THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 383/12
Reportable

In the matter between:

TELKOM SA LIMITED **Appellant**

and

Z T E MZANZI (PTY) LIMITED **First Respondent**

HUAWEI TECHNOLOGIES AFRICA (PTY) LTD **Second Respondent**

ALCATEL-LUCENT (PTY) LIMITED **Third Respondent**

Neutral citation:	*Telkom v Mzanzi & others* (383/12) [2013] ZASCA 14 (18 March 2013)
Coram:	NUGENT, LEACH and PETSE JJA, SCHOEMAN and SALDULKER AJJA
Heard:	**4 MARCH 2013**
Delivered:	**18 MARCH 2013**
Summary:	**Invitation to tender – construction – which it obliged Telkom to submit to resolving disputes with tenderers.**

ORDER

On appeal from North Gauteng High Court, Pretoria (Prinsloo J sitting as court of first instance).

The appeal is upheld with costs. The order of the court below is set aside and substituted with an order dismissing the application with costs that include the costs of two counsel.

JUDGMENT

NUGENT JA (LEACH and PETSE JJA, SCHOEMAN and SALDULKER AJJA CONCURRING)

[1] Telkom SA Limited (Telkom) – the appellant – invited tenders for the supply of telecommunications equipment in a document referred to as a Request for Proposals (RFP). The first respondent - ZTE Mzanzi (Pty) Ltd (Mzanzi) – was one of those who submitted tenders. Others included the second and third respondents, who were cited for their interest in the proceedings, but they played no role in the court below nor in this appeal.

[2] Tenders were to be evaluated in phases. They would need to cross the threshold requirements of each phase before they could proceed to the next phase. The tender submitted by Mzanzi was disqualified at an early stage for alleged want of compliance with certain criteria. The contract was ultimately awarded to the second and third respondents.

[3] Mzanzi was aggrieved at the disqualification of its tender. Its attorneys wrote to Telkom outlining its grievances and asking for certain information. It stated in addition that 'our client hereby declares a dispute' as contemplated by clause 43 of the Standard Terms and Conditions'. It also asked for an undertaking that Telkom would not proceed with the processes envisaged by the invitation to tender 'until such time that the envisaged process under clauses 43.3 and 43.4 of the Standard Terms and Conditions has been complied with'.

[4] Telkom declined to provide the undertaking and Mzanzi applied to the North Gauteng High Court for what was said to be an interim interdict restraining Telkom from proceeding with the process 'pending the finalization of the dispute resolution process that has been commenced by the applicant in terms of clauses 43.3 and 43.4 of the Standard Terms and Conditions read with clause 1.2.2 of the RFP'. The order was granted by Prinsloo J and Telkom now appeals with his leave.

[5] The Standard Terms and Conditions referred to were those contained in the contract a tenderer would be required to conclude with Telkom if his or her tender was accepted. The relevant portions read as follows:

'43.1 If any dispute arises out of or in connection with this Agreement, or related thereto, whether directly or indirectly, the Parties must refer the dispute for resolution firstly by way of negotiation and in the event of that failing, by way of mediation and in the event of that failing, by way of Arbitration …

43.2 A dispute within the meaning of this clause exists once one Party notifies the other in writing of the nature of the dispute and requires the resolution of the dispute in terms of this clause'.

The remaining sections provide the mechanics for the process and need not detain us.

[6] That clause was incorporated by reference into the RFP by clause 1.2.2 of that document, which read as follows:

'Should any dispute arise as a result of this RFP and/or the subsequent contract, which cannot be settled to the mutual satisfaction of the Bidders and Telkom, it shall be dealt with in terms of clause 43 of the Standard Terms and Conditions.'

[7] Although it makes no difference to the outcome of this appeal one aspect of the relief granted ought to be corrected. The matter was dealt with as if what was being sought was an interim interdict to be decided upon the rules expressed in cases like *Olympic Passenger Service (Pty) v Ramlagan.*[1] That is not correct. What is contemplated by those rules is an interdict pending the outcome of further proceedings in which the rights of the parties are to be determined by a court. The fact alone that an interdict is to endure only until a defined event occurs and not in perpetuity – as in this case – does not bring it within the terms of those rules. As pointed out recently by this court in *Minister of Defence v SA National Defence Union*,[2] in such a case it is a final interdict for that period, to which the ordinary rules for the grant of final relief apply.

[8] It is trite that the submission of a tender in response to an invitation to do so creates no contractual relationship between the parties. Lest there was any uncertainty on that score it was reiterated by Telkom's RFP in clause 1.1.3. To find that the introduction into the RFP of the terms of clause 43 became binding upon Telkom and bidders would make material inroads into that principle. It was submitted that it did no more than

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[1] *Olympic Passenger Service (Pty) v Ramlagan* 1957 (2) SA 382 (D) 383D-G.
[2] *Minister of Defence v SA National Defence Union* [2012] ZASCA 110.

determine the forum in which disputes would be resolved. Once Telkom has accepted a bid and contracted with the bidder that is no doubt correct. But to construe it as contended by Mzanzi would have the effect of imposing a contractual obligation upon Telkom to engage in disputes with bidders, which it would ordinarily not have.

[9] That would be a most unbusinesslike construction to place on the clause. Indeed, its consequences would be absurd. It would mean that Telkom would be obliged to engage in resolving disputes with multiple bidders, ultimately by arbitration with varying awards, before it could safely award the tender. That could not have been intended by Telkom. Nor can the terms of the RFP sustain such construction.

[10] The court below concluded that 'the only reasonable interpretation to be attached to 1.2.2 is that provision is made for two separate dispute resolution procedures: the one flowing from a dispute arising as a result of the RFP between Bidders and Telkom and the other flowing from the subsequent contract between the ultimate service provider and Telkom'. I cannot agree.

[11] It is true that the use of that unfortunate term 'and/or' suggests that the clause applies as much between Telkom and its contractor as it does to disputes between Telkom and bidders, but that construction leaves out of account the use of the definite article 'the', which indicates that a contract exists at the time the dispute arises. It is true that its insertion in the RFP is tautology but tautology is often to be found in commercial documents. Any other construction would lead to the absurd results I have mentioned, and would be in direct conflict with the expressed intention of Telkom in

the RFP that no contractual relationship would arise by reason only of the submission of bids.

[12] In my view the court below misconstrued the clause and its order must be set aside. Two counsel appeared in the court below for both parties, but we were told by counsel for Telkom that it had not been considered necessary to employ two counsel for the appeal.

[13] The appeal is upheld with costs. The order of the court below is set aside and substituted with an order dismissing the application with costs that include the costs of two counsel.

R W NUGENT
JUDGE OF APPEAL

APPEARANCES:

For appellants:	C H J Badenhorst SC Instructed by: Routledge Modise Incorporated p/a Eversheds Attorneys c/o Friedland Hart Solomon & Nicolson, Pretoria Matsepes, Bloemfontein
For respondents:	M C Erasmus SC W T B Ridgard Instructed by: Langa Attorneys c/o KMG & Associates, Pretoria Honey & Partners, Bloemfontein