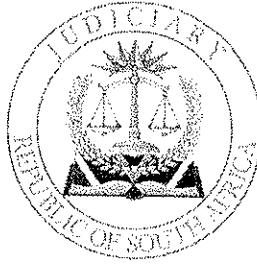


Reportable:	NO
Circulate to Judges:	NO
Circulate to Magistrates:	NO
Circulate to Regional Magistrates:	NO



**IN THE HIGH COURT OF SOUTH AFRICA  
"NORTH WEST DIVISION, MAHIKENG"**

CASE NO: KPUM32/2018

In the matter between:

**CONTOUR TECHNOLOGY (PTY) LTD**

**APPLICANT**

and

**MAMUSA LOCAL MUNICIPALITY  
CIGICELL (PTY) LTD**

**1<sup>st</sup> RESPONDENT**

**2<sup>nd</sup> RESPONDENT**

**JUDGMENT**

**PETERSEN AJ:**

## **INTRODUCTION**

[1] The applicant seeks an order in the following terms as set out in the amended notice of motion of 3 April 2019, that:

- “1. It is declared that the Service Level Agreement between the respondents concluded on 22 March 2017 (“SLA”) was unlawfully awarded.
2. The SLA is set aside.
3. The first respondent is ordered immediately initiate a new competitive tender process for the services provided in terms of the SLA.
4. The setting aside of the SLA is suspended pending the commencement of a new contract awarded pursuant to the tender process referred to in order 3 above, which shall be no later than 1 March 2020.
5. The first and second respondents are jointly and severally liable for the applicant’s costs, including the costs of two counsel.
6. Further and/or alternative relief.”

[2] The respondents, Mamusa Local Municipality (“the Municipality”) and Cigi Cell (Pty) Ltd (“Cigi Cell”) oppose the relief sought by the applicant. Whilst the Municipality filed opposing papers, no heads of argument were filed or appearance noted to argue its opposition to the relief sought. In light of the issues at hand and the grounds of opposition raised by the Cigi Cell, the grounds of opposition raised by the Municipality are dealt with in the judgment.

## **BACKGROUND**

- [3] The background facts which gave rise to the application extracted from the founding affidavit and supplementary founding affidavit can succinctly be summarized as follows. The underlying basis for the application is that Contour had in place a SLA with the municipality concluded on 1 July 2015, for the rendering of a system for the purchase of prepaid electricity services. The nature of the system was that Contour, did not physically sell prepaid vouchers, but provided back-end services which operate the sale of prepaid electricity. All sales of prepaid electricity were performed by the Municipality and third-party vendors including spaza shops and supermarket chains including Checkers and Shoprite.
- [4] Whilst the Contour SLA was still in place and not terminated by the Municipality by providing 90 days' notice to Contour in terms of the SLA, it concluded a SLA with Cigi Cell in March 2017. The Acting Municipal Manager of the Municipality on 31 March 2017 consequently wrote to Contour purporting to give notice of cancellation of its SLA with Contour with effect from 30 June 2017. The cancellation is said to have been premature as the agreement was for a minimum of three years, until 30 June 2018. After directing correspondence to the Municipality about the three year period and 90 days' notice period after the initial three year period had ended, the Municipality did not persist in its attempts at premature cancellation. Contour accordingly continued to render the services required of it in terms of its SLA with the Municipality.

- [5] Contour's further challenge to the SLA between the Municipality and Cigi Cell, is premised on an allegation that the Municipality failed to follow official procurement process as prescribed in the Municipal Supply Chain Management Regulations of 2005 ("the SCM Regulations") to the Municipal Finance Management Act 56 of 2003 ("the MFMA") and its Supply Chain Management Policy ("SCMP"), prior to the appointment of Cigi Cell.
- [6] Contour alleges that it learnt of the SLA when its Ben Meyer received an email from Floris Webb of Shoprite, one of the third-party vendors that sells prepaid electricity on behalf of the Municipality. Mr Webb requested him to switch off vending for the Municipality and to remove the meter numbers so as to avoid Shoprite selling tokens for meters which their customers could not use. Contour further takes issue with an undated notice signed by the Municipal Manager, Mr Mokgathle J. Ratlhogo, which reflects Cigi Cell as the official provider of vending prepaid electricity for the Municipality.
- [7] Following unanswered correspondence from Contour's attorneys to the Municipal Manager, Contour decided to accept an invitation from the Municipal Manager to attend a meeting, with a view to avoid an application to Court. The said meeting took place on 2 November 2018 at 11h00am at the municipal offices attended by representatives of Contour and their legal representative and officials of the Municipality.
- [8] It is Contour's contention that at this meeting an anomaly with regard to the failure to conduct a mandatory tender process, as prescribed by the

