REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DATE: 9/2/2016

CASE NO: 24799/2013

DELETE WHICHEVER IS NOT APPLICABLE

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

9.2.2016 .....

DATE SIGNATURE

In the matter between:

VIP CONSULTING ENGINEERS (PTY) LTD REG NO: 1997/0005608/07	1ST APPLICANT
IGNATIUS WILHEN HENNING	2ND APPLICANT
PIETER VAN IMMERZEEL	3RD APPLICANT
STEFANUS PRINSLOO	4TH APPLICANT
JOHAN JANSEN VAN RENSBURG	5TH APPLICANT
JOSEPH RAMATHLODI RAMALOPE	6TH APPLICANT
GRAEME ARTHUR LLOYD AMDROSE	7TH APPLICANT
STRATFORD FULTNER POHL	8TH APPLICANT
IRVIN BAFANA SIBISI	9TH APPLICANT

And

THE MINISTER OF FINANCE: MR PJ GORDHAN In his capacity as the responsible Minister for the Department of National Treasury	1ST RESPONDENT
EKURHULENI METROPOLITAN MUNICIPALITY	2ND RESPONDENT
DEPARTMENT OF FINANCE: EKURHULENI METROPOLITAN MUNICIPALITY	3RD RESPONDENT
THE CHAIRPERSON OF THE BID ADJUDICATION COMMITTEE: EKURHULENI METROPOLITAN MUNICIPALITY	4TH RESPONDENT
THE CHAIRPERSON OF THE BID EVALUATION COMMITTEE: EKURHULENI METROPOLITAN MUNICIPALITY	5TH RESPONDENT

JUDGMENT

MSIMEKI, J

INTRODUCTION

[1] VIP Consulting Engineering (Pty) Ltd, as first applicant, together with eight other applicants brought an application against the first respondent and four others seeking orders contained in the prayers which form part of Part A and part B of applicants Notice of Motion dated 25 April 2013. Part A which was brought on an urgent basis was not opposed and an order was accordingly granted against first respondent. Part B of the Notice of Motion now serves before me. Second up to and including fifth respondent oppose the application.

BRIEF FACTS

[2] First applicant and second respondent concluded an engineering services contract in February 2007 as evidenced by a letter of appointment dated 12 February 2007. Second respondent on 30 July 2007 contracted with Niloti Carpentry & Construction CC (the contractor) for the construction of civil engineering infrastructure in the Western portion of Etwatwa

Extension 34 (the works). The construction of the civil engineering infrastructure was to be administered by first applicant. Second up to and including sixth applicant are currently directors of first applicant while the others were previous directors. Second respondent contends that first applicant breached the contract and that it (second respondent), as a result, has terminated the contract. First and second applicants' names have been listed on the data base of restricted suppliers which is kept and/or administered by the Department of National Treasury (first respondent). Applicants brought the application in Part B seeking an order that the decision and/or resolution adopted by second respondent's bid committees (fourth and fifth respondents) to prohibit first applicant from participating in contracts involving organs of state with effect from 23 July 2012, be reviewed and set-aside in accordance with the provisions of Rule 53 of the Uniform Rules of Court and that the decision and/or resolution adopted by second respondent's bid committees to publish and/or list the Applicants' names on the data base of restricted suppliers which is kept and/or administered by the Department of National Treasury be reviewed and set-aside in accordance with the provisions of Rule 53 of the Uniform Rules of Court. Applicants also seek an order that second up to and including fifth respondent be ordered to pay the costs of this application jointly and severally the one paying the other to be absolved. For convenience, I shall refer to the parties as they are cited in the main review application.

[3] Respondents have delivered their answering affidavit and raised two points *in limine*. These are that fourth and fifth respondents were not supposed to have been joined in the proceedings (misjoinder) and that the judicial review proceedings have been brought outside the 180 days period which means that they have been brought out of time which,

according to them, is a bar to the bringing of such review proceedings. Applicants, on the other hand, contend differently. First respondent abides the decision of the court and has filed no answering affidavit.

[4] Respondents also brought an application to have applicants' replying affidavit struck out on the basis that it introduces matters not dealt with in applicants' founding affidavit and that its nature amounts to applicants abandoning their cause of action and substituting that with a new cause of action. Again applicants disagree.

[5] I shall deal first with the points *in limine*. The point *in limine* relating to misjoinder, in my view, was correctly not pursued.

[6] **COMPLIANCE WITH SECTION 7 (1) (b) of the Promotion Administrative Justice Act 3 of 2000 (PAJA):**

"7 PROCEDURE FOR JUDICLIAL REVIEW

This section provides:

(1) Any proceedings for judicial review in terms of section (1) must be instituted without unreasonable delay and not later than 180 days after the date _

(a) .....

