

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Application No.: 2059/2013

In the application between:-

<u>MVD XARIEP-MOL PROCON JOINT VENTURE</u>	1 st Applicant
<u>MVD XARIEP CONSULTING ENGINEERS CC</u>	2 nd Applicant
<u>MOL PRO CONSULTING (PTY) LTD</u>	3 rd Applicant

and

<u>DIHLABENG LOCAL MUNICIPALITY</u>	1 st Respondent
<u>DIKGATO CONSULTING ENGINEERS</u>	2 nd Respondent
<u>MUNICIPAL MANAGER: DIHLABENG LOCAL MUNICIPALITY</u>	3 rd Respondent
<u>MASHININI ENTERPRISE</u>	4 th Respondent
<u>MAPITSI CIVIL WORKS</u>	5 th Respondent

<u>HEARD ON</u>	13 JUNE 2013
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<u>JUDGMENT BY:</u>	ZIETSMAN, AJ
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<u>DELIVERED ON:</u>	20 JUNE 2013
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- [1] This is an urgent application by the applicants for interim relief and therefore an interim interdict pending a review of a decision by the first, alternatively the third respondents, appointing the second, fourth and fifth respondents to

continue with the project called “Construction of sewer reticulation in Fateng Tse Ntsho”.

- [2] Although the application was initially brought on an urgent basis on 28 May 2013 and enrolled for hearing on 31 May 2013, the respondents filed a notice of opposition, and on 31 May 2013 the parties agreed that the application be postponed until 13 June 2013, opposing and replying affidavits to be filed, as well as heads of argument, in order that the application can be argued on 13 June 2013.
- [3] In this application the applicants aver that they have been contracted during or about 2007/2008 by the first respondent on a contract called “Construction of sewer plant and reticulation: Paul Roux”, and that after various business plans for the aforementioned sewerage works, as well as working drawings were drawn by the applicants, and even after an amount of more than R1 million have been paid in the interim to the applicants, the projects were put on hold due to lack of bulk water. A bulk water supply line had to be established from Bethlehem to Paul Roux, which had to be completed by the first respondent, before the project in which the applicants are involved, could resume. During or about December 2012, the applicants became aware that the aforementioned bulk water supply line was near completion, and therefore enquired from the first respondent regarding the resumption of the project by the applicants. Although the first respondent acknowledged receipt of the letter of the

applicants dated 4 December 2012, the applicants received no further response thereto.

- [4] On or about 23 April 2013, the applicants became aware of the fact that other contractors are busy with construction works on the project to which the applicants were the appointed contractors, and raised their concerns with the first respondent by way of an urgent letter dated 23 April 2013. In the last-mentioned letter dated 23 April 2013, the applicants' attorneys stated the following:

- "4. This project was thus approved by for MIG-funding, but due to the shortage of adequate bulk water to complete the project, the project was shelved until such time that the provision of adequate bulk water in the Paul Roux area could be established.
5. During December 2012 our client addressed a letter to yourselves enquiring about the continuance of this project and when the bulk water supply line from Bethlehem to Paul Roux is completed.
6. Our client has not received any response to this letter, but has learned last week that your municipality appointed another consulting engineer that is currently working on this very same project that our client was appointed on.
7. Our client furthermore noticed on 22 April 2013 that the contractor is busy with preparation work to start with certain sewer installations in this regard, which project should have been administered by our client, since our client was appointed on this project as the consulting engineers.
8. It is our view that your actions of appointing of another group of consultants to attend to this project is contrary to

the appointment that our client holds and that our client is suffering damages each day that this project is continuing without our clients.”

- [5] Thereafter the present application was held in abeyance until 28 May 2013, after the first respondent indicated that a meeting of a petitions committee, which obviously would have investigated the averments by the applicants, was to be held, which meeting eventually was postponed until 16 May 2013.
- [6] On 17 May 2013, the deponent on behalf of the applicants, Mr Steyn, came across an advertisement in the press wherein the first respondent calls for tenders, *inter alia*, for the construction of the waste water treatment works in Paul Roux. Thereafter, and up until the date that the application was lodged, no response had been received from the first respondent in this regard, nor has any decision been taken by the first respondent as to the applicants' grievances.
- [7] In the opposing affidavit, the third respondent, who also acts on behalf of the first respondent, denies that any agreement exists between the applicants and the first respondent. The third respondent furthermore avers that after a diligent search, no documentation could be found with the first respondent indicating that an agreement came into existence between the applicants and the first respondent or that any tender process had been followed in the appointment of the applicants on the project as averred. The third respondent

also avers that since 29 May 2008, and in terms of the Local Government Municipal Finance Management Act, 36 of 2003, a municipal supply chain management policy was in place with the first respondent which policy is also attached to the opposing papers. The third respondent furthermore indicated that even before the adoption of the policy by the council of the first respondent, the procurement of goods and services by municipalities was governed by regulations issued in terms of the Act and promulgated on 13 May 2005 (the Act, with reference to the Local Government Municipal Finance Management Act 56 of 2003). During argument it was conceded by Mr Heymans, on behalf of the applicants, that a supply chain management policy was in place even before 2008.

