



IN THE NORTH GAUTENG HIGH COURT, PRETORIA
[REPUBLIC OF SOUTH AFRICA]

(1) REPORTABLE: ~~YES~~/ NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

CASE NUMBER: 26111/2012

19/7/2013

19 JULY 2013
DATE

SIGNATURE

In the matter between:

STEFANUTTI STOCKS CIVILS, A DIVISION OF
STEFANUTTI STOCKS (PTY) LIMITED

FIRST APPLICANT

CYCAD PIPELINES (PTY) LIMITED

SECOND APPLICANT

STEFANUTTI STOCKS CIVILS, CYCAD OLIFANTS
RIVER JOINT VENTURE

THIRD APPLICANT

And

TRANS CALEDON TUNNEL AUTHORITY
BASIL READ (PTY) LIMITED

FIRST RESPONDENT
SECOND RESPONDENT

JUDGMENT

MAVUNDLA, J.

- [1] The applicant is aggrieved about the fact that, the first respondent on the 16 February 2012 awarded a tender under Contract Number TCTA –05 –002 (hereinafter referred to as “the tender”) to the second respondent for the construction of a bulk steel water pipeline in Limpopo province, which is part of a larger project to provide water services to underserviced areas in Limpopo. The applicant is also aggrieved about the fact that the first respondent found the entity Big Five to be the reserve bidder.
- [2] The third applicant (which is a joint venture between the first and second applicants), the second respondent, Group Five, WCE Joint Venture and Rumdel Joint Venture entities pre-qualified for the tender.
- [3] As indicated herein above, the second respondent was the bid winner. The entity called Group Five was declared by the first

respondent to be “the standby” party, in case negotiations with the first respondent were unsuccessful.

[4] The applicant seeks to have:

- (i) The decision of the first respondent reviewed and set aside and;
- (ii) the contract concluded between the first respondent and the second respondent pursuant to the award of the tender to the second respondent cancelled; and
- (iii) the tender awarded to the third applicant alternatively directing that the entire tender process commences afresh;
- (iv) the costs of this application be paid by the respondents who oppose the application.

[5] As indicated herein above, the second respondent was the bid winner. An entity called Group Five was declared by the first respondent to be the “standby” party, in case negotiations with

the first respondent were unsuccessful. Both these parties have chosen not to get involved in the present litigation. In respect of Group Five, this is so because, although it was not cited as a party in the matter, the first respondent had earlier successfully taken a point *in limine* of *non-joinder* of Group Five being an interested party. This court upheld the point *in limine* and ordered that the papers should be served upon Group Five. The papers have since been served upon Group Five, which nonetheless chose to abide by the court order.

[6] The applicants seek to have the decision awarding the tender to the second respondent reviewed on the following grounds:

6.1 The third applicant ought not to have been disqualified from the tender process for failure to have met the minimum requirement relating to internship programmes, mentorship programmes and preferential procurement targets;

6.2 the applicant ought not to have been disqualified from the tender process on the basis that it materially qualified its tender;

6.3 the applicant ought not to have been disqualified from the tender process for failure to submit certain particulars of its Bills of Quantities for option 2.B; for amending its Bills of Quantities for option 2.B after tender closing; for failing to meet the minimum mandatory requirements relating to Skills Development and for materially qualifying its tender in several respects.

6.4 Group Five as the reserve bidder (and the only other responsive bidder) ought to have been disqualified from the tender adjudication process for failure to submit letter of Intent ("Letter of Intent) for security in the amount of R100 million and for having executed the compulsory components of contingency, contract price adjustment and VAT from its original tender.

6.5 The first respondent afforded undue preference to Group Five and the second respondent during the adjudication process as a result of which the third applicant was treated unfairly;

6.6 the third applicant has a reasonable suspicion that the first respondent was bias in favour of the second respondent.

7. The applicants contended that in the circumstances the decision to award the tender to the second respondent ought to be reviewed and set aside on one or more of the following grounds:

7.1 There is a reasonable suspicion of bias in favour of second respondent, relying on section 6(2) (a)(iii) of PAJA;

7.2 The action was procedurally unfair, relying on section 6(2)(c) of PAJA;

7.3 The mandatory and material conclusions of the tender were not complied with, relying on s 6(2) (b)(g) of PAJA;

7.4 The action was influenced by a material error of the law, relying on s6 (2) (d) of PAJA;

7.5 The action was taken arbitrarily and capriciously, relying on s6 (2) (e)(vi) of PAJA;

7.6 The decision was not rationally connected to the information before the first respondent, relying on s s6 (2) (f) (ii) of PAJA.

