

IN THE HIGH COURT OF SOUTH AFRICA (Northern Cape Division)

Case No: 213/2008
Heard: 22/02/2008
Delivered: 29/02/2008

In the matter between:

ACTARIS SOUTH AFRICA (PTY) LTD

Applicant

and

SOL PLAATJE MUNICIPALITY

First Respondent

**INTELLIGENT METERING SYSTEMS
(PTY) LTD**

Second Respondent

JUDGMENT

BOSIELO AJP

INTRODUCTION

- 1] The parties hereto are embroiled in what promises to be a fierce and bruising legal war over a multimillion rand tender issued by first respondent (a Municipality as defined in terms of the applicable legislation).
- 2] This epic legal war will, in due course, be fought out in this court in the review application brought by the applicant under case number 1357/07 to have the decision to award the tender to second respondent reviewed and set aside.
- 3] This application was brought by applicant on urgency with the primary objective of restraining and interdicting both first and second respondents, temporarily and pending the hearing of the review of the awarding of the tender, from installing any further meters in terms of the tender which forms the subject of the review application. It is clear that the applicant's main focus or intention is to preserve the status quo pending the final determination of the review application.

THE PARTIES

- 4] The applicant is a company duly incorporated in accordance with the company laws of the Republic of South Africa with its principal place of business at 2nd Floor, Waterside Place, Southgate, Carl Cronjé Drive, Tiger Valley, Cape Town.
- 5] The first respondent is a municipality duly established in terms of the applicable local government laws and having its offices at Jan Smuts Boulevard, Kimberley.
- 6] The second respondent is a company duly incorporated in terms of the company laws of the Republic of South Africa and having its principal place of business at 99 Van Riebeeck Avenue, Edenvale, Gauteng.

BACKGROUND FACTS

- 7] In order to place this application in its correct and clear perspective and to facilitate easy comprehension, I deemed it imperative and necessary to give a brief history of this matter, in particular, the events which led to this application. During or about December 2006 the first respondent issued invitations to tender for four tenders. What is particularly relevant to this case, is the tender for the supply, delivery and installation of pre-payment electricity meters or compatible software and devices for revenue protection under tender numbers CEE/T2006. The applicant, second respondent and other tenderers submitted tenders for this contract which closed on 8 December 2006. I find it necessary to mention that prior to this invitation to tender, a company called Actaris Measurement and Systems (Pty) Ltd (Actaris M&S) of which applicant is a subsidiary was in charge of the supply to the first respondent of measurement and metering equipment systems and facilities for the supply of electricity to households falling within the first respondent's jurisdiction. To my understanding, this included amongst others, the provision of hardware, software, data communications and data management facilities to facilitate, amongst others, vending to pre-paid meters, receipting of payment bills, operational management of metering assets, installation, connection, disconnection, reconnection of metering and payment equipment and systems, data management, data processing and data warehousing, procurement of connectivity and customer data access, reporting related services. It is not in dispute that this contract commenced on 1 November 2003 and expired during

October 2006 but, with the mutual consent of both parties, continued on a month to month basis until second respondent took over on or about 4 July 2007. Self-evidently, this was intended to avert any unnecessary disruption of electricity supply to the residents of first respondent during the transition period.

- 8] It is common cause that the new tender closed on 8 December 2006. Both applicant and second respondent had submitted their tenders. The applicant avers that, contrary to para 23 of first respondent's own supply chain management policy, when the tenders were opened in public on 8 December 2006, quite inexplicably, the prices of the respective bidders were not read which conduct, applicant avers, seriously undermines the critical principle of openness and transparency which of all public tenders, in particular those administered by government, public institutions and organs of state must adhere to.
- 9] According to the applicant, until it wrote a letter of enquiry to first respondent on 29 June 2007, there had been no communication from first respondent as to who had won the tender. In the same letter applicant requested to be advised of who has won the tender and quite significantly, the reasons therefore. See Annexure "H". First respondent responded by a letter dated 4 July 2007 marked annexure "I" to the effect that the tender had recently been awarded to second respondent (IMS). It is worth noting that, notwithstanding a clear request for reasons embodied in annexure "H", first respondent furnished no reasons for its decision.
- 10] According to the applicant, it had heard rumours through the rumour-mill that the ultimate price of the tender awarded to second respondent was a princely amount R94 million as opposed to its meagre price of R36 million. This caused it considerable disquiet which prompted another letter to first respondent dated 9 July 2007, annexure "J" in terms whereof they lodged an appeal against the award of the tender in terms of the Local Government Municipality Systems Act, 32 of 2000 ("the Systems Act"). Furthermore applicant made a request for access to information in terms of the Promotion of Access to Information Act, 2 of 2000 ("PAIA"), in particular, the various reports submitted by the bid adjudication committee in terms of paragraph 5 of the Policy. The applicant also requested adequate reasons for the award of the tender as well as the appointment of an independent and impartial person to attempt to resolve the dispute between applicant and first respondent in terms of paragraph 49 of the

