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**IN THE HIGH COURT OF SOUTH AFRICA  
(NORTHERN CAPE HIGH COURT, KIMBERLEY)**

**CASE NO.: 588/2018**

**Date heard: 10-08-2018  
Date delivered: 22-03-2019**

In the matter between:

**Carospan (PTY) LTD**

**1<sup>st</sup> Applicant**

**Northern Cape Advanced Wireless (PTY) LTD**

**2<sup>nd</sup> Applicant**

And

**The HOD: Northern Cape Provincial**

**Government: Department of Education**

**1<sup>st</sup> Respondent**

**The MEC: Northern Cape Provincial**

**Government: Department of Education**

**2<sup>nd</sup> Respondent**

**CORAM: WILLIAMS J:**

**JUDGMENT**

**WILLIAMS J:**

1. The applicants Carospan (Pty) Ltd and Northern Cape Advanced Wireless (Pty) Ltd, a joint venture (the JV), were the successful tenderers under contract NC/DE/002/2016-2017 for the appointment of a service provider for the leasing of five

- photo copier high speed printers for three years by the Northern Cape Department of Education.
2. The respondents are the Head of Department and the Member of the Executive Council of the Northern Cape Provincial Government: Department of Education. I refer to the respondents herein as "*the Department*".
  3. The required specifications of the machines were set out in detail in the tender invitation and were amongst others:
    - Machine 1 - Complete high volume digital production press (continuous form printing) with a minimum speed of 1350 A4 impressions/images per minute;
    - Machine 2 – High speed cut sheet production printer with a minimum printing speed of 250 ppm A4 and A3 duplex printing, saddle stapled and folded;
    - Machine 3 – High speed colour cut-sheet production printer with a minimum printing speed of 100 ppm A4 and A3 duplex printing, saddle stapled and folded;
    - Machine 4 – fully integrated, automated packaging machine; and
    - Machine 5 – A booklet binding machine.
  4. The JV submitted its bid in time and having been found responsive the JV's bid was shortlisted. Subsequent hereto the JV was invited by the Department to do a presentation on functionality on 18 January 2017. A further presentation on functionality was held on 11 May 2017 since the Department had found that the bidders had focused more on machine functionality at the first presentation than the functionality

- aspects as “*per criteria*”, which include project methodology, past experience and the structure and capacity of the bidder.
5. The JV and three other bidders qualified after the functionality test to be evaluated by the bid evaluation committee. The JV scored the most points whereupon the bid was referred to the bid adjudication committee for further consideration.
  6. On 30 May 2017 the Department requested a meeting with the JV where various issues were discussed. Amongst others, the specifications of the machines to be provided by the JV were discussed and agreed upon. In this regard the JV indicated that a separate booklet binding machine was not necessary as the printing machines had booklet binding capacity. The models for the machinery were agreed upon. Monthly rental was set in an amount of R1 573 200.00 including VAT. The Department also negotiated a discount in the form of three months free rental.
  7. After the meeting of 30 May 2017, the Department awarded the tender to the JV and on the same day sent a letter to the JV confirming the agreement reached. On 31 May 2017 the Department sent an official confirmation to the JV of the acceptance of their bid, noting that the total cost of the project is R51 915 600.00.
  8. Thereafter further meetings were held between the Department and the JV, mainly concerning the logistics for the implementation of the installation of the machines, the signing by the Department of a Master Rental Agreement which the JV required to obtain finance for the project, the signing of a