(b) Where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons (my emphasis)

[7] Variation of time is covered by **section 9 of the Act.**

Section 9 (1) (b) and 9 (2) provides:

"(1) The period of,

(a) 90 days referred to in section 5 may be reduced; or

(b) 90 days or 180 days referred to in sections 5 and 7 may be extended for a fixed period, by agreement between the parties or, failing such agreement, by a court or tribunal on application by the person or, administrator concerned.

(2) The court or tribunal may grant an application in terms of subsection (1) where the interests of justice so require".

[8] The respondents contend that section 7 of PAJA is applicable in this matter. This is borne out by their reliance on section 7 in paragraphs 20.2 and 21 of their answering affidavit. It is respondents' contention that applicants were duly informed of what was happening but failed to act in accordance with the provisions of section 7 of PAJA.

[9] Indeed, applicants, in their founding affidavit, did not specifically refer to specific sections of PAJA. This, according to respondents, means that applicants, by dealing with PAJA in their replying affidavit were introducing new matters which they had not dealt with in their founding affidavit. Applicants disagree.

[10] Before dealing with the matter it is necessary to refer to page D1-703 of Van Loggerensberg Erasmus: Superior Court Practice, second Edition where the authors say:

"Although it is not necessary for a litigant who seeks to review administrative action to specify the provisions of PAJA relied on such

litigant should identify clearly both the facts on which the cause of action is based and the legal basis of such cause of action:

At page D1-704 the authors state that:

"In a review application if the rights of a member of the public were involved, the latter was entitled to have the full record before the court and to have the reasons for the impinged decisions available" **(See South African Football Association v Stanton Woodrush (Pty) Ltd t\a Stan Smidt & sons 2003 (3) SA 313 (SCA).**

[11] **In Scott and Others v Hanekom and Others 1980 (3) SA 1182 (C) at page 1193 C** Marais AJ said:

"In my view, the period of time within which review proceedings are brought forms no part of an applicant's cause of action".

At 1193E-F the court said:

"I recognise that there may be cases (and they are likely to be rare) in which the delay is so manifestly inordinate that an applicant can be expected to explain the delay in his founding affidavits. But, unless the delay which has occurred does fall within this extreme category of case, an applicant should not be expected, as a matter of course, to explain, in advance of any objection by the respondent or the Court, any apparent delay which may have occurred. If such an object is raised by the respondent, the applicant can deal with it in his replying affidavits." (my emphasis)

[12] It was submitted by Mr Botes, for the applicants, that this aspect was dealt with by the applicants in their replying affidavit also demonstrating that respondents had also failed to comply with the provisions of sections

3 and 6 of PAJA by failing to provide applicants with the reasons for the decision or resolution that was adopted on 23 July 2012. It is applicants' contention that the 180 days period finds no application in this application.

[13] It appears to me that certain of the issues in the main application overlap with those in the second point *in limine* . This would account for the manner in which the matter was argued.

[14] Mr Botes, for the applicants, submitted that the respondents never furnished the reasons for prohibiting Naloti Construction and Carpentry CC, its members and directors of first applicant from participating in contracts involving any organ of state with effect from the resolution by the Bid adjudication committee, for a period of (5) five years. Mr Botes submitted that Mr Mkize, for respondents, would not be able to provide an answer because the reasons were never given.

[15] Mr Botes submitted that applicants, in various letters, called for such reasons without success. One such letter is from applicants' attorneys to respondents' attorneys dated 19 November 2012 (annexure VIP 12). The second paragraph thereof reads:

"Please be so kind as to revert to us with regards to the documentation considered by the Bid Committee and the City Manager prior to deciding to terminate the VIP appointment and to have them and their directors restricted from participating in contracts involving organs of state as well as the reasons for taking the aforesaid decision." (my emphasis)

[16] Respondents' attorneys, in their letter to applicants' attorneys, dated 20 November 2012 (annexure VIP 13) responded saying:

"We note the contents of your aforesaid letter and we are taking instructions from client and shall revert back to you in due course". No reasons were furnished.

[17] In annexure VIP14, the letter from applicants' attorneys to respondents' attorneys dated 4 December 2012, the applicants' attorneys in paragraph 2 of the letter said:

"It is absolutely imperative that we receive feedback from your office, specifically with regards to information and documentation considered by the Bid Committee and the City Manager prior to deciding to terminate the VIP appointment and to have them and their directors restricted from participating in contracts involving organs of state."

