

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case Number: 64340/13

In the matter between:

DATE: 5/6/2015

VIVA ENGINEERING PROJECT CC

First Applicant

VIVA ENGINEERING PROJECT CC

AND CORRO-WEAR JOINT VENTURE

Second Applicant

and

MINISTER OF WATER AFFAIRS

First Respondent

MRS Z MATHE NO

Second Respondent

METHABICA CONSULTING

Third Respondent

STELENBOSCH NACO

Fourth Respondent

BELTA SERVICES

Fifth Respondent

PRO-ELECTRO SERVICES

Six Respondent

JUDGMENT

A B ROSSOUW A J

- (1) This is an application for leave to appeal against the order that I made on 17 March 2015.
- (2) The application for leave to appeal was brought to my attention about two weeks ago. I immediately requested the registrar to facilitate the hearing of this application.
- (3) The applicants raised eleven grounds for leave to appeal. These grounds are set out in the applicant's notice of application for leave to appeal, which I find unnecessary to repeat.
- (4) The applicants argued that an unsuccessful bidder has *locus standi* simply by virtue of its having submitted a bid. This submission was made in respect of my finding that the second applicant lacked *locus standi*. It must be borne in mind that the issue of standing is divorced from the substance of the case. Thus, I had to decide this issue on the assumption that the second defendant's challenge was justified. I found that the second applicant, ie Viva and Corro-Wear, in their capacity as partners or associates in a joint-venture, did not have a standing because the alleged joint-venture never existed for

the reasons set out in my judgment. A non-existent entity does not have any standing, let alone constitutional rights and I am not aware of any authority proclaiming that each constituent member of an alleged entity with *locus standi* is rendered with legal standing by a finding that the entity has never existed. I am of the opinion that there is no reasonable prospect that my finding in this regard would be overturned on appeal.

- (5) The applicants further argued that my finding of an absence of irregular conduct in the first phase did not dispose of the whole case. If there was no irregularity committed in the administrative phase, then the question is whether a bidder who was *duly disqualified* in the first phase has any *locus standi* to challenge a decision made in any subsequent phase. Counsel submitted that such a disqualified bidder does have that right. I could not find any reported judgment dealing with *locus standi* in the context of a phased evaluation bidding process. If the broader principles of constitutional own-interest standing as set out in *Giant Concerts CC v Renaldo Investments (Pty) Ltd and others* 2013 (3) BCLR 251 (CC) are applied to the facts of this case, I have difficulty to see how a decision taken in any subsequent phase can directly affect the said bidder's rights or interests or potential rights or interests,

or how such an interest can be real and not merely hypothetical or academic or on what basis such a person is entitled to claim the court's time and put the opposing party to trouble. Even from a purely pragmatic point of view, it would make no sense to grant such a bidder the opportunity to contest a decision made in any subsequent phase. In the light hereof, I am of the view that there is no reasonable prospect that another court would find that a duly disqualified bidder in a phased evaluation bidding process has *locus standi* to challenge any decision in any subsequent phase.

- (6) Regarding the applicant's grounds relating to SDB9, the following: I found that the purpose of SDB9 was to prevent any form of bid rigging, which included collusive dealings between constituent firms and the prevention of more than one (alternative) bid per bidder with a view to preventing *any form of bid rigging*. It is true that the terms of SDB9 had a wider scope than the Competition Act, but in my opinion there is no reasonable prospect that another court would find that the terms were unreasonable, immaterial or unconstitutional or that the Committee was entitled to ignore them or that the terms were the cause of any form of unfair treatment for the reasons set out in my judgment.

(7) Regarding the remaining grounds for leave to appeal and mindful of the factual findings and my reasons contained in my judgment, I am likewise of the opinion that the appeal would have no reasonable prospect of success.

(8) I therefor make the following order:

1. The application for leave to appeal is dismissed with costs, including costs of senior counsel.

A B ROSSOUW A J

DATE: 05/06/2015

DATE OF HEARING: 3 JUNE 2015

DATE OF JUDGMENT: 5 JUNE 2015

FOR THE FIRST AND SECOND APPLICANTS:

ADVOCATES: MM SNYMAN (With him ND DE LANGE)

ATTORNEYS: NORTON ROSE FULBRIGHT
(INCORPORATED AS DENEYS REITZ INC), UMHLANGA
C/O MARITZ SMITH VAN EEDEN INC, PRETORIA

FOR THE FIRST AND SECOND RESPONDENTS:

ADVOCATE: Z Z MATEBESE

ATTORNEYS: THE STATE ATTORNEY, PRETORIA

FOR THE THIRD RESPONDENT:

NO APPEARANCE

FOR THE FIFTH RESPONDENT:

ADVOCATE: A G SOUTH

MACROBERT INC, PRETORIA