the right relied upon for an *interim* interdict need not have to be shown on a balance of probabilities as it is enough if it is *prima facie* established, though open to some doubt.

[16] In adjudicating this application for an *interim* interdict the facts set out by applicant, together with any facts set out by respondent which applicant cannot dispute are taken into consideration together with the inherent probabilities in order to establish whether applicant should, not could, on those facts obtain final relief eventually. See Erasmus, **Superior Court Practice** at E8-10 and **Spur Steak Ranches Ltd v Saddles Steak Ranch** 1996 (3) SA 706C at 714E – H. Material conflicts of fact should not prevent the grant of *interim* relief, but applicant should not succeed if serious doubt, and not some doubt only, is cast upon its case. See also **Ladychin Investments v South African National Roads Agency** 2001 (3) SA 344 (N) at 353E – 354C. There is a dispute between the parties as to whether applicant was informed on the 21st February 2013 that it would be required to do a presentation only the following day, whilst the **demonstrations** would have to be presented the following week. As indicated *supra* with reference to the email communication and especially those portions highlighted, the objective facts do not support Centlec's version. In the circumstances and bearing in mind the nature of the proceedings before me, I am not prepared to find that serious doubt was cast on applicant's right to procedural fairness.

[17] Applicant was disqualified by Centlec's evaluation committee. The question to be asked is whether this decision to disqualify is indeed reviewable. This has a direct bearing on the first requirement of *interim* interdicts, i.e. whether applicant has shown at least a *prima facie* right, though open to some doubt. In **Director: Mineral**

Development, Gauteng Region and Another v Safe the Vaal Environment and Others 1999 (2) SA 709 (SCA) at para [17] the Supreme Court of Appeal set the record straight:

> "[17] … It is settled law that a mere preliminary decision can have serious consequences in particular cases, *inter alia* where it lays '. . . the necessary foundation for a possible decision . . .' which may have grave results. In such a case the *audi* rule applies to the consideration of the preliminary decision."

In **Earthlife Africa (CT) v DG: Department of Environmental Affairs and Tourism** 2005 (3) SA 156 (C) 167, at paras [35] – [37] Griesel J relied on the SCA judgment *supra* as well as Hoexter, **The New Constitutional and Administrative Law**, vol 2 (2002) at 222 for the following conclusion:

> "The fact that the DG's approval is but the first step in a multi-stage process does not mean that the *audi* rule is inapplicable, nor does it mean that an aggrieved party must await the *final* step before it can take legal action for review."

[18] Mr Grobler for applicant referred in argument to Bolton, **The Law of Government Procurement in South Africa** at p 185 and 186 where the author deals with pre-disclosure of tender adjudication criteria as follows:

> "It is always open to a tenderer who has doubts about the information supplied in a call for tenders, even though reasonably sufficient information was arguably provided, to ask

> for further clarification from the organ of state. Such information may then not be withheld unless the request for further information is unreasonable."

It must immediately be pointed out that Bolton specifically dealt with information reasonably required by tenderers before submitting their tenders which is not the case in *casu*. I am of the view that the review court may well find that this principle should also apply in the event of uncertainty during the procurement process, e.g. when shortlisted bidders are requested to make presentations or perform demonstrations. It is clear from the papers that Centlec held a similar view insofar as it was prepared to provide further information to the shortlisted bidders prior to the presentations. The issue is whether sufficient and reasonable information was timeously presented to applicant.

[19] Although this is not a review application it is apposite to deal to a certain extent with applicant's prospects in the review application in order to ascertain whether at least a *prima facie* right, though open to some doubt, has been established. I am mindful of the fact that "(n)ot every slip in the administration of tenders is necessarily to be visited by judicial sanction". See **Moseme Road Construction and Others v King Civil Engineering Contractors (Pty) Ltd and Another** 2010 (4) SA 359 (SCA) at para [21]. Considerations of public interest, pragmatism and practicality play a role as well and should inform the exercise of a judicial discretion whether to set aside administrative action or not. See **Ceo, SASSA v Cash Paymaster** 2012 (1) SA 216 (SCA) at para [29] with reference to **Associated**

<u>Institutions Pension Fund and Others v Van Zyl and Others</u> 2005 (2) SA 302 (SCA) at para [46] and **<u>Oudekraal Estates (Pty) Ltd v City of Cape Town and Others</u>** 2004 (6) SA 222 (SCA) at para [36].

[20] Centlec is of the view that the applicant had sufficient information pertaining to technical data to prepare for its presentation and that there was no reason why it failed to attend the presentation as scheduled. According to it, applicant has to date failed to state to what extent the technical data supplied by Centlec was inadequate. However the email correspondence and Centlec's willingness to provide further assistance and information during the night of the 21st contradict this viewpoint. Furthermore it is Centlec's case that applicant was fully aware of the fact that it and the other shortlisted bidders were no longer required to give a **demonstration** of their systems during the presentations scheduled for the 21st and 22nd February 2013 and that in the circumstances there was no reason for applicant's absence. Again and as mentioned the objective facts indicate the fallacy of this stance.

Reliance was also placed on the tender document to the effect that bidders would be expected, on request, to present their proposals to the evaluation committee which would be compulsory and the note at the end of the special conditions in the document which reads as follows:

> "Note: Failure to adhere to the subjective special conditions will invalidate your bid proposal."