Municipality's own SCM policy, which was circumvented by appointing Cigi Cell in terms of Regulation 32 of the SCM regulations, emerged. This consequently triggered the present review application before Court.

- [9] The Municipality was required to deliver a record of its decision to appoint Cigi Cell pursuant to Uniform Rule 53. It purported to comply by supplying a 13 page document to Contour of a record of reconstructed minutes of meetings and reports, contending that the original documents were destroyed in a fire. The amended notice of motion and supplementary founding affidavit was drawn upon receiving the reconstructed record from the Municipality.

#### **THE MAIN ISSUE IN DISPUTE**

- [10] On a careful scrutiny of the papers and in particular the founding papers of Contour, the main issue in dispute is discernible, and is simply, whether the SLA between the Municipality and Cigi Cell, was in accordance with official procurement process as prescribed by the Municipal Supply Chain Management Regulations of 2005 ("the SCM Regulations") to the Municipal Finance Management Act 56 of 2003 ("the MFMA") and its Supply Chain Management Policy ("SCMP").
- [11] The issue is further limited by the Municipality through its claim that it followed its SCMP, the MFMA and more importantly relied predominantly on Regulation 32 of the SCM Regulations.

- [12] The main issue in dispute accords with the relief sought in the amended notice of motion. The focus in this judgment will accordingly be premised on this issue. Before turning to the main issue in dispute, I briefly address the points *in limine* raised by the respondents.

## **THE POINTS *IN LIMINE* RAISED BY THE RESPONDENTS**

### **Contour's lack of *locus standi***

- [13] The Municipality contends that Contour lacks *locus standi* to bring this application. In this regard, the main issue in dispute goes to the heart of the procurement process allegedly followed by the Municipality which impacts directly on the public interest. Even if Contour's *locus standi* may be brought into question, its interest in the matter pales in comparison to the greater public interest. The sentiments expressed in **Giant Concerts CC v Rinaldo Investments (Pty) Ltd and Others** 2013 (3) BCLR 251 (CC) at paragraph 34 is apposite:

"To this observation one must add that the interests of justice under the Constitution may require courts to be hesitant to dispose of cases on standing alone where broader concerns of accountability and responsiveness may require investigation and determination of the merits. By corollary, there may be cases where the interests of justice or the public interest might compel a court to scrutinize action even if the applicant's standing is questionable. When the public interest cries out for relief, an applicant should not fail merely for acting in his or her own interest."

- [14] This point *in limine* must accordingly fail.

**The review application is out of time**

- [15] Cigi Cell contends that the application, which is brought within the ambit of section 7(1) of the Promotion of Administrative Justice Act, Act 3 of 2000 is outside the 180 day period as prescribed.
- [16] The evidence of Contour that it became aware of the SLA concluded between the Municipality and Cigi Cell on 17 October 2018 when it received correspondence from Mr Webb of Shoprite is undisputed. The present application was launched on 12 November 2018.
- [17] This point *in limine* must likewise fail.