- Service Level Agreement (the SLA) between the parties, and so forth.
9. In the meantime and during August 2017 the machines were delivered to the Department. It appears that at this stage the machines were only to be stored at the Department since the parties had agreed that the rental agreement commence from the beginning of December 2017, since the Department's previous rental agreement would still be in place until the end of November 2017.
  10. Whilst in the process of finalising the SLA, the Department's Deputy Director – Legal Services, Ms N Alexander, noticed that the specifications of the machines which had been delivered did not match up with the tender specifications. The Department then called a meeting with representatives of the JV, Messer P Wilbers and J Theron, on 23 October 2017 to explain the discrepancy.
  11. At this meeting Mr Wilbers, the JV's sales manager, informed that the specifications of the machines indeed conformed with the specifications, but that the machines were updated versions and their brochures were not available on-line. Mr Wilbers then e-mailed the Department a brochure purportedly pertaining to the machines and which showed that the model SPPRO 8220S, which had been supplied can produce 1350 copies per minute.
  12. The SLA was concluded between the parties on 20 November 2017 and the machines were installed by the JV during December 2017.

13. After installation the Department discovered that not one of the machines could produce more than 136 images per minute while the bid specification for the high volume digital production press was for a minimum of 1350 images per minute. The Department identified other problems with the machines as well (relating to colour, binding and other capabilities) but for purposes of this judgment, since the JV admits that not one of the machines could produce 1350 images per minute, I will restrict the problems encountered with the machines to this function.
14. The Department then called a meeting with the JV on 26 January 2018. The JV was represented at this meeting by Mr A Killian, the JV's Operational Director, and two other gentlemen. Mr Killian admitted that the product the JV had supplied was not according to the specifications and that their sales manager Mr Wilbers had "gone rogue" by manipulating the brochures to conform with the bid specifications. Mr Killian was very apologetic and asked for an opportunity to scrutinise the specifications and present an alternative plan on 29 January 2018. The Department stressed the fact the JV had misrepresented the capabilities of the machines and that the Department would have to cancel the contract. Nevertheless the JV was given the opportunity to remedy the problem.
15. On 29 January 2018 Mr Killian presented as an alternative and to increase productivity, the use of additional machines at the same rental but that the rental period be extended to cover the costs of the extra machines. The JV's suggestion was not acceptable to the Department and Mr Killian was informed of

- the cancellation of the contract. On 7 February 2018 the Department cancelled the contract in writing due to misrepresentation which induced the contract.
16. The JV refused to accept the cancellation and on 13 February 2018 tendered to provide the Department with a Ricoh V20100 Roll Feed Production Printer in the place of two of the machines, which they allege will comply in all aspects with the bid specifications. The Department rejected the proposal and requested that the JV remove the offending machines before 23 February 2018.
  17. The JV brought this application, initially as a matter of urgency, for relief essentially that; pending the final adjudication of an action to be instituted within 30 days of the granting of the order herein, the Department be interdicted and restrained from in any way further repudiating and/or performing any act of repudiation of the agreement the parties had reached on or about 31 May 2017 under the particular tender contract number; that the JV be ordered to provide to the Department for rental in the *interim* the Ricoh V20100 printer in the place of two SP Pro 8220 S machines originally indicated in the Master Rental Agreement, that all the remaining aspects of the Master Rental Agreement and the Maintenance Agreement concluded on 19 September 2017 remain in place; the above orders serve as an interim interdict; the applicants be ordered to provide the Ricoh V20100 machine within 70 days of the application and that costs of the application be costs in the main proceedings, alternatively in the event the Department opposes the

application, that the Department pay the costs of the application.

18. The reference in the Notice of Motion to the Master Rental Agreement is as a result of the assumption by the JV in its founding affidavit that the party's relationship was governed by that agreement. Subsequently in the replying affidavit the JV accepted that the SLA of 20 November 2017 is the relevant agreement. No application for the amendment of the Notice of Motion has however been applied for.
19. Be that as it may, the JV contends that the cancellation of the contract by the Department is unlawful, given the terms of the SLA. In this regard Mr Grobler who appeared for the applicant referred to *Government of RSA vs Thabiso Chemicals (Pty) Ltd 2009 (1) SA 163* where Brand JA held with regard to a dispute about the alleged wrongful cancellation by the State Tender Board of a contract for which the respondent had been the successful tenderer, at 168 J – 169 A thereof that:  
*“I do not believe that the principles of administrative law have any role to play in the outcome of the dispute. After the tender had been awarded, the relationship between the parties in this case was governed by the principles of contract law. . . ”*
20. With this *dicta* in mind Mr Grobler argues that no matter the shenanigans of Mr Wilbers, all that I should consider at this stage is that the bid specifications did not require a bidder to provide a specific make or model of machine and neither was it one of the criteria upon which functionality was scored. The contract between the parties, in the simplest of terms, was for the JV to provide machines of a certain capability. Machines