Policy. Quite importantly, the applicant requested first respondent to cease taking any further steps in appointing second respondent (IMS) before the outcome of the appeal. First respondent, responded through their legal representatives, Routledge Modise (RM), by facsimile dated 24 July 2007, annexure “K”, wherein they stated, quite unequivocally, that they would not cease to implement the tender with second respondent (IMS). Furthermore, first respondent refused to furnish the information requested in terms of “PAIA” on the basis that the request “does not comply with the provisions of PAIA”. Concerning the request for reasons the first respondent responded that it would be regarded as a request in terms of the Promotion of Administrative Justice Act, 3 of 2000 (“PAJA”) and would be responded to within 90 days of receipt of the request. The appeal in terms of section 62 of the Systems Act could not be entertained as first respondent claimed that it did not contain sufficient information.

- 11] Far from being deterred by first respondent unco-operative attitude, applicant was galvanized into more action as will become more clearer hereunder. On 3 August 2007, applicant, through its legal representatives, Edward Nathan Sonnenberg (ENS) sent a formal request for access to information in the prescribed form in terms of PAIA to first respondent and specifically requested all letters, reports and technical or financial evaluations compiled by representatives of first respondent; all recommendations by KES (Khatima Engineering Services CC) which was a technical consultant employed by first respondent to evaluate the various tenders; all minutes, documents, draft documents, correspondence, assessments, transcripts and calculations by the first respondent and point calculations of all tenders received from the various contracts. By another facsimile dated 3 August 2007, annexure “L”, applicant expressed the view to first respondent, that even if its initial request for information may not have complied strictly with PAIA, first respondent was obliged in terms of the PAIA not to be unnecessarily pedantic and obstructive but to assist applicant in its quest for essential information. Furthermore the applicants request for reasons and information was repeated. Quite interestingly, first respondent replied by facsimile on 7 August 2007 annexure “M” to the effect that insofar as the request for access to information is concerned, the first respondent will adhere to the time-frames prescribed by PAIA and further that the reasons for the award of the tender will be furnished in accordance with section 5(2) of PAJA (i.e. within 90 days of receipt of the request).

- 12] On 2 October 2007, first respondent, under cover of a letter, annexure “N” supplied the applicant, in response to request for access to information of 3 August 2007, with, amongst others a document entitled “Final Technical Report for Kimberley Sol Plaatje [sic] Municipality for Technical Evaluation of Prepaid Electricity Metering System FIN/INC-VEND; CE/R/1/12006; CEF/RE/1/2006; CEE/T/2006; prepared by KES with annexures; the “*Agenda & Minutes*” of the Evaluation Committee held on 6 September 2007 annexure “P”; and a letter dated 7 May 2007 addressed to Actaris. The applicant complains bitterly that many essential documents relating to all letters, reports, and technical or financial evaluations complied by representatives of first respondent; all minutes, documents, drafts documents, correspondence, assessments, transcripts and calculations made by first respondent and more importantly point calculations of all tenders received in respect of this tender were still excluded.
- 13] On 22 October 2007, the applicant served the review application on the respondents. The applicant did this as it believed that whatever essential documents which the first respondent had failed to deliver, it would be obliged to deliver to them as part of the record in terms of Rule 53(1)(b) of the Uniform Rules of Court. On 16 November 2007, the first respondent delivered the original record to the applicant which comprised of two arch-lever files. According to the applicant this record was woefully incomplete. It excluded the following crucial documents viz. recordings and transcripts of various proceedings and crucial meetings of the bid evaluation committee held on 25 May 2007 and 11 July 2007 as well as meetings of the bid adjudication committee held on 25 May 2007 and 6 September 2007; correspondence relating to the tenders addressed to first respondent from members of its own internal departments (which applicant had reason to believe did exist) and correspondence between the first respondent and KES (the technical consultants) pertaining to the tenders.
- 14] In a desperate attempt to obtain these essential documents, the applicant served notice in terms of Rule 35 on first respondent, annexure “Q” on 29 November 2007. It was only on 20 December 2007 that the first respondent responded and delivered the following documents to applicant viz. their reply to the Rule 35 notice; the first respondent additional reasons, annexure “S”; first respondents’ supplementary record in terms of Rule 53 of the Uniform Rules. It is worth noting that for the first time the supplementary record included an internal memorandum by one Pretorius (the first respondent’s engineer)