- [8] The third respondent also avers that the applicants have furnished the scantiest of information regarding the contracts on which they rely on. He furthermore avers that no service delivery agreement is relied upon, no agreement whatsoever is attached to the founding papers, there are no averments as to when the agreements commenced, when the works had to be completed, if penalties were applicable and how payment had to be made.
- [9] Although the third respondent also indicated that if a proper procurement process was followed by the applicants, and that they were appointed as such in terms of such proper procurement process, the applicants are invited to provide

proof of that fact. The applicants did not answer to such an invitation in reply.

- [10] In reply, Mr Steyn on behalf of the applicant, amongst others, indicated that the applicants' appointment emanated from paragraph 289 of the supply chain management policy which, amongst others, and what is relevant in this matter, determines as follows:

“DEVIATION FROM THE PROCUREMENT PROCESSES

General

289 The municipal manager may dispense with the official procurement processes established by this policy, and procure any required goods or services through any convenient process, which may include direct negotiation, but only in respect of:

289.1 any contract relating to an emergency (as described in clauses 291 and 292 below) where it would not be in the interest of the municipality to invite bids...”

- [11] The applicants therefore aver in replication that they were appointed by the first respondent in such an emergency situation described in paragraph 289 read with paragraphs 291 and 292 of the aforesaid policy.

- [12] The requisites for the right to claim an interim interdict, which is trite law, are:

(a) *A prima facie* right;

- (b) A well-grounded apprehension of irreparable harm if the interim relief is not granted and ultimate relief is eventually granted;
- (c) That the balance of convenience favours the granting of an interim interdict; and
- (d) That the applicant has no other satisfactory remedy.

See Harms: **Civil Procedure in the Superior Court**, p A-40; **Setlogelo v Setlogelo** 1914 AD 221 at 227.

- [13] With reference to the *prima facie* right, Harms, *supra*, describes the requisite as follows:

“The degree of proof required has been formulated as follows:
The right can be *prima facie* established even if it is open to some doubt. A mere acceptance of the applicant’s allegations is insufficient but the weighing up of the probabilities of conflicting versions is not required. The proper approach is to consider the facts as set out by the applicant together with any facts set out by the respondent which the applicant cannot dispute, and to decide whether, with regard to the inherent probabilities and the ultimate onus, the applicant should on those facts obtain final relief at the trial. The facts set up in contradiction by the respondent should then be considered, and if they throw serious doubt on the applicant’s case he cannot succeed.”

See Harms: *supra*, p A-41.

- [14] It is also trite law that a court has a discretion in this regard to allow or refuse an interim interdict, even if the required

requisites have been established. In this regard Harms states as follows:

“A court always has a wide discretion to refuse an interim interdict even if the prerequisites had been established. This means that the court is entitled to have regard to a number of disparate and incommensurable features in coming to a decision, and not that the court has a free and unfettered discretion. The discretion is a judicial one, which must be exercised according to law and upon facts. On the other hand, a court has no discretion to grant an interim interdict if the requirements have not been established.”

See Harms: *supra*, p A-43.

- [15] In this regard it must first be established whether the applicant or applicants have made out a clear right, or at least a *prima facie* right although open to some doubt. Such a *prima facie* right entails that the applicants must prove that, on the facts, they have established the existence of a right in terms of substantive law.

See **Edrei Investments 9 Ltd (In Liquidation) v Dis-Chem Pharmacies (Pty) Ltd** 2012 (2) SA 553 (ECP).

- [16] On the facts of this matter it is clear that if the applicants have established an existing contract with the first respondent, it might very well be that at least a *prima facie* right in substantive law has been made out, although open to some doubt. The question that begs to be answered in this

matter, is whether the applicants have produced evidence as to the existence of a binding contract, validly concluded with the first respondent. According to the Appellate Division, it is established law that in motion proceedings the affidavits constitute not only the evidence, but also the pleadings. In other words, the affidavits need to be evaluated on the basis of the question whether a contract, validly entered into, existed between the applicants and the first respondent at any stage before the application was lodged.

See **Transnet Ltd v Rubenstein** 2006 (1) SA 591 (SCA) on 600 par [28]. See also **Absa Bank Ltd v Kernsig 17 (Pty) Ltd** 2011 (4) SA 492 (SCA) on 499A – D.