**DISCUSSION OF THE MAIN ISSUE IN DISPUTE: THE ALLEGED UNLAWFUL AWARDING OF THE SLA TO CIGI CELL****The contentions of the Municipality**

- [18] The Municipality contends that by December 2016 it faced several legal issues with pressure and demands placed on it, particularly by Eskom. Eskom implemented electricity supply interruptions premised on the Municipality's failure to settle its monthly Eskom bill. It takes issue with Contour's failure to come to its assistance during those trying times when it suffered electricity interruptions which threatened the shutdown of the Municipality's sewerage system, water shortages were experienced, older persons reliant on life-support systems were at risk, there was prejudice



to education, and businesses found it impossible to maintain productivity resulting in downsizing and placing many positions at risk. The Municipality cites this as a few examples of the situation it experienced. The Municipality's technical department undertook an audit of prepaid electricity meters and was tasked to identify the root cause of the deteriorating situation of electricity income. The Municipality contends that it discovered that electricity meters were modified and damaged or bypassed and that many citizens consumed electricity for which they did not pay. The Municipality contends that there was an emergency at hand and consequently engaged with Cigi Cell when it identified Cigi Cell as having been involved in the delivery of services to an adjoining Municipality. It contends that it subsequently engaged Cigi Cell to provide prepaid electricity services as the the SLA with Contour did not provide for exclusivity. It entered into a SLA with Cigi Cell to see whether the income and the sales of electricity could be improved. It further did this as the SLA with Contour was close to expiration.

[19] The Municipality contends that it acted in accordance with its supply chain policy which makes provision for the procurement of goods and services under contract secured by other organs of state. This was done in addition to the emergency situation at hand. The Municipal Manager contends that he engaged the services of Cigi Cell upon satisfying himself of the following:



1. A contract had been procured by Ga-Segonyana Local Municipality by means of a competitive bidding process applicable to that municipality.
2. The Ga-Segonyana Local Municipality and Cigi Cell consented to such procurement with the Municipality in writing.
3. He had no reason to believe that such contract with the Ga-Segonyana Local Municipality was not validly procured.
4. There was clear demonstrable discounts and benefits to go with Cigi Cell.

[20] The Municipality contends that the services of Cigi Cell could be established from pre-established sources and to this end the SLA with Ga-Segonyana Local Municipality prevented unnecessary duplication, saved on costs attached to the normal competitive bidding process such as advertising costs and the costs of printing bid documentation. It says that it therefore follows that the approach saved substantially on the time factor of an independent bidding process where the municipality to speed up a solution, having regard to the emergency created by the impasse with Eskom.

[21] The Municipality concedes that it accepts that the general principle is that the State should procure goods and services through tender processes. To this end, it states that Regulation 16.A6.4. read with the treasury instruction note defines an exception to this principle in certain specified circumstances and that the case of emergency that the municipality experienced is such an exception. The municipality qualifies this by stating that it had in any event, followed supply chain management,

Regulation 32 of 2005 that provides for participating in contracts already concluded with other organs of state in a competitive process.

[22] In its supplementary answering affidavit to Contour's supplementary founding affidavit deposed to by the chief financial officer, he essentially referred back to the answering affidavit deposed to by the municipal manager and the issues addressed therein. The Municipality contends that it was of the view all along that it had followed due process and that they could utilise the contract concluded in the Ga-Segonyana Municipality. It states that if there was an error in that regard, it was *bona fide* and not motivated by fraud or promise of kickbacks and that Contour's rights were not unduly affected by the introduction of Cigi Cell as competition in the sale of prepaid services. The Municipality makes the allegation that this application was motivated by Contour's greed and constitutes an abuse of process to stifle the competition on prepaid electricity sales. The municipality denies that that the current agreement concluded with Cigi Cell was unlawful. The municipality makes a serious allegation that the hands of Contour are dirty and that it does not trust Contour as a service provider.

[23] The Municipality submits that, should this Court find that the appointment of Cigi Cell was unlawful or irregular, which it denies, they support the view that it would be just and equitable to suspend the effect of such order. To this end, they submit that the suspension can however not be until March 2020, or a date thereafter premised on substantial costs it may incur if Cigi Cell for the purchase and/or removal of meters.

