/SG

IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

DATE: 28/11/2012

CASE NO: 63108/2012

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

29·11·2012

DATE SIGNATURE

In the matter between:

THE GOODHOPE TEXTILE CORPORATION (PTY) LTD TRADING AS DA GAMA TEXTILES	APPLICANT
And	
THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	1ST RESPONDENT
SEARDEL INVESTMENT CORPORATION (PTY) LTD	2ND RESPONDENT
SEARDEL GROUP TRADING (PTY) LTD	3RD RESPONDENT
EYE WAY TRADING (PTY) LTD	4TH RESPONDENT

JUDGMENT

MAKGOBA, J

[1] The applicant approached this court on urgent basis to interdict the first and fourth respondents from giving effect to the further implementation of a tender contract awarded to the fourth respondent in respect of

tender contract RT60/2012T, pending the finalisation of the review application brought by it in case number 48769/2012 wherein an order is sought to review and set aside the award of the tender to the fourth respondent.

The tender concerns the supply of textile products involving the use of poly-cotton yarn in the weaving of material known as greige.

[2] The application is opposed by all the four respondents.

Factual Background

[3] On or about 19 March 2012 the National Treasury (which is the Government department that was tasked with the implementation of the tender process in question) notified the fourth respondent that it (the fourth respondent) had been successful in its bid in respect of eight of the sixteen tender contract items contained in tender contract RT60-2012T .

[4] The tender contract is for the supply and delivery of fabric to various state departments for the period 1 April 2012 to 31 March 2013. Each

contract is for a specific quantity of fabric finished in accordance with the governments' detailed specifications.

The remaining eight contract items were awarded to entities that are not parties to these proceedings or the review proceedings.

[5] The implementation of the tender contract is in process and continuing. Almost nine months of the twelve months contract period have now passed and the fourth respondent is supplying the product in terms of the tender contract.

[6] The applicant was not successful in respect of any of the contract items for which it tendered. It now seeks to stop the further implementation of the eight tender contract items awarded to the fourth respondent.

[7] Clause 20.1 of the Special Conditions of Contract provides:

> *"Only locally manufactured products from local raw materials or input will be considered. If the raw material or input to be used is not available locally, contractors should obtain written*

confirmation from the Department of Trade and Industry ('the DTI')."

[8] Approximately five months after the award of the tender to the fourth respondent, the applicant brought a review application before this court on 24 August 2012 to review and set aside the decision of the National Treasury to award the tender to the fourth respondent.

As a ground for the review application the applicant avers that the winning bidder, being the fourth respondent, was not compliant with the tender specifications in that the fabric supplied by the fourth respondent is not locally produced in South Africa. The applicant asserts that the supply of the fabric by the fourth respondent was contrary to the requirements for local content contemplated in the conditions of the tender.

[9] The current urgent application is based on the same complaints as those raised in the review proceedings.

Issues

[10] There are two main issues for determination in this matter, namely:

10.1 Whether the matter is urgent; and

10.2 Whether the applicant has made out a case for the relief it now seeks.

Urgency

[11] It is common cause that the tender *in casu* was awarded to the fourth respondent on 19 March 2012 in respect of the eight items published under tender contract RT60-2012T.

The applicant raised its concerns with regard to the tender process and the allocation of the tender to the fourth respondent for the first time on 16 April 2012.

[12] Various communications and correspondence were exchanged between the applicant and the first respondent and the applicant's attorneys of

record were eventually notified on 31 July 2012 that National Treasury is:

> *"... satisfied that the successful bidder had complied with the bid specification and therefore there would not be any reasonable grounds for the termination of the contract."*

[13] As a result of the above, the applicant served a review application in the ordinary course under case number 48769/12 on 24 August 2012.

The present urgent application was only served on 2 November 2012 – more than three months after the National Treasury's letter dated 31 July 2012.

[14] One of the material requirements prescribed in rule 6(12)(b) of the Uniform Rules of Court is that the applicant must, in the founding papers –

> *"Set forth explicitly ... the reasons why he claims that he could not be afforded substantial redress at a hearing in due course."*

In papers before me, the applicant failed to set out explicitly the circumstances rendering this matter urgent and also the reasons why it will not be afforded substantial redress at a hearing in the ordinary course as required by rule 6(12)(b) of the Uniform Rules.

