IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

CASE NUMBER: 26396/05

31/10/2012

DELETE WHICHEVER 'S NOT APPLICABLE

1.REPORTABLE ~~YES~~/NO

2.OF INTEREST TO OTHER JUDGES/~~YES~~/NO

3.REVISED

2012-10-31 .....

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	FIRST RESPONDENT
BASIL READ (PTY) LIMITED	SECOND RESPONDENT

MAVUNDLA, J.

[1] This is an application for the review and setting aside of the first respondent's decision to award a tender under Contract Number TCTA –05 –002 hereinafter referred to as "the tender", for the construction of a wielded steel bulk water pipeline of approximately 65 kilometers between the Olifants River, Steelpoort River and Sand River Catchment areas in Limpopo Province, to the second respondent.

[2] It is common cause that the third applicant is the joint venture between the first applicant and second applicant. Over and above the order mentioned herein above, the applicants also seek the setting aside of the contract between the first respondent and the second respondent, pursuant to the award of the tender to the second respondent, and the order awarding the tender to the third applicant, alternatively directing the first respondent to commence the tender process *de novo*.

[3] The third applicant, second respondent, Group Five, WCE Joint Venture and Rumdel Joint Venture entities pre-qualified for the

tender. The second respondent and third respondent were the only entities found to have submitted responsive tenders. The third applicant together with the other two tenderers was unsuccessful in their tender bids. On the 16 February 2012 the first respondent awarded the tender to the second respondent and found Group Five to be the reserve bidder.

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

4.1 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;

4.2 the applicant ought not to have been disqualified from the tender process on the basis of materially qualifying its tender;

4.3 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.

4.4 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.

4.5 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;

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

5. 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:

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

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

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

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

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

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

[6] The application is being opposed by the first respondent. The second respondent has indicated that it would abide by the Court's decision. However, the first respondent has also taken a point *in limine* of non-joinder. It is therefore necessary to first dispose of this point *in limine* before dealing with the merits.

[7] The first respondent in its replying affidavit, taking the point *in limine* stated *inter alia* that Group Five has a direct and material interest in this matter because were the award to the second respondent to be set aside:

7.1 Group Five as a reserved bidder could become a preferred bidder, were the second respondent, for whatever reason, to fall away from the tender process.

7.2 Group Five would have a legitimate expectation that the tender would be awarded to it;

7.3 The applicants seek a relief that would bypass Group Five and the latter would be prejudiced by the relief sought;

7.4 Group Five remains and continues to be a preferred bidder and contender.

[8] Group Five was not a party to the urgent application which sought to interdict the implementation of the contract concluded between the first respondent and second respondent.

[9] It is contended on behalf of the applicants that Group Five's right of expectation to be awarded any contract in this matter lapsed on 3 March 2012. At that point in time it could not have expected that the tender would be award to it. Group Five did not lodge any action challenging the decision of the first applicant to award the tender to the second respondent and therefore it no longer has any right whatsoever in the matter or any legitimate expectation. Group Five has no direct and material interest in these proceedings and remain an unsuccessful tenderer and could not entertain any notion that the tender would be awarded to it. Besides, there is no shred of evidence to show that the award could have been awarded to it, so it is contended.

[10] It was further submitted on behalf of the applicants that Group Five was aware of the urgent application and also the present application and chose not to oppose both applications. It is further submitted on behalf of the applicants that the point *in limine* should therefore be dismissed.

[10] The first question to be answered is whether Group Five has a direct and material interest in the outcome of these proceedings and whether it is necessary for it to be joined in these proceedings. In the matter of *Burger v Rand Water Board and Another* 2007 (1) SA 30 (SCA) at 33B the Supreme Court of Appeal said:

> "[7] The right to demand joinder is limited to special categories of parties such as joint owners, joint contractors and partners, and where the other party(ies) has(have) a direct and substantial interest in the issues involved and the order the court might make."

[11] Where a party has a direct and substantial interest in the results or the order which might be given in the proceeding, the matter cannot be proceeded with without such party having been joined as a party; *vide Standard Bank v Swartland Municipality*[1]; *Tau v Agricultural Minister of Agriculture & Land Affairs*[2].In the matter of *Ex Parte Body Corporate of Caroline* Court 2001 (4) SA 1230 (SCA) at 1234 D the Supreme Court of Appeal stated that: "The basic principle of our law that interested parties who may be prejudiced by an order issued by a Court should be joined in the suit, as set out in

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[1] 2011(5) SA 257 (SCA) at 259G and the authorities therein cited.
[2] 2005 (4) SA 212 at 226D.