### **The contentions of Cigi Cell**

- [24] Cigi Cell in what is referred to as its preliminary answering affidavit, in respect of the relief sought in the initial notice motion, which sought to review the SLA between the Municipality and Cigi Cell, correctly in my view states that the lawfulness of its appointment in terms of Regulation 32 is largely the province of the Municipality to address. In a single paragraph Cigi Cell, weighs in on the issue by stating that the allegations of Contour in its founding affidavit that the regulation 32 appointment was unlawful are so vague and speculative that they do not justify a response, let alone interim relief and denies the allegations. In a complete turnaround, Cigi Cell in its answering affidavit to the further supplementary founding affidavit of Contour, purports to bolster the Municipality's opposition to the relief sought by weighing in more substantively on the issue of the lawfulness of its SLA with the Municipality. Cigi Cell thereby essentially seeks to justify its SLA with the Municipality entered into within the ambit of Regulation 32.
- [25] Cigi Cell states that the allegation of Contour that no competitive bidding process was followed resulting in the agreement being unlawful is a subversion of the correct legal position. It essentially contends a bidding process is lawful, as is a regulation 32 appointment which is an administrative act which stands until set aside. It contends that Contour bears the onus to persuade this Court that the Regulation 32 appointment should be set aside. Cigi Cell as with the Municipality contends that the criticism of the Municipality for not supplying sufficient documents as

required by Rule 53 is not justified as the Municipality explained that the documents were lost in a fire and had requested documents from Ga-Segonyana municipality. Cigi Cell maintains that Contour misses the point completely as there is better evidence than the documentation which it seeks.

- [26] The better evidence says Cigi Cell is found in the implementation of Cigi Cell's system which has had enormous benefits for the Municipality and based on this it is difficult to understand how Contour could contend that the decision to award the SLA was unlawful, irrational and somehow reviewable.

**The relevant legislation framework premised on the main issue in dispute**

- [27] Regulation 32(1) of the SCM Regulations provides that:

"A supply chain management policy may allow the accounting officer to procure goods or services for the municipality or municipal entity under a contract secured by another organ of state, but only if-

- (a) the contract has been secured by that other organ of state by means of a competitive bidding process applicable to that organ of state;
- (b) the municipality or entity has no reason to believe that such contract was not validly procured;
- (c) there are demonstrable discounts or benefits for the municipality or entity to do so; and
- (d) that other organ of state and the provider have consented to such procurement in writing."

[28] Section 110(2)(c) of the MFMA, provides that:

“This Part, except where specifically provided otherwise, does not apply if a municipality or municipal entity contracts with another organ of state for-  
(c) the procurement of goods and services under a contract secured by that other organ of state, provided that the relevant supplier had agreed to such procurement.”

[29] At Clause 5 of the Municipality’s SCM Policy Regulation 32 is incorporated verbatim. The SLA with Cigi Cell exceeds a value of R200 000 and in accordance with Regulation 12(1)(d) of the SCM Regulations any procurements must be done through a competitive bidding process.

[30] Regulation 36 of the SCM regulations is applicable in the event of, *inter alia*, an emergency situation. It provides as follows:

“36 Deviation from, and ratification of minor breaches of, procurement processes

(1) A supply chain management policy may allow for the accounting officer

—

(a) to dispense with the official procurement processes established by the policy and to procure any required goods or services through any convenient process, which may include direct negotiations, but only-

(i) in an emergency situation

...’

(2) The accounting officer must record the reason for any deviations in terms of subregulation (1)(a) and (b) and report them to the next

meeting of the council, or board of directors in the case of a municipal entity, and include as a note to the annual financial statements.”