There is no explanation for the applicant's failure to bring this application immediately after receipt of the National Treasury's letter dated 31 July 2012 nor did the applicant explain why it did not combine the review and urgent application in its application served on 24 August 2012.

[15] In ***Commissioner for SARS v Hawker Air Services (Pty) Ltd; In Re Commissioner for SARS v Hawker Aviation Services Partnership and Others*** [2006] 2 All SA 565 (SCA) 569; 2006 4 SA 292 (SCA) 299H-300A CAMERON JA held as follows:

> *"Urgency is a reason that may justify deviation from the times and forms the rules prescribe ... Where the application lacks the requisite element or degree of urgency, the court can for that reason decline to exercise its powers under Rule 6(12)(a). The*

matter is then not properly on the court's roll, and it declines to hear it. The appropriate order is generally to strike the application from the roll."

[16] *In casu* three months before deposing to the founding affidavit on 26 October 2012 the applicant was in possession of all the facts on which it now relies for its urgency (this is three full months before it lodged this urgent application) and indeed more than three weeks before it launched its review application on 24 August 2012.

Given the applicant's delay in launching this application, any purported urgency relied upon is entirely self-created. In the circumstances the application should either be struck from the roll or be dismissed.

[17] I have, irrespective of my finding that the matter is not urgent, found it appropriate to go into the merits of the case.

Prima Facie Right

[18] The applicant seeks to rely on its alleged right to have the tender contract set aside. In this regard, it contends that the material supplied

by the fourth respondent does not accord with the tender conditions relating to the use of local inputs.

[19] Condition 20.1 of the Special Conditions of Contract RT60-2012T provides as follows:

> *"Only locally manufactured products with local raw material or inputs will be considered. If the raw material or input to be used is not available locally, contractors should obtain written confirmation from the Department of Trade and Industry (the DTI)."*

[20] The facts of this case show that the fourth respondent procures the fabric it supplies to the State from Berg River Textiles. Berg River Textiles is based in Paarl in the Western Cape and it converts greige fabric supplied to it by Hextex into the final product in dyed and printed form. Hextex is based in Worcester in the Western Cape where it weaves the greige fabric. In other words, Berg River Textiles which is a local manufacturer sources it primary input, the greige fabric from Hextex which is also a local manufacturer. For this reason the final

product of Berg River Textiles is locally manufactured in compliance with condition 20.1.

[21] The Record of Decision reveals that had the contract items not been awarded to the fourth respondent the applicant would still not have received any of the contract items. There were five bidders who participated in the bid. The applicant scored the lowest in the evaluation of the tender. Bearing in mind how poorly the applicant fared in the tender evaluation there is no realistic prospect of it being successful in being awarded the tender should the assailed tender award be set aside.

[22] On the facts set out above the applicant failed to show that it has a *prima facie* right that needs to be protected. In ***Webster v Mitchell*** **1948 1 SA 1186 (W)**, CLAYDEN J held as follows:

> *"In an application for a temporary interdict, the applicant's right need not be shown by a balance of probabilities; it is sufficient if such right is prima facie established, though open to some doubt. The proper manner of approach is to take the facts set out by the*

applicant together with the facts set out by the respondent which applicant cannot dispute and to consider whether, having regard to the inherent probabilities, the applicant could on those facts obtain final relief at a trial. The facts set up in contradiction by respondent should then be considered, and if serious doubt is thrown upon the case of applicant he could not succeed."

[23] The fact that there is no realistic prospect of the applicant being successful in being awarded the tender is a sound reason for me to exercise my discretion against granting the relief sought.

Irreparable Harm

[24] The applicant does not specifically show that it will suffer irreparable harm if the interdict is not granted. Instead it contends that "irreparable harm will be occasioned to the public purse and the end user of the product".

In my view, given the applicant's poor performance in the tender evaluation (it came last amongst five bidders) even if the interdict were to be granted, it is highly unlikely that it would be awarded the contract.

In the circumstances the applicant has not even established a basis on which it may suffer prejudice let alone irreparable harm.

Balance of Convenience

[25] The applicant contends that the balance of convenience favours the grant of the relief because it stands ready to supply the balance of the tender contract.

This contention does not hold water. It is a fact that amongst all the five bidders the applicant performed the worst in the evaluation of the tender.

[26] The balance of convenience must be assessed taking into account also the respective position of all the parties that are affected as well as the delays on the part of the applicant in launching this application.