were provided and installed which did not have this capability. In these circumstances clauses 13.1(c), 16.6 and 16.7 of the SLA apply.

- 20.1 Clause 13.1(c) provides for the termination of the contract where the service provider (the JV) fails to remedy a breach caused by *“not delivering the goods and services in line with the required specifications”* within 7 days of receipt of written notice from the client (the Department) to do so.
  - 20.2 Clause 16.6 states that the SLA constitutes the entire agreement between the parties and that no alterations to the agreement be valid unless committed in writing and signed by both parties.
  - 20.3 Clause 16.7 is a non-variation clause which states that no variation of the terms of the agreement or consensual cancellation shall be effective unless reduced to writing and signed by both parties.
21. The argument thus being that since the Department has not given the JV written notice to remedy its breach as per clause 13.1 and the agreement has not been varied in writing in terms of clauses 16.6 and 16.7, the cancellation by the Department of the agreement is unlawful and the agreement is still extant.
  22. As far as the issue of Mr Wilbers’ misrepresentation goes, the argument is that this is an issue which can be dealt with at trial stage and that the ambit of the dispute at this stage is whether there was performance in terms of the SLA (with reference to Brand JA’s remarks in the Thabiso case).



23. I do not agree with the stance taken by Mr Grobler. Whilst the dispute has to be determined in terms of the law of contract, it does not exclude the effect of misrepresentation on a contract, which is very much part of the law of contract. It is also pivotal to the determination as to whether the JV has shown a *prima facie* right, one of the requisites of an *interim* interdict.
24. In *Webster v Mitchell* 1948(1) SA 1186 (W) at 1189 Clayden J laid down the approach to be followed to establish whether an applicant for an interlocutory interdict has *prima facie* established his right as follows:

*“ . . . the right to be set up by an applicant for a temporary interdict need not be shown by a balance of probabilities. If it is ‘prima facie established though open to some doubt’ that is enough. . .*

*The proper manner of approach I consider is to take the facts as set out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute, and to consider whether, having regard to the inherent probabilities, the applicant could on the those facts obtain final relief at the trial. The facts set up in contradiction by the respondent should then be considered. If serious doubt is thrown upon the case of the applicant he could not succeed in obtaining temporary relief, for his right, prima facie established, may only be open to some doubt’. But if there is mere contradicting, or unconvincing explanation, the matter should be left to trial and the right be protected in the meanwhile, subject of course to the respective prejudice in the grant of refusal of interim relief.”*

25. Ogilvie Thompson J took a stricter approach in *Gool v Minister of Justice* 1955(2) SA 682 (C) at 688 D-E and said “*in my view the criteria on an applicant’s own averred or admitted facts is: should (not could) the applicant on those facts obtain final relief at the trial.*”

The approach laid down by Clayden J as modified by Ogilvie Thompson J is what has been followed numerous times.