[8] The applicant is criticising the decision of the first respondent in awarding the tender to the second respondent on the ground that

the decision was biased and irrational. It is contended that, looking individually or collectively at the grounds the decision is assailed upon, it becomes glaring that the first respondent was biased and bent over backward to accommodate the second respondent instead of disqualifying its tender application when it should have, but proceeded to award it the tender.

[9] It was further submitted that the approach in assessments of the tender documents submitted by the second respondent and those submitted by the applicant differed markedly and raises a reasonable perception of bias. It is contended that whereas the applicant provided detailed information in its tender documents, the second respondent had not. It was further submitted that the bias of the first respondent is reflected by the very fact that in the case of the second respondent, the approach was to afford the latter an opportunity.

[10] The opposition of these proceedings by the first respondent was highly criticised by and on behalf of the applicant. In my view, the

first respondent, whose decision it is sought to have reviewed, is expected, as the responsible authority in the award of tenders, and obliged to defend its decision which is being assailed for whatever reason. The extent and degree of its opposing any court application which seeks to reverse its decision, is nothing to raise eyebrows about, nor cause to draw adverse conclusions thereof.

- [11] The applicant who brought these proceedings bears the *onus* to demonstrate on a balance of probabilities that the decision in awarding the tender to the second respondent and its finding that Big Five be the standby party was tainted by irregularity or illegality warranting the award to be set aside. Mere suspicion of bias does not at all assist the applicant in the absence of demonstrable evidence evincing such bias. *In casu* I have not been persuaded that there was any such bias calculated to disadvantage the applicant and to enhance the second applicant's interest or that of Big Five.

[12] In the matter of *Moseme Road Construction CC and Others v King Civil Engineering Contractors (Pty) Ltd and Another*¹ the Supreme Court of Appeal held that: “[2] The award of government tenders is governed by s217 (1) of the Constitution. Awards must be made in accordance with a system that is fair, equitable, transparent, competitive and costs-effective. But a procurement system may provide for categories of preference and for the advancement of categories of persons (s 217 2)). National legislation must prescribe a framework for the implementation of any preferential policy (s217(3)).This is done by the Preferential Procurement Policy Framework Act 5 of 2000. It provides that organs of State must determine their preferential procurement policy based on a points system. The importance of the points system is that contracts must be awarded to the tenderer who scores the highest points unless objective criteria justify the award to another tenderer (s2(1)(f).” This as much was met by the first respondent.

[13] It bears mentioning that the colossus and significant nature of the tender *in casu* was well chronicled in the heads of argument of the applicant as set out herein below. The tender involved herein is of significant importance and when completed, would most

¹ 2010 (4) SA 359 (SCA) at 361F-H.

definitely bring great relief to various communities in a wide region. The tender is for the construction of a welded steel bulk water pipeline between the De Hoop Dam and Steelpoort in Limpopo Province, and part of the Olifants River Water Resources Development Project (“ORWRDP-2” or “the project”) located within the catchment area of the Olifants River, Steelpoort River and Sand River. The project is divided into several phases:

13.1 Phase 2A involves the construction of the De Hoop Dam which is currently being undertaken but has not been completed and has a proposed timeline June 2007 to March 2013;

13.2 Phase 2B involved the construction of the pipeline from Flag Boshielo Dam to Pruissen near Mokopane and includes the construction of a pump station at the Flag Boshielo Dam, two additional pump stations en route and a terminal reservoir at Pruissen and has a proposed timeline of January 2014 to December 2015;

- 13.3 Phase 2C involves the construction of a pipeline from the De Hop Dam to Steelpoort and has a proposed timeline January 2012 to December 2013;
- 13.4 Phase 2D involves the construction of a pipeline from Steelpoort to Groothoek and includes the construction of a terminal reservoir at Groothoek; also has a proposed timeline January 2012 to December 2013;
- 13.5 Phase 2E involves the construction of a pipeline from the Mooihoek to the Havercraft Junction and has a proposed timeline January 2014 to December 2015;
- 13.6 Phase 2F involves the construction of a pipeline from Havercraft Junction to Olifantspoort and includes surge pressure structures the and has a proposed timeline January 2014 to December 2015;
- 13.7 Phase G will be at a later stage for augmentation once project completed
- 13.8 Phase 2H involves the incorporation of the existing Lebalelo infrastructure into the project, and includes cross connections with the adjacent new pipes which have been

constructed during Phase 2C and 2D to be incorporated in 2013.