## **EVALUATION**

- [31] The emergency situation faced by the Municipality at the time it engaged Cigi Cell is noted and the threat to basic services and the rights of the residents/ratepayers of the Municipality cannot be downplayed. The Municipality's attitude to Contour is clear from the papers, is stated is very tersely and in my view should not detract from the real issue at hand. That having been said, the main issue as stated above is the Municipality's case that it purports to have relied on Regulation 32 to enter into the SLA with Cigi Cell, with reference to an emergency situation which existed in the Municipality hinting at Regulation 16.A6.4. read with the treasury instruction note defines to justify the emergency situation.
- [32] There are a number of patent problems with the Municipality having invoked Regulation 32 of the SCM Regulations to conclude the SLA with Cigi Cell. In the first instance, Regulation 32 allows the accounting officer to procure services for the municipality under a contract secured by another organ of state. It does not permit the Municipality to contract directly with a service provider, only an organ of State. The Municipality subject to meeting the further requirements of Regulation 32 effectively takes the place of the other organ of State in its contractual obligations with the service provider. It is clear that the Municipality in the present matter concluded a SLA directly with Cigi Cell, contrary to the purport of Regulation 32. See **Blue Nightingale Trading (Pty) Ltd t/a Siyenza**



**Group v Amathole District Municipality** 2017 (1) SA 72 (ECG) at paragraph 31. The SLA entered into with Cigi Cell on this basis alone is unlawful and reviewable in terms of section 6(2)(f)(i) of PAJA.

- [33] In the second instance, there is no proof that the Ga-Segonyana Municipality followed a competitive bidding process in the award of its SLA to Cigi Cell, and that the Municipality had no reason to believe that such contract was not validly procured. Whilst the Municipality alleges and it is accepted that a fire destroyed its documents relevant to the matter at hand, there is no explanation put forward why the bid documents relevant to Ga-Segonyana Municipality's award of its SLA to Cigi Cell was not obtained. It does not suffice for the Municipality simply to allege, in the absence of providing the bid documents, that the requirements 1(a) and (b) of Regulation 32 were met.
- [34] Cigi Cell endeavored to come to the assistance of the Municipality to demonstrate that there was a competitive process in the awarding of its SLA by Ga-Segonyana Municipality by providing amongst others, a portion of an invitation to bid, the letter of award from Ga-Segonyana and its letter of acceptance, the cover page of the Ga-Segonyana SLA and a letter from the Municipality requesting Ga-Segonyana to confirm the process followed to appoint Cigi Cell. This falls gravely shy of the tenet of Regulation 32(1)(a) and (b).
- [35] On this score the SLA with Cigi Cell was likewise unlawful and reviewable in terms of section 6(2)(f)(i) of PAJA.

- [36] In the third instance, Regulation 32(1)(c) makes it clear that there must be proof of demonstrable discounts or benefits for the Municipality to assume the contractual obligations of the other organ of State. The Municipality fails to address compliance with this requirement satisfactorily. In a nutshell the Municipality simply contends that the benefit derived was inherent in avoiding a lengthy tender process, in the face of its emergency situation brought about by the impasse with Eskom. On this score too the SLA with Cigi Cell was unlawful in terms of section 6(2)(f)(i) of PAJA.
- [37] In the final instance, there is no evidence provided by either the Municipality or Cigi Cell in attempting to justify the Municipality's award of the SLA to it, that Ga-Segonyana Municipality consented to the Municipality's procurement of services under its agreement. On this score too, the SLA with Cigi Cell was unlawful in terms of section 6(2)(f)(i) of PAJA.
- [38] The Municipality's attempt at justifying reliance not only on Regulation 32 but also Regulation 16A6.4 of the Treasury Regulations is misplaced as it is clear that the awarding of the SLA to Cigi Cell was done predominantly on the basis of Regulation 32.

**The approach to the unlawful Service Level Agreement between the First and Second Respondents**

- [39] Any act which is declared unlawful and invalid must be reviewed and set aside by a court. A court however is vested with a wide discretion not to set aside an unlawful and invalid administrative act, to keep in place an

unlawful agreement on the ground of practical exigency and if it would be just and equitable to do so.

- [40] Cigi Cell implores this Court, to adopt the approach followed by Swain J in **Vukukanye Personnel Services CC v Ethekekwini Municipality and Others** (8110/2010) [2010] ZAKZDHC 68 at paragraph 33, where he said:

“Considering all of the above, I reluctantly conclude in the exercise of my discretion, that although the award of the contract to the second and third respondents was invalid when made, I should decline to set aside the award. To do so at this stage, would be highly prejudicial to the second and third respondents, as well the ratepayers of the first respondent. The second and third respondents are not guilty of any wrongdoing, and the applicant does not allege that the award was tainted by fraud or corruption. I am enjoined by the Supreme Court of Appeal to exercise my discretion in such a case as the present, pragmatically and practically. To set aside the award at this stage of events would neither satisfy neither of these criteria.”