annexure “T”; letter of appointment of KES which embodied its instructions and all three technical reports submitted by KES. Based on these essential documents the applicant prepared and filed a supplementary affidavit on 17 January 2008. Based on the information available to it at this stage applicant wrote a letter to first respondent on 25 January 2008 requesting an undertaking to delay the implementation of second respondent’s system. On 4 February 2008, first respondent, once again refused to delay the implementation of second respondent’s system through a very lengthy letter which raised various other issues. One of the critical and crucial issues raised in the letter is the allegation that in terms of the contract between first and second respondents, second respondent was supposed to commence with the manufacture of the new meters on 3 September 2007. All in all there were 33000 meters to be manufactured. According to this letter which allegation was repeated in the respondents’ answering affidavit, second respondent had already manufactured and delivered 16400 single meters to first respondent. According to the respondents the manufacture of the remaining meters is in progress and second respondent intends to complete this phase by 17 February 2008. The installation of the meters was scheduled to commence on 7 February 2008. Based on this, the respondents aver that as second respondent has already manufactured and delivered some of the meters, it would be impractical to stop further implementation of the contract at this stage.

- 15] It is clear from their opposing papers, that the attitude of the respondents to this application is that it has no merit and that it is an abuse of the court process. In fact, the respondents pertinently attacked the alleged urgency of this application and alleged that, given the history of the matter, whatever urgency may be seen to exist in the matter, is self-created. In addition hereto, both respondents aver that by virtue of the fact that second respondents has commenced to perform in terms of the contract, the relief sought by the applicant is not competent nor practical. They furthermore dispute the fact that applicant has no alternative remedy as it still intends to proceed with the main review application. It was also alleged by both respondents that as the second respondent has already started to implement the contract for which the first respondent is legally liable to pay, the balance of convenience weighs heavily against the granting of the relief sought by the applicant as this would result in a waste of first respondent’s resources, particularly because what has been done cannot realistically be undone.

LEGAL SUBMISSIONS

- 16] As a starting point, Mr Newdigate SC (duly assisted by Mr Hugo) for the applicant argued with force that the peculiar history of this matter makes it patently and inherently urgent. He submitted that whatever ultimate delay occurred herein, is solely due to the evasive and obstructive tactics adopted by first respondent. In a very clinical fashion, he set out in clear terms all the various diligent steps taken by applicant, first to enquire if the tender was awarded, followed by various appropriate steps to protect its interests. This included amongst others, the request for reasons for the award of the tender, as well as access to essential information which had a direct bearing on the award of the tender, as well as access to essential information which had a direct bearing on the award of the tender. Mr Newdigate set out in great detail the various stages from the informal letters of request, to the formal letters in terms of PAIA, the request for reasons in terms of PAJA, the Rule 53 review application followed by the notice in terms of Rule 35 all of which constitute diligent attempts by the applicant to obtain crucial information and documents which would put it in a position where it could properly assess its legal position. Mr Newdigate contended that applicant was furnished with sufficient knowledge to enable it to finalise its review application only during 20 December 2007, which incidentally was during the festive period. He submitted further that when respondent made it clear by letter dated 4 February 2008 that it will not suspend or delay the implementation of the tender by second respondent, the applicant had no choice but to prepare an urgent application to restrain or interdict any further implementation of the tender, in particular the installation of the meters. Mr Newdigate argued with zeal that, given the facts of this case, it would be unconscionable to allow the respondents to deny the applicant its remedies when they are responsible for the delay which occurred.
- 17] With regard to the existence of a prima facie right Mr Newdigate submitted that the applicant, being a corporate citizen, is like everybody else legally entitled to administrative action which is lawful, reasonable and procedurally fair as envisaged by section 33(1) of the Constitution. He argued further that this right is further bolstered by section 217(1) of the Constitution which requires an organ of state either at national, provincial or the local sphere of government when contracting for goods or services to do so *“in accordance with a **system which is fair, equitable, transparent, competitive and cost effective.**”* He argued that it is not an accident that the same principles are encapsulated in the Local Government: Municipal Finance Management Act, 56 of 2003. In addition, Mr Newdigate submitted that the applicant’s right to procedural fairness in adjudicating the tender was infringed in that certain facts were considered against applicant without giving applicant the opportunity to