[14] It is common cause that on 9 June 2004 the Cabinet decided to proceed with the project in terms of the Memorandum to Cabinet No. 2 of 2004. The project was included in the Government's Programme of Action for 2006 in pursuit of achieving the goals for supplying basic water services to support the growth and development strategy, particularly mining, of the Limpopo Province, to facilitate investment in the mining sector with associated growth opportunities in support of the accelerated and shared growth initiative of South Africa whilst providing an anchor project for the development of the mining industry.

[15] It was submitted on behalf of the first applicant that the review is an exercise in futility because: it is not just and equitable, in the circumstances, to set aside the award of the tender to the second applicant. The project is far advanced to justify either a fresh tender process or introduction of a new contractor in the form of the applicant. To do so, would invariably result in the delay of the

project with concomitant astronomical costs, and prejudice the first applicant, either in having to pay for escalated costs for steel, and or double payment for the new contractors and the incurred costs of the second applicant and potential loss. The delay would be prejudicial to the affected communities who are without water services.

- [16] The question of setting aside is a matter of the discretion of the Court². The Court should have regard to the circumstances of the case and the importance of the project not only to the parties involved in the dispute but the overall best interest of the public. Where there is credible evidence of fraud, dishonesty and corruption in the procurement of the tender or the award thereof, setting aside of the tender should follow; *vide South African Post Office v De Lacy and Another*.³ A careful scrutiny of the voluminous documents that were placed before this court does not reveal any corrupt or dishonest conduct on the part of any of

² *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) at 246B-D(para [36]); *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources 9Pty) Ltd and Others* 2011 (4) SA 113 (CC) at para 84-85.

³ 2009 (5) SA 255 (SCA) at 260G-I para [14].

the role players *in casu*, which conduct could have justified a setting aside of the award.

[17] The project is geared, in my view, in accelerating the eradication of the legacy of apartheid manifesting itself in vast rural areas occupied by the majority of the populace, which is still without water infrastructure and sanitation. It is geared in eventually improving the quality of life of the wretched communities that do not enjoy a better quality of life as a result of the lack of access to the basic necessities of life,⁴ including water which is a constitutionally entrenched commodity.⁵ This as much was conceded by the applicant⁶. In my view, the premium of accelerating the attainment of the ethos encapsulated in the Preamble and the Bill of Rights is fundamental and we dare not delay these because of warring commercial interests, some of which do not necessarily advance Black Economic and Skills development, if not to perpetuate the inequality of pre-1994.

⁴ *Vide Mazibuko v City of Johannesburg* 2010 (4) SA 1 (SCA) at 4C et 20B

⁵ S27(1)(b) of The Constitution of the Republic of South Africa, Act 108 of 1996.

⁶ *Vide, inter alia*, paginated page 1673 para 87.1 of the replying affidavit.

[18] Setting aside would, in my view, delay this project and have catastrophic financial consequences to the first respondent in having to start the tender process *de novo*. The applicant has conceded that the project is far advanced.⁷ This as much can also be gleaned from the photographs attached to the supplementary affidavit of the respondent⁸. Huge amounts running into several hundred millions have already been expended, so far; *vide Millennium Waste Management (Pty) v Chairperson, Tender Board: Limpopo Province and Others v King Civil Engineering Contractors (Pty) Ltd and Another*.⁹ What further militates against setting aside is the potential escalated costs of completing the entire project, this as much was conceded by the applicant in its replying affidavit at paginated page 1698 Para 136. 1. This was recognised by Fabricius J in the urgent application brought by the applicant against the first respondent *in casu* (annexure CP2 P102 para 10). I am of the view that setting aside of this project would not be in the best interest of the public; *vide Millennium Waste Management (Pty) Ltd v Chairperson of the*

⁷ *Vide* paginated page 60 para 139 of the founding affidavit.

⁸ *Vide* paginated pages 1783-1804.

⁹ 2010 (4) SA 359 (SCA) at para 21.

Tender Board; Limpopo Province and Others; ¹⁰ *Minister of Environmental Affairs & Tourism v Phambili Fisheries*¹¹; *Allpay Consolidated Investment v CEO, SA Social Security*.¹²

[19] The applicant further contended that in the event this Court were to set aside the award of the tender to the second respondent, and the finding of Big Five as “standby” then the court should award the tender to the applicant. In my view, this submission cannot prevail for the reason that it is not the function of the Courts to grant orders which fall within the competency and expertise of a particular board, *in casu*, the first respondent; *vide Darson Construction (Pty) Ltd v City of Cape Town*,¹³ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others*.¹⁴

¹⁰ 2008 (2) SA 481 (SCA) at 490C-D. [also reported at [2008] 2 ALLSA 145 (SCA)—Ed].