26. This is especially so where an application for an interdict may be *interim* in form but final in substance as *in casu*, where the finalisation of an action in all probability will exceed the 3 year term of the contract. In such instances it has been held not sufficient for an applicant to make out a *prima facie* case: it is necessary to establish the right on a balance of probabilities.
27. It is therefore important to look at how the JV’s version has unfolded. In its founding affidavit the JV contends that the Department could not have been induced into entering into the agreement by the misrepresentation of Mr Wilbers since the JV had already in October 2016, when it submitted its bid, appended a brochure of the machines it proposed. This brochure specifically states that the machines proposed can generate 95, 110 and 135 impressions/images per minute. Despite the capabilities of the proposed machines being well below the bid specification, the JV was found to be responsive and shortlisted. The JV was then invited to the functionality meeting of 19 January 2017 where the specifications were discussed and the brochures were explained. During the second functionality meeting of 11 May all the aspects of the first meeting were repeated. These presentations led to the

meeting of 30 May 2017 where *inter alia* the models and specifications of the machines were agreed upon pursuant whereto the JV was awarded the tender.

28. The Department, in its answering affidavit, denies that the JV had submitted any brochures with its bid documents and states that the JV first introduced brochures/material when it did not power point presentations at the functionality meetings. The Department attached the material which the JV used at these meetings and it includes a picture of a machine with a description of “1375 images per minute”.
29. In reply the JV has admitted that it had not submitted any brochures with its bid documents. It fails however to explain how such a mistake, on an issue so fundamental to their case, could have been made in the founding affidavit. The JV also admits to having used the material that the Department attached in the functionality presentations, with the exception of the material relating to the machine that can produce 1375 images per minute.
30. The first problem I have with the material used at the functionality presentations is that it is also not the brochure which the applicant alleges to have used at these meetings. This material has obviously been prepared by the presenter for the power point presentation and is not a brochure. Secondly the JV’s denial of the material relating to the machine which can print 1375 images per minute being used at these presentation, raises more questions than answers. If it had not been used and the JV had used only material relating to the machines which could produce 95, 110 and 135 images per minute

referred to in paragraph 27 above, why would the Department have agreed to these specifications so disparate from the bid specifications? Why the concern by the Department when the delivered machines, even before installation and usage, did not appear to be in accordance with the bid specifications? Why then did Mr Wilbers find it necessary to tamper with the brochures to reflect compliance with the bid specifications if it was never so represented by the JV?

31. In my view the probabilities by far favour the version of the Department, that misrepresentation induced the contract. That the misrepresentation went to the root of the contract entitling them to resile from the contract without having to comply with requirements of the SLA as alluded to by Mr Grobler.
32. Mr Grobler's argument that the Department in any event cannot resile from the contract since it has chosen to give the JV an opportunity to rectify the problem and therefore has waived its right to rescind, also does not hold water. Whilst it is so that a party who has been induced by misrepresentation into a contract must make his decision to either stand by the contract or rescind within a reasonable time and that he cannot approbate and reprobate, from the minute of the meeting of 26 January 2018 it is clear that the Department did not approbate. Mr Killian of the JV was told that the contract would have to be cancelled. It was on Mr Killian's insistence that the Department gave the JV a weekend to come up with a proposal to rectify the problem and when it could not, the contract was cancelled immediately verbally and within a week in writing. In these circumstances it cannot be said that the Department has

waived its right to resile from the contract. See in this regard *Berkemeyer v Woolf 1929 CPD 235*.

33. In these circumstance I am of the view that the JV has failed to show a *prima facie* right.
34. I deal briefly with the other requisites for an an interim interdict. The requirement of irreparable harm and no other satisfactory remedy are closely linked. Whilst it is so that the JV will suffer financial harm by being liable for payments to the financial institution without the benefit of the rental income from the Department, nothing stands in its way to institute an action for damages against the Department. As far as the requirement that the balance of convenience favour the granting of *interim* relief is concerned, the JV contends that the Department will suffer no inconvenience should the *interim* interdict be granted, since the Ricoh machine which it tenders for use by the Department, pending the finalisation of the action to be instituted, would comply with the bid specifications, which assertion has not been denied by the Department. Whilst this may be so, an *interim* interdict cannot be granted merely because the balance of convenience favours the granting thereof.
35. In these circumstances the application must fail. There is no reason why costs should not follow the result.

The following order is made:

**The application is dismissed with costs.**