- [41] The *status quo* of this matter at the time it was argued in November 2019 is that some 3 months was left before the end of the SLA in March 2020. As at the time of this judgment just over one month remains. In **Nambithi Technologies (Pty) Ltd v City of Tshwane Metropolitan Municipality** 2013 JDR 2524 (GNP) at paragraphs 32 and 33, the court said:

“32 The appointment of the fifth respondent was for a period not exceeding 12 months and we are now in the 10<sup>th</sup> month. If I set aside the appointment with the full period not yet having run its course, such order will have serious and

prejudicial results to the members of the public, more so that they will be left with two months before its expires. That will interrupt the services that should be given to the members of the public.

33 Therefore in my view, even though I find the decision to appoint the fifth respondent warrants to be set aside, I am not inclined to do so.”

[42] Contour takes issue, amongst others, with the SLA between the Municipality and Contour, allowing for automatic renewal. The submission is this that if the SLA were not set aside, there is a likelihood that it will continue in effect after 22 March 2020. Contour at the time the matter was argued in line with the relief sought in its amended notice of motion that an order be granted for a new tender process to be concluded by 1 March 2020 as the SLA terminates on 22 March 2020. It submits that this could result in substantial savings to the Municipality.

[43] The Municipality in on record on oath as stating the following at paragraphs 44.1 of its first answering affidavit, that:

“44. The standard process at the MLM (Mamusa Local Municipality) is that:

44.1 a contract will never exceed a period of 36 months in line with section 33(1) of the Municipal Finance Management Act (MFMA)”

[44] In the exercise of my discretion, I find myself in a similar position to the Courts in **Vukukanye** and **Nambithi**. In the present matter, notwithstanding the allegations by Contour that the SLA between the Municipality and Cigi Cell may potentially be extended indefinitely and for

this reason an order should be granted for a new tender process to be completed by no later than 01 March 2020, the Municipality in my view should be held to its own standard practice in line with section 33(1) of the MFMA, insofar as it states on oath that a contract will never exceed 36 months. On this statement alone, this Court would expect that the Municipality would commence a competitive bidding process as a matter of urgency, considering the looming date of 22 March 2020 when its unlawful SLA with Cigi Cell terminates.

[45] I am accordingly not inclined to set aside the unlawful SLA between the Municipality and Cigi Cell for practical reasons which speak for themselves in this matter.

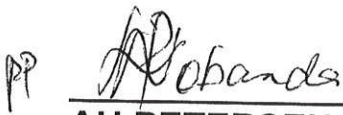
### **COSTS**

[46] The applicant has been successful in its argument that the SLA is unlawful, but not in the relief that same be suspended pending a new tender process to be completed by 01 March 2020. The applicant acting in the interests of the public was justified in bringing this matter to court, where the exercise of administrative power by a Municipality could not be left unchecked. In the exercise of my discretion, costs should nevertheless be granted to the applicant. In my view, the nature of the matter is such that it did not merit the employment of two Counsel by the applicant.

**ORDER**

[47] In the result, it is ordered as follows:

1. The application is dismissed.
2. The first and second respondents shall pay the costs of the Applicant, including the costs of one Counsel.



**AH PETERSEN**

**ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA  
NORTH WEST DIVISION, MAHIKENG**

**APPEARANCES**

FOR THE APPLICANT	: Adv. C. Steinberg and Adv I. Cloete
INSTRUCTED BY	: Shepstone and Wylie Attorneys
FOR THE SECOND	
RESPONDENT	: Adv. A.J. Boulle
INSTRUCTED BY	: Barkers Attorneys
DATE OF HEARING	: 21 NOVEMBER 2019
DATE OF JUDGMENT	: 07 FEBRUARY 2020