IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case Number: 36110/2016

6/6/2016

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.

(3) REVISED. ✓

6/6/16
DATE

SIGNATURE

In the matter between:

ESOR CONSTRUCTION (PTY) LTD	APPLICANT
And	
LEPELLE NORTHERN WATER	1ST RESPONDENT
DEPARTMENT OF WATER AND SANITATION	2ND RESPONDENT
VHARANANI PROPERTIES (PTY) LTD	3RD RESPONDENT

JUDGMENT

Fabricius J,

1.

Applicant seeks an order, pending the final adjudication of a review application to be launched within 20 days, interdicting the Respondents from implementing a tender relating to the supply of water from one day to another in the Mopani District.

2.

Applicant also seeks copies of various documents mainly relating to the tender of Third Respondent, which was the successful tenderer.

3.

The application, heard in the urgent Court on 1 June 2016, was opposed on a

number of grounds, and very helpful Heads of Argument were presented to me for which I thank Counsel.

4.

The question of urgency loomed large and it was also contended that the requirements for an interim interdict were not present.

In this context I must refer to my judgment in ***Afrisake and Others vs City of Tshwane and Others,*** delivered on 14 March 2014, under case number 74192/13.

This judgment was followed with approval by my brother Tuchten J, in ***KGP Media Investments (Pty) Ltd vs Passenger Rail Agency of South Africa*** under case number 23826/16, dated 18 April 2016, and in ***Helen Suzman Foundation vs Minister of Police*** under case number 23199/15, dated 18 April 2016.

5.

It is clear that Applicant must at the very least establish a right to which, if not protected by an interdict, irreparable harm would ensue. I must add, that Applicant

must show that such right needs to be protected urgently, if an application is brought in the urgent Court. The third requisite, namely the balance of convenience is closely related to the question of irreparable harm and is often decisive. Even when all the requirements for an interim interdict are present, a Court retains a discretion whether or not to grant an order which must be exercised judicially having regard to all the facts of the matter considered holistically.

6.

Applicant argued that the prima facie right relied upon was that First Respondent was obliged to seek clarification relating to any ambiguities or uncertainties pertaining to Applicant's actual tender, and that this exercise would have contributed to a system such as envisaged by the provisions of s. 217 (1) of the ***Constitution***. Further, a disturbing factor was that the award of the tender to the Third Respondent resulted in a higher price of some R 170 million. It appears however from the Bid Evaluation report dated 14 December 2015 that there were five other bids whose tender price was less than that of Applicant.

As to the right relied upon I was referred to: ***Metro Projects CC v Klerksdorp Local Municipality 2004 (1) SA 16 SCA at par. 13 - 14.***

It is clear from the relevant dicta however, that the actual right referred to, is the right to a fair process. A corollary of that right may be a process of clarification if there is some unclarity in the actual tender, but this would always depend on the context in each given case. In my view it is conceptually wrong to assert that one has a right to a clarification process without qualification.

7.

I may add that Applicant's cause of action herein is not based on any fraud, corruption or procedural defect in the process followed.

8.

I do not intend to deal with all defences raised by the Respondents herein. Those are for a review Court to decide.

9.

The question that now needs to be decided is whether this right must be protected now by way of an urgent order, failing which, irreparable harm will result in the future.

10.

A brief history of the matter is therefore necessary and this history is in my view also a relevant consideration in the context of the question of the balance of convenience, although Applicant's Counsel did not agree.

11.

11.1

The relevant tender was awarded to the Third Respondent on 8 January 2016. Applicant says it became aware thereof on 2 February 2016.

11.2

On 3 February 2016 it wrote a letter of objection also calling for information and

demanding a response by 5 February 2016, failing which an interdict would be sought to stop the execution of the project. It is clear that Applicant contemplated an urgent application with or without the documents sought. It is also clear that apart from the Evaluation Report, none of the documents sought then, formed the basis of the present application, which is dated 29 April 2016.

11.3

On 5 February 2016 (per "E9"), First Respondent replied and gave the reasons why the tender was not successful, and was in fact disqualified, because certain specific requirements had not been fulfilled or complied with. It is common cause herein (except the compliance with the CID8 practice point), that the specified items were in fact not complied with, but Applicant's view was that these deviations were minimal and/or ought to have been the subject-matter of a clarification process.

11.4

On 8 February 2016, Applicant replied to this letter and referred to, and explained, the deviations, after having stated the following in the introductory paragraph: "We hereby notify you of our intention to dispute and appeal the Municipality's decision to

disqualify Esor from the Construction from the tender process (sic). It is our opinion that Lepelle Northern Water have erroneously disqualified Esor Construction...".

At the end of this letter a commitment in writing, within two days, was sought that no construction activities would continue before a resolution of the dispute.