[27] In ***Chairperson, Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others*** **2008 (2) SA 638 (SCA)** the applicant, having established the invalidity of the tenders in question was

effluxion of time and the work that had already been performed under the tenders.

[28] *In casu* a substantial number of contract items awarded have already been completed and the remaining portion of the uncompleted contract items will be completed by March 2013, a period of hardly four months from now. In my view the late changes at this stage will disrupt the supply of fabric to the State.

Furthermore, the prejudice to the first respondent and the fourth respondent if the interdict is granted will far outweigh the prejudice to the applicant if the interdict is refused.

See ***Erickson Motors (Welkom) Ltd v Protea Motors, Warrenton and Another*** **1973 3 SA 685 (AD) 691D-F**.

Alternative Remedy

[29] In paragraph 18.4 of its founding affidavit applicant merely alleges that it has no other satisfactory remedy without stating explicitly the basis thereof.

There is no suggestion that any of the respondents would be unable to meet a claim for damages. The applicant has an alternative remedy by instituting a claim for damages. This of course will depend on its success in the pending review proceedings.

Application to strike out by fourth respondent

[30] At the hearing of this matter the fourth respondent brought an application to strike out the contents of paragraphs 44, 45, 46, 47, 56, 64.10 and 65 of the applicant's initial replying affidavit and paragraphs 30, 31, 32, 40, 45, 46, 47, 48 and 49 of the applicant's supplementary replying affidavit in so far as it relates to the issue of "fronting".

The essence of the allegations is that the fourth respondent is doing business as a front for Berg River Textiles and/or the third respondent.

[31] In its founding affidavit in this urgent application the applicant made absolutely no mention of the issue of alleged "fronting". Instead, in the founding affidavit in the urgent application the applicant limited itself entirely to the issue raised in the founding affidavit of the review

application, namely the matter of local content which is dealt with above in this judgment.

The applicant for the first time introduced the issue of alleged "fronting" as a relevant consideration in the urgent application through its replying affidavit and supplementary replying affidavit.

[32] I agree with the submission by counsel for the fourth respondent that the fourth respondent is prejudiced by the attempt of the applicant to introduce the issue of "fronting" in the replying affidavit since the fourth respondent would not have the opportunity to file any further affidavit to refute the new allegations. It is trite law that an applicant must raise the issues upon which it would seek to rely in the founding affidavit. The parties must know the case that must be met and in respect of which they must adduce evidence in the affidavits.

See: ***Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others*** **1999 (2) SA 279 (T)**;

MEC for Health, Gauteng v 3p Consulting (Pty) Ltd **2012 (2) SA 542 (SCA)**.

[33] The contents of the abovementioned paragraphs of the applicant's replying affidavits are accordingly struck out as irrelevant to the present proceedings and that it constitutes an irregular attempt to introduce new matter to this urgent application.

[34] On the evidence before me there is absolutely nothing untoward in the business model of the fourth respondent and the manner in which it conducts its business is expressly provided for in the tender process of the State.

There is nothing irregular or improper in the fourth respondent's business relationship with various manufacturers and wholesale suppliers including Berg River Textiles and/or the third respondent. I am satisfied that the fourth respondent conducts its business at arms length.

Conclusion

[35] The application lacks urgency. Furthermore the application should be dismissed on the grounds that the applicant failed to establish a *prima facie* right, a well-grounded apprehension of irreparable harm, that the

balance of convenience favours the granting of an interim interdict and that it does not have an alternative remedy.

[36] The application is accordingly dismissed with costs of two counsel for the first, third and fourth respondents, such costs to include the costs occasioned by the postponement of this matter on 20 November 2012.

E M MAKGOBA

JUDGE OF THE NORTH GAUTENG HIGH COURT

63108/2012/sg

Heard on:	27 November 2012
For the Applicant:	Adv IJ Smuts SC and HP Joubert
Instructed by:	Bate Chub and Dickson Inc c/o Julian Knights and Associates, Pretoria
For the 1st Respondent:	Adv TV Norman SC and BM Lecoge
Instructed by:	The State Attorney
For the 2nd and 3rd Respondents:	PB Hodes SC and MR Townsend
Instructed by:	Edward Nathan Sonnenbergs c/o Friedland Hart Solomon and Nicolson
For the 4th Respondent:	Adv SD Wagener SC and J Barnardt
Instructed by:	Jacques Roets Inc.
Date of Judgment:	