¹¹ 2003 (6) SA 407 at 430[46]-[53]- H.

¹² 2013 (2) ALL SA 501 (SCA) at 506.

¹³ 2007 (4) SA 488 (CPD) at 503B-D.

¹⁴ 2004 (4) SA 490 (CC) at para 46-50.

[20] I am of the view that this application should fail only on the aforesaid basis, without the need to traverse the rest of the other points raised by the parties.

[21] Assuming that I am wrong in the above stated views and conclusion, which is not conceded, I am of the view that the application should still fail on the merits for a singular reason, namely failure to meet the skill's developmental threshold, as was required by the tender.

[22] In my view, through the process of tenders, it is also a means by the Government of ensuring that there is a genuine and meaningful skills transfer and development among the formerly disenfranchised and disadvantaged communities. I am of the view, that those who seek to procure financial benefits through the tender process, but found lacking in meeting the skills transfer and development requirements, the Courts should not readily come to their rescue, when their tenders are rejected for that reason, as *in casu*. The consideration of whether the skills

transfer and development requirement has been met is also a discretionary consideration in the hands of the administrative officer and cannot be interfered with on review.¹⁵ Where there is comparison, then the qualitative value aspect should take precedent.

- [23] The applicant's tender was found to be non-responsive in various respects¹⁶. Its proposed type of internship, to provide welders, plumber general construction and electricians; bursaries schemes for FET College and or Universities of Technology that offer Civil Engineering were found not to be mentorship driven. Indeed, the applicant's internship was not advancing their intended recipients to be registered as professionals. The applicant also did not indicate that it would remunerate these candidates. The applicant merely offered to provide practical training to students registered at FET College and or Universities of Technology that offer Civil Engineering as a subject. The applicant's tender in this regard was found by the first respondent not to be responsive. The applicant's tender was also found was also found to be non-

¹⁵ *Vide Hira and Another v Booysen and Another* 1992 (4) SA 69 (A) at 93-94 read with *SA Defence and AID Fund V Minister of Justice* 1967 (1) SA 31 (C) at 34-35.

¹⁶ Paginated page 1525—1526.

responsive for the reason that it allocated less percentages than the minimum percentages required in various aspects, inter alia, in respect of black women owned enterprise (BWOE); black women owned local enterprise (BWOLE).¹⁷

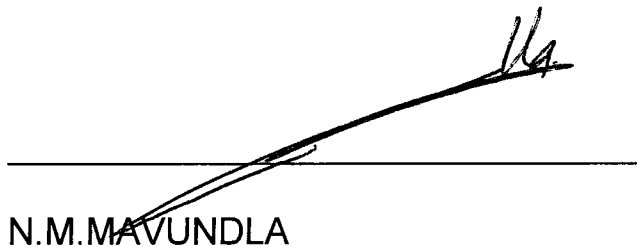
[24] On the other hand the second respondent and Group Five in respect of the skills development requirement did not pitch their bar low, but higher in that they indicated that they were to provide University Engineers graduates. It needs no stretch of imagination that engineer graduates compared to Techno- college students are qualitatively and preferentially better than the latter. In my view, the applicant's commitment to genuine skills transfer and development of the formerly disenfranchised communities oft referred to as formerly disadvantaged, falls short, to say the least. The decision of the first respondent that the applicant's tender was non-responsive as indicated herein above is a value judgment, which cannot be offset by this Court.¹⁸ I am therefore of

¹⁷ Paginated page1525.

¹⁸ Vide *Darson Construction (Pty) Ltd v City of Cape Town (supra)*.

the view that the applicant's tender was correctly found to be non-responsive and it had, only on this ground to fail. Consequently, in my view, the application for review, must for the above reasons fail.

[25] In the result the application is dismissed with costs including the costs of two counsels.



N.M. MAVUNDLA

Date of Hearing : 25-28 / 02 / 2013

Date of Judgment : 19 / 07 / 2013

APPLICANTS' ATTORNEYS: DU TOIT MCDONALD INC

APPLICANTS' ADVOCATE : MR. P. DANIELS SC, with

APPLICANTS' ADVOCATE : ADV T. PRINSLOO (Ms.)

1ST RESPONDENT'S ATT : RUDOLPH, BERNSTEIN &
ASSASSOCIATES

1ST RESPONDENT'S ADV : MR. RAFIK BHANA SC, with

ADV. I. GOODMAN (Ms)