I must add at this stage that the intended internal appeal was not proceeded with. It is also not clear to me on which basis in law an erroneous disqualification can without further ado form the subject-matter of a review application.

11.5

On 29 February 2016 a letter of demand was written notifying First Respondent that Applicant's Attorney had been instructed to seek an urgent interdict, mainly because the Third Respondent "is continuing his preparations and establishment of the works".

The existence of the harm alleged now existed then, but no application followed.

11.6

On 3 March 2016, First Respondent refused to accede to Applicant's demand that construction cease. It was also said that an approach to the Court at that stage was

not justified as the urgency was self-created.

11.7

On 8 March 2016, Applicant's Attorney wrote again that an urgent application would follow. First Respondent was afforded until 10 March 2016 to confirm that all work would cease. At that stage, reliance was placed on the judgment of the Supreme Court of Appeal referred to below, which dealt with fraud and corruption in a previous tender, although this had not been the subject-matter of Applicant's objection to the award of the tender. It was stated that if no undertaking was given "we will immediately proceed with the application". Again, reference was made to "ongoing criminal or corrupt activity".

11.8

On 11 March 2016, Respondent's Attorney refused to accede to this demand and advised that they would accept service of an application.

11.9

On 6 April 2016, Applicant wrote again stating that it would follow all necessary procedures for requesting information.

11.10

On 8 April 2016, Applicant's Attorney wrote again stating that their client, the Applicant, was intent on launching an urgent application and that the documents sought were critical. It appears that this is not so. To the contrary, with the exception of the Evaluation Report, none of the "critical" documents were the subject-matter of the Founding Affidavit.

11.11

On 12 April 2016, First Respondent's Attorney wrote and stated that any urgent application would be opposed and that urgency was self-created.

11.12

On 21 April 2016, Applicant's Attorney again threatened an immediate urgent application. This was only launched on 29 April 2016.

12.

It is my view that Applicant could have launched a review application calling for documents, amongst others in terms of the Rules of Court in February 2016. On its

own version, it was also ready to launch an urgent application by then, even without the so-called critical documents. The threatened internal appeal also did not materialize.

13.

In the meantime, First Respondent has been in possession of the site since 28 January 2016. Third Respondent's Contract Manager made an affidavit stating that offices, toilets, septic tanks, electricity facilities, generators, storage facilities, bore-holes and access roads have all been established. By 16 May 2016, Third Respondent had done about 500 000 cubic metres of excavation, had surveyed the pipe-line and had procured about 70km of pipe at a cost of about R 188 million. Personnel have been employed.

14.

I do take into account that the whole project will take 24 months to complete. I do not however agree with Applicant's Counsel, who submitted in this context, that for

those reasons the needs of the community played no significant role. Having regard to the whole history of the matter, which is set out in great detail in ***Esorfranki Pipelines (Pty) Ltd and Another v Mopani District Municipality and Others ZASCA 21 (28/03/2014)***, the interest of the particular community that requires the supply of water, remains a relevant consideration, both in the context of self-created urgency and the balance of convenience, which does not favour the Applicant at this stage at all.

15.

This Court has consistently refused urgent applications in cases when the urgency relied-upon was clearly self-created. Consistency is important in this context as it informs the public and legal practitioners that Rules of Court and Practice Directives can only be ignored at a litigant's peril. Legal certainty is one of the cornerstones of a legal system based on the Rule of Law.

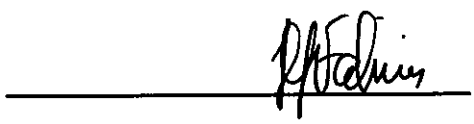
There is no adequate or satisfactory explanation before me why the urgent application was not launched in February 2016, or the appeal. On the objective

facts emanating from the mentioned correspondence and Founding Affidavit and its annexures, there is no merit in the assertion that all relevant documents were furnished to Applicant late April only, and that such was "critical" or even necessary.

16.

The appropriate order is that the application be struck off the Roll with costs, including costs of two Counsel where employed, and this is so ordered.

I may also add that I find that the balance of convenience does not favour the Applicant in any event.



JUDGE H.J FABRICIUS

JUDGE OF THE GAUTENG HIGH COURT, PRETORIA DIVISION

Case number: 36110/16

Counsel for the Applicant:	Adv K. W. Lüderitz SC
	Adv C. Woodrow
	Instructed by: Thomson Wilks Inc
Counsel for the 1st Respondent:	Adv W. R. Mokhari SC
	Adv M. P. Mdalana
	Instructed by: Phambane Mokone Inc
Counsel for the 3rd Respondent:	Adv P. L. Carstensen SC
	Adv T. L. Marolen
	Instructed by: Ramabulana Attorneys

Date of Hearing: 1 June 2016

Date of Judgment: 6 June 2016 at 10:00