respond thereto i.e. the fact that first respondent allegedly had difficulty to understand Actaris' financial costing, whilst certain relevant facts were not considered e.g. the price and applicant's previous track record. Furthermore, Mr Newdigate was critical of the fact that second respondent saw it fit to award this tender to second respondent at an astronomical amount of R94 million and rejected the applicant's tender of a mere R36 million. He was furthermore critical of what he termed bald and unsubstantiated allegations that applicant's tender amounted to R70 million and not the R36 million reflected in its tender documents. He submitted that if these allegations are correct, then first respondent was obliged to bring this to applicant's attention and give it an opportunity to explain before rejecting its bid in terms of the *audi-principle*.

- 18] Mr Cassim SC (assisted by Mr Maenetje) for the first respondent unleashed a scathing attack against the applicant for having delayed to launch its application earlier. He submitted that according to the applicant, as early as 9 July 2007, applicant knew that the awarding of the tender was irregular and even threatened to obtain an interdict to stop the implementation of the tender, if first respondent failed to give an undertaking not to proceed with the implementation of the tender. He submitted that when first respondent refused to grant such an undertaking in July 2007, the applicant should have issued its application immediately and not wait until January 2008. Mr Cassim submitted that with the effluxion of time the respondents signed a formal agreement and preceded to implement the contract. As a result it has become impractical to stop the implementation as it has already taken place. In other words, he submitted that the granting of an interdict by this court would be a futile and academic exercise and would have disastrous financial consequences for both respondents. Concerning a *prima facie* right, he submitted that the review application launched by the applicant is doomed to fail as it has no merit. He argued that the tender was correctly awarded to second respondent as it beat the applicant on functionality, which is one of key and strategically important aspects for considering the tender. With regard to the price difference, Mr Cassim argued without elaboration and without much conviction that first respondent discovered certain hidden costs in the applicant's tender which would make it more expensive in the long term. On the crisp issue of balance of convenience and irreparable harm, Mr Cassim argued that as second respondent has already started to implement the tender, any action intended to halt further implementation of the tender would have disastrous consequences for both first and second respondents, particularly as first respondent might be forced to pay some R82 million to second respondent for work already done.

- 19] To a large extent, Mr Khoza SC (assisted by Mr Mokoena) for the second respondent echoed Mr Cassim's sentiments for obvious reasons. He argued with force and zeal that second respondent who was the innocent party in this entire saga stand to suffer irreparable harm should it be restrained from continuing with the implementation of the tender in terms of the Project Plan Summary, Annexure "AA". He submitted that the second respondent has already manufactured and delivered 16400 of the 33000 meters which were ordered at a cost of a princely R82 million. As a result, he contended that any order to stop any further implementation of the tender by second respondent would bring about irreparable harm to second respondent whose financial position is very precarious. He furthermore argued that applicant is the author of its own misfortune having known as far back as 9 July 2007 that it was not happy with the fact that it had lost the tender. He submitted that when first respondent refused to furnish applicant with reasons and essential documents during July-August 2007, applicant should have issued its application forthwith. Furthermore, he submitted that having lodged an appeal in terms of section 62 of the Municipal Systems Act, applicant should have followed it with an urgent interdict to stop any further implementation of the tender. As a result, he submitted that the long and inordinate delay by the applicant should be held against the applicant, as it basically allowed the proverbial horse to bolt out of the stable.

CONCLUSION

- 20] I have found the following facts to be common cause i.e. first and second respondents are fierce rivals in the field of supply, installation and management of metering equipment and facilities for the supply of electricity; that during 2003 to July 2007, the applicant's holding company Actaris M&S had a contract with first respondent for the supply , installation and management of the metering equipment and facilities for the supply of electricity for households within the first respondent's jurisdiction; that during 2006 after the expiry of the Actaris contract, first respondent put up tenders for a new contract; that applicant and second respondent put in their tenders for the contract; that this tender was awarded to second respondent during May 2007; that applicant knew of this fact during July 2007 after it had written a letter of an enquiry to first respondent; that applicant had requested to be furnished with reasons for the award of the tender to second respondent which request was not complied with and further that applicant was denied access to crucial and essential information and documents which had a direct bearing on the award of the

tender in issue.