I could not find any proof that the non-appearance before the evaluation committee *in casu* was such a special condition. I have considered the disqualification criteria in the tender document and also in this regard, no provision is made for disqualification in the event of non-appearance before the evaluation committee. Logic dictates that shortlisted bidders may from time to time be called upon to make presentations or to give demonstrations, especially in a technical field as *in casu,* but it is different matter to, without clear warning, disqualify a non-compliant bidder forthwith. It is reiterated that the invitation to applicant to make a presentation did not specify that in the event of failure to attend as invited, it would automatically be disqualified. The mere fact that Centlec was prepared to reschedule demonstrations for the following week supports applicant's assertion that it was not fully briefed. It is unnecessary to embark on a journey to consider the technical aspects referred to by the parties in their papers.

[21] Centlec is of the view that applicant was really on a fishing expedition and that the various e-mails are proof thereof. There may be some doubt as to whether applicant really needed further information for purposes of attending the presentation, but as indicated, it is unnecessary to analise this any further. I am satisfied that it cannot be found, as Centlec wants the court to do, that applicant misled the court, that it had ulterior motives and that it sought undue preference. Furthermore I cannot draw an inference that applicant was merely toying with process, or seeking to thwart a propitious development for the ultimate benefit of the general public.

[22] I am loath to dismiss applicant's application for an *interim* interdict where a *prima facie* right has been shown to exist, especially insofar as serious prejudice on the part of Centlec is absent. Applicant's potential prejudice needs to be considered as well. Having regard to the case law *supra,* I am satisfied that applicant will suffer irreparable harm if this application is dismissed and it ultimately succeeds with the review application.

[23] I ascertained from Mr Snyman during his oral argument that Centlec's adjudication committee has not finally dealt with the matter and consequently, no tender has been awarded yet. From a pragmatic and practical point of view it would be better to stop the process at this stage than to allow the tender to be awarded, only for that award to be reviewed and possibly set aside a year or two later. It would also be cost effective and any prejudice that Centlec might suffer as a result of granting *interim* relief might be much less that the prejudice to be suffered if an award has to be set aside at a stage when the contract with the successful tenderer has already been implemented. The balance of convenience favours the granting of an *interim* interdict. Mr Grobler submitted, correctly in my view, that courts do not and cannot unscramble the egg, meaning that by the time the administrative right of the wronged tenderer is asserted, the horse has bolted figuratively speaking and such right is minimised to no more than an impotent solecism. Applicant has a constitutional right to just administrative action, but such right may become meaningless if an interdict is not granted at this stage and applicant eventually in a year or

two's time finds out that although it should have been successful with the review, it is left without an effective remedy. Harms DP summed this up as follows:

> "Tendering has become a risky business and courts are often placed in an invidious position in exercising their administrative law discretion – a discretion that may be academic in a particular case, leaving a wronged tenderer without any effective remedy."

Moseme *loc cit* at 361E.

[24] I have reason to believe that the prejudice applicant will suffer if no order is granted, will automatically far outweigh the prejudice that Centlec would suffer if the parties' rights *vis-a-vis* each other are kept on ice. This is even more so where the other shortlisted bidders, the 4th to the 8th respondents, chose not to oppose the application and to seek to advance any prejudice of their own.

[25] I am of the view that applicant does not have any suitable alternative remedy in light of the SCA judgment in **Moseme** *loc cit*, **Olitzki Property Holdings v State Tender Board and another** 2001 (3) SA 1247 (SCA) at paras [37] and [38] and **Darson Construction (Pty) Ltd v City of Cape Town and Another** 2007 (4) SA 488 (C) at 506E – H.

[26] Consequently I am of the view that a sufficient case has been made out for the grant of an *interim* interdict and the relief claimed in para [2] of Part A of the Notice of Motion. It does not appear from the papers what influence the Mangaung Metropolitan Municipality has over Centlec. I

doubt that a case has been made out why 1st and 3rd respondents should be interdicted together with Centlec. First respondent may be a shareholder of Centlec, and even the sole or majority shareholder, but it has not been shown that it controls Centlec, directly or indirectly. These two respondents did not oppose the application and Centlec did not object to their joinder. Having said this, it cannot do any harm if the relief as claimed is granted. However the taxing master is directed to tax off any costs that might be claimed by applicant pertaining to extra copies and service of the papers on 1st and 3rd respondents.

COSTS

[27] My initial inclination was not to grant costs to the successful applicant, but to order that costs be costs in the review application. However and after reconsidering the issue, especially pertaining to applicant's initial stance not to ask for costs if Centlec would be prepared to allow it an opportunity to present a proper presentation, which would be as far as I am concerned the most cost effective and pragmatic and practical approach, I came to the conclusion that applicant should be allowed its costs. I say this especially in light of the fact that Centlec eventually opposed the application and caused me to hear an opposed application on an urgent basis.

ORDER

[28] The following orders are made:

1. It is directed that the application be considered as an urgent application in terms of Rule 6(12) of the Rules of

this Court and that applicant's non-compliance with the forms and service be condoned;

2. Pending finalisation of Part B of this application, the First, Second and Third Respondents are interdicted and restrained from any furtherance of the evaluation and/or adjudication process in respect of Bid Number: RFP12/2012, for pre-paid electricity vending services ("the Tender"), or executing and/or fulfilling and/or giving effect to any award made in relation to the Tender or any agreement concluded pursuant to such award.
3. The second respondent is ordered to pay the costs of the application.

J.P. DAFFUE, J

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Instructed by:
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On behalf of 2nd respondent: Adv. C. Snyman
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