Amalgated Engeenering[3] and *Pretorious*[4] cases *supra*, and expressed in Rule 6(2) of the Uniform Rules of Court should have been applied..."

[12] The question whether Group Five has a direct and substantial interest must be decided on the basis whether the judgment the Court might issue might prejudicially affect its interest; *vide Amalgamated Engeenering (supra), P E Bosman Transport Wks Com v Piet Bosman Transport*[5]. The applicants contended in their papers that Group Five ought to have been disqualified in the adjudication of the tender process. The implication of this order sought against Group Five is that the Court should find that the first respondent, in finding Group Five to be reserved bidder, misdirected itself in that regard. If I find in favour of the applicants I must set aside the decision made that Group Five is a reserved bidder. Such a decision, would undoubtedly negatively affect the already positive finding made by the first respondent in favour of Group Five, without the Court having heard the latter. Such an approach would be against the spirit and tenor of not only Rule 6(2) of the Uniform Rules of High Court but also s34 of the Constitution which guarantees fairness to a person to be heard in

[3] *Almagated Engeenering Union v Minister of Labour 1949 (3) SA 637 (A) at 651.*
[4] Pretorious v Slabbert 2000 (4) SA 935 (SCA) at 939C-F.
[5] 1980 (4) SA 801 (TPD) at 804D-E.

[13] Rule 6(2) provide that:

"When relief is claimed against any person, or where it is necessary or proper to give such a person notice of the application, the notice of motion shall be addressed to both the registrar and such person; otherwise it shall be addressed to the registrar only."

[14] Where an Act or Rules of Court decree personal service of a document, then such service must be directly served upon such person unless the person consent to service otherwise; *vide Odendaalsrus Municipal v Odendaalsrus Extension* 1959 (1) SA 375 (AD) at 38. I have not been persuaded that Group Five consented to accept service of the pleadings upon his attorneys. Neither have I been persuaded that a complete set of papers were served on the alleged attorneys of Group Five.

[15] It is however, important to look at Rule 4(aA) of the Uniform Court Rules, which provides as follows:

"Where the person to be served with a document initiating application proceedings is already represented by an attorney of record, such document may be served upon such attorney by the party initiating such proceedings." In the matter of *BHP Billiton Energy Coal South Africa Ltd v Minister of Mineral Resources*[6], it was held that this rule applies to proceedings already initiated, in effect to ancillary and interlocutory proceedings.

[16] I therefore conclude that Group Five has a direct and material interest in the outcome of these proceedings and the order which might be granted by this Court. I further conclude that it is necessary that Group Five should have been served with the papers relating to this application, in accordance with the Uniform Court Rules of the High Court.

[17] I am of the view that the application should be postponed *sine die* to allow service of the papers on Group Five. The applicants in my view should have known better and served papers on Group Five. They should be mulcted with the costs occasioned by this

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[6] 2011 (2) SA 536 (GNP) at 542E-H, confirmed on appeal sub nom *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd*, unreported case no 363/2011 dated 30 March 2012.

postponement. It stands to reason that the first respondent was successful in its point *in limine* and therefore entitled to its costs including costs of two counsel.

[18] In the result I make the following order:

1. That the point *in limine* of non-joinder of Group five is upheld;

2. That the applicants are directed to cause to be served in accordance with Rule 6(2) of the Uniform Court Rules all necessary and relevant papers of this application, including this Order, upon Group Five within two weeks of the grant of this Order;

3. That Group Five to file its notice of intention to oppose this matter within 5 days of service of papers in accordance with order 2 herein above, where after to file its answering affidavit within 3(three) weeks of filing of its notice of intention to oppose.

4. That the applicants, jointly and serverally, the one paying the other to be absolved, to pay the costs attended to the

4. That the applicants, jointly and serverally, the one paying the other to be absolved, to pay the costs attended to the point *in limine*, which costs to include the costs of two counsel.

N.M.MAVUNDLA

Date of Hearing : 29 / 10 / 2012

Date of Judgment : 31 /10/ 2012

APPLICANTS' ATTORNEYS: DU TOIT MCDONALD INC

APPLICANTS' ADVOCATE: MR. P. DANIELS SC

With: ADV T. PRINSLOO (Ms.)

1ST RESPONDENT'S ATTORNEYS: RUDOLPH, BERNSTEIN & ASSOCIATES

2ND RESPONDENT'S ADVOCATE :MR. RAFIK BHANA SC.
WITH : ADV. I. GOODMAN (Ms)