- 21] It is abundantly clear from applicant's founding affidavit which is fully amplified by his supplementary affidavit filed on **17 January 2008** that from the beginning second respondent was not willing to be of any assistance to the applicant. Second respondent used every conceivable strategy to frustrate applicant in its quest for reasons and for essential information surrounding the award of the tender. It is furthermore clear that even after first respondent decided to comply with the applicant's request, for some inexplicable reasons, first respondent became very selective concerning the information which it made available to the applicant. Firstly, the first respondent prevaricated to furnish reasons for the award of the tender. This is notwithstanding the fact that section 33(2) of the Constitution makes it crystal clear that *"everyone whose rights have been adversely affected by administrative action has the right to be given reasons."* In response to this request, first respondent sought refuge under section 5(1) of PAJA. I regret to state that this move was ill-conceived as section 5(1) does not necessarily prescribe that reasons shall be furnished only after 90 days of the request. All that this section does, is to give the aggrieved person who has not been furnished with reasons for any action which adversely and materially affect his/her rights, the mechanism to use and the time period within which such a person can apply for such reasons. Speaking for myself I can think of no cogent or logical reason why first respondent was not willing to furnish reasons to the applicant as early as July 2007 if it had nothing to conceal from the applicant.
- 22] To compound this problem further when it ultimately gave reasons, it gave two sets of different if not conflicting reasons. It is interesting to note that in the first reasons it is alleged, without any proof, that applicant was disqualified due to the fact that first respondent had received a number of complaints, apparently from members of the public (i.e. users), about the support and functionality of its services. This is however directly contradicted by the letter by first respondent dated 4 July 2007 wherein it is stated that *"Sol Plaatje and its staff had a wonderful and pleasant experience working with Actaris Metering Systems and its staff hence would like to take this opportunity to extend our gratitude and sheer appreciation of the services that your company has offered through out the years."* As Mr Newdigate correctly pointed out these serious allegations were never taken up with the applicant to give it the opportunity to respond. Faced by a similar problem in **Logbro Properties CC v Bedderson N.O and Others** 2003(2) SA 460 (SCA) at p472B para [25] Cameron JA stated

as follows:

“Procedural fairness, in my view, demanded that the committee in reconsidering the tenders would afford the compliant tenderers an opportunity to make representations, at least in writing, on any factor that might lead the committee not to award the tender at all. That opportunity not having been afforded, the committee's 1997 decision must be set aside, and the matter remitted to the appropriate authority to afford the appellant and the other compliant tenderers the opportunity to make representations, at least in writing, on any supervening consideration relevant to the committee's exercise of its powers in relation to the award or non-award of the tender.”

Self-evidently this dictum lends authority to the hallowed principles of natural justice as encapsulated in the *audi alteram-partem* rule.

23] Of even great significance is the refusal by first respondent to grant applicant access to certain essential information which was pivotal to the deliberations of both the bid evaluation committee, the bid adjudication committee, as well as the most important technical reports and recommendations compiled by KES (the technical consultants). I find it extremely perplexing if not mind-boggling that the first respondent alleges that very crucial meetings of the bid evaluation committee and bid adjudication committee were not recorded and no minutes thereof were kept. It requires to be emphasized that these are the two critically important committees which evaluated and finally adjudicated over the various tenders. The importance of the reports, assessments and recommendations made by KES, the technical consultants, are self-evident. As the technical consultants, this is the agency which had the duty to analyse the technical data and help first respondent to reach the ultimate decision regarding which of all competing tenders was the best. Their reports and recommendations are patently relevant and significant. How first respondent can be content with oral representations on such an important and strategic aspect, defies my logic. It deserves to be mentioned that applicant had to resort to the machinery of Rule 53 followed by a notice in terms of Rule 35 to compel the first respondent to make the necessary information available to it. It is both noteworthy and seriously disconcerting that it was only after the Rule 35 notice that additional reasons for the award of the tender together with a reply to Rule 35 notice were furnished to applicant. This only took place as late as 20 December 2007. What I found even seriously confounding and disturbing is the allegation by first respondent that the advice it received from the National Treasury Consumer Advisor in respect of this tender was oral and that therefore there are no records of such advice.