[17] If the founding affidavit is evaluated, it is clear that although the applicants performed certain work on the Paul Roux project, no formal oral and/or written agreement between the applicants and the first respondent has been proved.

17.1 There are not even averments as to what the terms were of an oral agreement (if such an oral agreement was concluded).

17.2 There are appointment letters from project managers called SVP Quantity Surveyors dated 18 January 2007 on the aforesaid project, whereby MVD Xariep was appointed to the project for engineering services (which included application for funds at MIG).

17.3 There is furthermore a confirmation of the appointment by the first respondent that at 18 August 2008

(annexure “E” to the founding papers) which states that the applicants’ appointment has reference, and which instructed the applicants to commence with the implementation of the project as soon as possible. No further documentation exist as between the applicants and the first respondent.

17.4 Although it furthermore seems that it is common cause that the applicants have been paid until a certain stage for work done, it is not common cause by whom payment was effected. The applicants aver payment by the first respondent, however no details are provided in confirmation of such payment and/or payments.

17.5 The third respondent also deny that the first respondent ever had an agreement with the aforesaid SVP Quantity Surveyors, who appointed the applicants.

17.6 It is also common cause that no tender process had been followed when the applicants have been appointed, nor is there any evidence of whatsoever nature how the appointment came about, who were consulted before the appointment was made, whether the appointment was made fairly, openly and/or equitable, competitive or cost-effective.

[18] In this instance it is necessary to refer to the Supreme Court of Appeal’s decision in **Municipal Manager: Qaukeni Local Municipality and Another v FV General Trading CC** 2010 (1) SA 356 (SCA) par [11], which reads as follows:

“In considering the validity or otherwise of the written contract ZEV 2, it is necessary to recall that s 217(1) of the Constitution, couched in peremptory terms, provides inter alia that an organ of State in the local sphere (such as a municipality) which contracts for goods and services 'must do so in accordance with a system which is fair, equitable, competitive and cost-effective' (my emphasis). This constitutional imperative is echoed in both the Local Government: Municipal Systems Act 32 of 2000 and the Local Government: Municipal Finance Management Act 56 of 2003 (the Financial Management Act), as will become apparent from what is set out below.”

- [19] Again with reference to the aforementioned Supreme Court of Appeal matter, and even if a supply chain management policy is not in place, it is still required in terms of the Constitution read with the Local Government: Municipal Systems Act 32 of 2000 and the Local Government: Municipal Finance Management Act 56 of 2003, that when a municipality (in this instance the first respondent) contracts for goods and services it must do so in accordance with a system which is fair, equitable, competitive and cost-effective. The failure to implement a supply chain management policy does not mean that a municipality contracting with an external supplier is therefore relieved of the obligation to act transparently and to follow the aforesaid requisites, namely to be fair, competitive and cost-effective through a bidding process.
- [20] With reference to the aforesaid, no factual averments by the applicants are made that the agreement they concluded with

the first respondent during or about 2007 was transparent, fair, competitive, cost-effective or of an urgent nature.

- [21] The aforesaid Supreme Court of Appeal matter found the contract between the parties to be unlawful if the agreement did not comply with the aforesaid prerequisites.
- [22] If there are no factual averments as to the fact or facts that the aforementioned prerequisites were complied with, even if there was an agreement concluded between the applicants and the first respondent during or about 2007 and/or 2008 (which is in itself not clear) such an agreement would have been invalid in the circumstances. If the applicants have not established a validly concluded agreement between themselves and the first respondent, no clear right or even *prima facie* right can exist.
- [23] This is also a case in which the applicants clearly have an alternative remedy if they can prove a valid concluded agreement. The applicants will always have the right to claim damages, which in my view will not be impossible to prove, if they have established that a validly binding contract came into existence between the first respondent and the applicants.
- [24] I am thus of the view that the requirements for an interim interdict have not been established and that in that instance I have no discretion to grant the interim relief sought. Even if all requisites have been established, I am not prepared to exercise my discretion in granting the interim interdict in this

instance as prayed for. The fact that I am not satisfied to grant interim relief, does not mean that the applicants cannot still establish a validly concluded agreement when they approach this Court for a review of the decisions of the first, alternatively the third respondents, in appointing the second, fourth and fifth respondents to proceed with or to fulfil the contractual obligations that they have been appointed for in the circumstances.

[25] For the reasons of my finding in this regard, it is in my view not necessary to deal with the arguments relating to the urgency of the application in the circumstances. I therefore do not make any finding as to urgency.

[26] In the aforesaid circumstances I am not satisfied that a case had been made out by the applicants for the relief claimed regarding an interim interdict, and I therefore make the following order:

The application with reference to part A referred to in the Notice of Motion, is dismissed with costs.

P. ZIETSMAN, AJ

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On behalf of first and third
respondents:

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