24] I agree with the applicant's assertion that first respondent's conduct of not

keeping records and minutes of such important meetings is seriously suspicious to a point where, in my view, it attracts seriously negative inferences. It is worth noting that under pressure from the applicant and in response to Rule 35 notice, the minutes of the meetings of the bid evaluation committee and the bid adjudication committee including some three technical reports from KES were surprisingly produced. Although the minutes were not complete, at least they served one crucial purpose of exposing second respondent to have lied when it initially alleged that no minutes or records of such meetings and presentation by KES were kept. However what sticks out like a sore thumb is that it is these dilatory, evasive and obstructive tactics by first respondent which delayed and seriously hampered applicant in preparing its application. To my mind, the first respondent's conduct described above is subversive of the basic and fundamental principles of openness, transparency and accountability which should underpin the actions of all organs of state.

- 25] Concerning the crisp legal issue of urgency, I am satisfied that first respondent is solely to blame for the invidious position in which applicant found itself. The first respondent is obliged by law to furnish reasons to any aggrieved party who applies for such reasons. As **Pickard JP** correctly found in **Cash Paymasters Services (Pty) Ltd v Eastern Cape Province** 1999(1) SA 324 (CK CH) at p 353G. *"It is almost standard practice that an independent tribunal such as the Tender Board would in review proceedings comply with the requirements of Rule 53 of the Uniform Rules of Court by making available the record of its proceedings and its reasons and such documentation as the court may need to adjudicate upon the matter and, if necessary, to file and affidavit setting out the circumstances under which the decision was arrived at."* In my view, any conduct falling short of this threshold requires to be seriously deprecated as it militates against the constitutionally protected principles of openness, transparency, justness, fairness and accountability.

I venture to say that the reasons to be furnished must be full, and adequate and must be furnished as expeditiously as the circumstances permit to enable the aggrieved party to investigate its case in order to determine what legal recourse he/she intends to take. It is clear *in casu* that first respondent deliberately failed to do that. In fact first respondent proved itself to be dishonest by giving different reasons. I furthermore find that the first respondent's refusal to grant applicant access to essential information which was pivotal to the final decision not to award the tender to applicant is seriously reprehensible and requires to be seriously deprecated. It forces one to infer

that first respondent had something to hide from scrutiny. I find it seriously disconcerting that applicant had to resort to PAIA, PAJA, Rule 53 and later Rule 35 to obtain information to which it is in law entitled. In the context of this case, I find that first respondent was unnecessarily and deliberately obstructive. Accordingly, I find that this matter is indeed urgent and further that the applicant, at all times, acted with extraordinary diligence and laudable expedition against all odds.

- [26] Reverting to the question of *prima facie* right, I am of the view that what is in issue herein is the applicant's right to a procedurally fair administrative action. Section 217(1) of the Constitution commands all organs of state even in the sphere of local government wherever they enter into contracts for goods or services to do so ***"in accordance with a system which is fair, equitable, transparent, competitive and cost-effective."*** Quite importantly section 65(2) (ii) read with chapter 11 of the Local Government Municipal Finance Management Act 56 of 2003 calls for policies of procurement which are ***"fair, equitable, transparent, competitive and cost-effective."*** In my view, it is beyond dispute that the applicant was entitled to a lawful and procedural fair process. It follows logically that the decision by first respondent which clearly affected its rights materially and adversely must be justifiable in relation to all the facts put before first respondent and the reasons proffered by first respondent. See **Logbro Properties CC v Bedderson N.O and Others** 2003(2) SA 460 (SCA) at 465G. I have already alluded to the fact that the reasons advanced by first respondent in its first reply and the so-called additional reasons appear to be seriously contradictory and therefore open to serious criticism. Clearly the applicant is entitled to take this matter on review so that this entire tender can be exposed to scrutiny. The veil of secrecy which first respondent cast around this tender is a source of grave concern to me. As the learned **Ebrahim AJ** correctly found in **Cash Paymaster Services** (supra) at 357J:

"One of the fundamental requirements of democracy is that the affairs of Government be open to public scrutiny and that it may be held accountable for its actions."

- 27] Much energy was spent on the controversial aspect of irreparable harm and balance of convenience. Both respondents submitted that, should the contract be halted or suspended, they stand to suffer irreparable harm as the second respondent has already commended implementing the contract. The facts of this case make it patently clear that as early as July 2007, first respondent

knew that applicant was aggrieved by the award of the tender to the second respondent – in fact, applicant requested first respondent in writing as early as July 2007 not to commence with the implementation of this contract. Applicant went further to lodge an appeal in terms of section 62 of the Municipal Systems Act, which the first respondent ignored. Furthermore, the applicant made it perfectly clear that it intended to approach court for an interdict to stop the implementation of the contract. The attitude of first respondent at all times was sheer intransigence and arrogance. Notwithstanding the request for reasons in terms of PAJA, request for access to information in terms of PAIA, the Rule 53 review application followed by notice in terms of Rule 35, first respondent proceeded with the implementation of the contract which it knew fully well, applicant was not happy with. Quite curiously, the events *in casu* are analogous to the events in **Chairperson - Standing Tender committee v JFE Sapela Electronics** [2005] 4 ALL SA 487 (SCA) at p 497 paras [25] and [26] where the Scott JA expressed himself eloquently as follows:

“[25] Counsel for the appellant submitted that the court a quo ought to have declined to set aside the contracts, if for no other reasons because it was not possible to reverse what had already been done, and because by the time judgment was delivered it was no longer practicable to start the tender process over again for the outstanding work. It was submitted further that this state of affairs was attributable to the respondents’ failure to institute review proceedings timeously and to seek an interim interdict preventing the work from proceeding.

[26] There is no merit in counsel’s further submission. Within a day or two of becoming aware of the award of the Helderstroom tender the respondents wrote to the Ministry expressing their concern over the tender process. As early as 26 January 2004 they wrote to the DPW requesting the documents necessary to enable them to ascertain their rights with regard to a possible review. The request was refused. A subsequent attempt to invoke the provisions of the Promotion of Access to Information Act was similarly unsuccessful. Ultimately they were obliged to institute proceedings even before they were fully apprised of the facts necessary to substantiate the review. The documents they sought were eventually furnished to them on 23 March 2004, almost two months after their initial request. It was only then that they were able to file a supplementary affidavit properly substantiating the relief they sought. In my view they were not in any way to blame for a delay in initiating proceedings or bringing them to finality. Nor were they at fault for

failing to stop the work from proceeding. The DPW made it quite clear in correspondence that it was not prepared to suspend the work or to withhold from Nolitha access to any of the installations. It is true that the respondents did not proceed with their threatened interdict but, as explained in the replying affidavit, access to all the installations had by then (10 April 2004) been granted to Nolitha. Any application for an interdict would in any event have been opposed by the applicants.”

- [28] However in my view, the distinguishing aspect of the two cases is that, unlike *in casu*, in JFE Sapela’s case the work performed by Nolitha was so far advanced that the court took the view that it would not be practical to stop the work. On the contrary, I was given very little and scanty information of the extent of the work already done by second respondent. Too much reliance was put on the figure of R82 million which was seductively bandied around as a magic wand. The only real information I have is the one sketched out in the PROJECT PLAN SUMMARY Annexure AA, coupled with the allegation that 16 400 of the 33 000 meters to be manufactured have already been manufactured and delivered. There was simply no clear evidence that the meters have already been installed or not. To my mind and in accordance with PROJECT SUMMARY PLAN “AA”, I can safely accept that second respondent has just commenced with the first phase of the contract. Undoubtedly, this makes this matter different from **Sebeza Kahle Trade v Emalahleni Local Municipal Council** [2003] 2 ALL SA 340 (T) at p348 where **Kirk-Cohen J** held that:

“Should an order be made in terms of prayer 1 of the declaration it would be meaningless and have no practical effect for the simple reason that the contract in question has not only been awarded but completed. A court will not decide abstract, academic or hypothetical questions unrelated to a right...”

- [29] On the facts before me, I am constrained to find, as I hereby do, that it is in fact in the interests of all the parties, including the communities falling under first respondent’s jurisdiction that the interim interdict be granted to avert any further unnecessary possible wastage of the municipality’s scant and rare capital resources which, in any event, come from the public purse. Any further delays would invariably give the second respondent the unfair advantage to continue to finish off the project. In the long run and by the time the main application for review is heard in all likelihood the project will be finished and both first and second respondents would then argue, correctly so, that the contract has been fully executed and any relief would therefore be merely academic and therefore not capable of practical application.

[30] The applicant severely criticized first respondent for rejecting its tender of some R36 million and opting for a more expensive one of an astronomical figure of some R94 million. Manifestly the huge disparity in the pricing of the two competitors should be of some grave concern to all right-thinking people blessed with a modicum of economic sense. This becomes critically important when due regard is had to the contents of “Annexure T”, the report by Mr Pretorius who expressed serious criticism particularly regarding the price and financial implications of the second respondent’s tender both to first respondent and the people of Sol Plaatje. In essence, he asserted that the tender by second respondent had no financial benefits for first respondent. It was therefore not good value for money. In any event both section 217(1) of the Constitution and section 65(2)(i) of the Municipal Finance Management Act (MFMA) prescribe *inter alia* that any process involving tenders or procurement should be **competitive and cost-effective**. The emphasis on cost-effectiveness is further bolstered by sections 112(1) and 120(4) of MFMA both of which speak of “**affordability and value for money**” in any bids or tender or public-private partnership entered into by a municipality. This is clearly intended to ensure that municipalities do not whimsically embark on wasteful and fruitless expenditure, to the grave prejudice of the tax-payers. It is clear to me that the issue of price looms large in the applicant’s case and is one of the issues it wishes to raise during the review application. I am unable to say that there is no merit on this aspect. This aspect was dealt with in the minority judgment of **Ebrahim AJ** in **Cash Payments Services (Pty) Ltd v Eastern Cape Province**, (supra) at p357F-G where the learned judge clearly stated:

“It is trite that one of the crucial factors in the awarding of a tender is the question of costs. While the Tender Board is not necessarily obliged to accept the lowest tender, it is required, where it rejects such a tender, to provide adequate and cogent reasons for its decision based on the relevant facts before it.”

The learned judge proceeded to conclude with the following thought-provoking if not poignant statement at p359J:

“It is manifestly clear that the reconstruction of South African society is a task of enormous magnitude and will tax the financial resources of the country to its limits. Whatever funds are available must be allocated prudently and utilised in such a manner that it results in the greatest number of people reaping the maximum possible benefits from it. Those in public office, at every level, must constantly be aware of their responsibilities in this regard.”

I can only hope that first respondent will take heed of these wise words in all its future dealings concerning tenders and procurement of goods and services.

31] Having given this matter careful and anxious consideration, I am satisfied that the applicant has no other alternative remedy than an interim interdict. The argument that the review application would be adequate in the circumstances is simply fallacious. If the respondents are not interdicted now, by the time the review application is heard, it will be water under the bridge for the applicant as the contract will be fully implemented. In the circumstances the respondents must take full blame for the position in which they find themselves. I have found some comfort and support for my view in the matter of **Coruim (Pty) Ltd v Myburg Park Langebaan (Pty) Ltd** 1993(1) SA 853 (CPD) at page 858; where **Conradie J** stated:

“The first respondent, on the other hand, had been warned as early as May 1991 that it was proceeding with the development at its peril. It must have been aware of the risks involved in proceeding with the development. In particular I believe that the first respondent should have stopped to think that the development was bound to provoke a good deal of criticism from many quarters, not least from people who had had no advance notice of it. In this regard I should say that I have the uneasy feeling that the applications for rezoning and subdivision were dealt with in an alarmingly secretive fashion. I cannot for the life of me understand how the second and fourth respondents could have thought (as they say they did) that the grant of permission to develop a township in an area as sensitive as this, an area which forms part of our national heritage and which might well one day be incorporated into the West Coast National Park, would be uncontentious; and that notice to nearby landowners was not required since no person could maintain that he was detrimentally affected thereby. I think that from the time that the first rumblings of discontent which, as I have said, the first respondent should have anticipated, were heard, it should have proceeded very cautiously. By plunging headlong into the development without the sensitivity to its neighbours which it professes to display for the environment, the first respondent was to an extent the author of its own misfortune.”

32] Consequently and for reasons adverted to above I hereby grant the following order:

1. **The forms and service provided for in the Uniform Rules of Court are dispensed with for the purpose of this interim application which I have found to be urgent.**
2. **An interim interdict restraining an/or interdicting first and second respondents, pending the finalization of the review application under case number 1357/07, from installing any meters in accordance with respondents PROJECT PLAN SUMMARY "AA", copy whereof is attached to the Notice of Motion is hereby granted.**
3. **Both first and second respondents are ordered to pay the costs of this application on a party and party scale jointly and severally, the one paying the other to be absolved, such costs to include the costs consequent upon the employment of two counsel.**

L O BOSIELO
ACTING JUDGE PRESIDENT
Northern Cape Division

On behalf of the Applicant:	Adv. J.A. NEWDIGATE SC
Assisted by:	Adv. HUGO
Instructed by:	EDWARD NATHAN SONNENBERG ATTORNEYS
On behalf of the First Respondent:	Adv. M. CASSIM SC
Assisted by:	Adv. N.H MAENETJE
Instructed by:	MESSRS. ROUTLEDGE MODISE
On behalf of the Second Respondent:	Adv. M.KHOZA SC
Assisted by:	Adv. P. MOKOENA
Instructed by:	MESSRS. MATHOPO ATTORNEYS