[18] Mr Botes referred the court to the minutes of first respondent's Bid Adjudication Committee meeting on 23 July 2012. Paragraph 12 thereof reads:

"That the request of VIP Consulting Engineering (Pty) Ltd to be allowed the opportunity to further make presentations before any decision is made to prohibit VIP Consulting Engineering (Pty) Ltd from further participating in organ of state contracts for a period not exceeding 5 (five) years BE CONSIDERED."(my emphasis)

This, according to Mr Botes, appears not to have been done. It appears so.

[19] Mr Botes further submitted that through the use of Rule 35 (14) annexure VIP 44 was unearthed. VIP 44 is a letter from second respondent to the Chief Director: Supply Chain Management dated 21 August 2012. The letter reads"

"1. The Bid Adjudication Committee, at its meeting held on 23 July 2012 resolved that Niloti Construction and Carpentry CC and VIP Consulting Engineering and all its members/Directors be prohibited from doing business with the Public Sector due to breach of contract, with effect from 23 July 2012 for a period of five years." "With effect from 23 July 2012 for a period of five years" is in bold. This, despite the fact that the same Bid Adjudication Committee had resolved that "the request of VIP Consulting Engineering (Pty) Ltd to be allowed the opportunity to further make presentations before any decision is made to prohibit VIP Consulting Engineering (Pty) Ltd from further participating in organ of state contracts for a period not exceeding 5 (five) years BE CONSIDERED." No where do we see the consideration taking place. It appears first applicant was simply slapped with the sanction without having been given the opportunity to address the Bid Adjudication Committee before the sentence was passed. If so, the Bid Adjudication Committee, unilaterally took the decision to prohibit first applicant from further participation in the business with the public sector. Mr Botes submitted that the *audi alteram partem* rule was not observed and this, according to him, could not be done. He is, in my view, correct.

[20] The reasons for the decision to prohibit first applicant from further participation in the business involving state organs without according first applicant, as the adjudication committee had resolved, the opportunity to address it on the issue appear not to have been furnished to date.

[21] Second respondent, according to first applicant, did not afford first applicant a reasonable and/or fair opportunity to address the issues raised in its letter dated 22 February 2012 which is annexure "VIP 4." This, according to first applicant, ought to have been done before first applicant was prohibited from further participation in the business involving state

organs. Second respondent as a result was not entitled to submit applicants' names to first respondent for purposes of placing them on the data base of restricted suppliers which is kept/or administered by the Department of National Treasury. Without observing its resolution to allow first applicant to address it (Bid Adjudication Committee) on the issue raised by applicant regarding the sanction, the adjudication committee was not entitled to slap first applicant and its directors with the sanction in issue. This offends the *audi alteram partem* rule.

[22] Mr Mkize, for second to fifth respondents, submitted that first applicant had been afforded the opportunity it is complaining about. This cannot be correct. First, applicants submitted that the representations that they had made had been inadequate. Second, no reasons were furnished to show why the *audi alterum partem* rule was not observed. Third, the Bid Adjudication Committee saw the need to allow applicants to address it on the issues before they were prohibited from further participating in organ of state contracts for a period of 5 (five) years.

[23] In "VIP 29" which is a letter from second to fifth respondents' attorneys to applicants' attorneys dated 22 April 2013 respondents attorneys said:

"5.2. Our client: (referring to second respondent)

5.2.1 has no legal obligation to actually list any person in terms of the relevant legal provisions. And as a matter of fact -

5.2.3. did not list your clients in the manner alleged – or at all. The listing was done by the National Treasury: as you yourself, at times correctly pointed out in your letter."(my emphasis)

This, indeed, contradicts the contents of annexure "VIP 44" which

confirms that their client, indeed, was responsible for the listing of applicants' names on the data base of restricted suppliers.

[24] Respondents' 'attorneys denials and non-observance of the *audi alteram partem* rule by respondents, according to Mr Botes, prompted applicants to launch the main review application which second to fifth respondents oppose. The reasons for the taking of the decision that the Bid Adjudication Committee took on 23 July 2012, to not allow first applicant to address it on the saction, before the saction was imposed, have still not been given.

First respondent in the disclaimer which appears on each page of annexure "VIP9" which is the list of the restricted suppliers, shows that first respondent was not involved when the resolution or decision was adopted by the Bid Adjudication Committee. This leaves second respondent as the culprit. Mr Botes submitted that Mr Mkize's submission that the review application was brought out of time in light of the facts of the case cannot be correct. The submission, in my view, appears to be correct. The second point *in limine* should be dismissed.

THE INTERLOCUTOTY APPLICATION

[25] The application which seeks the striking out of the applicants replying affidavit in its entirety is premised on Rule 6 (15) of the Uniform Rules of Court.

The Rule reads:

"(15) The court may on application order to be struck out from any affidavit any matter which is scandalous vexatious or irrelevant, with an appropriate order as to costs, including costs as between attorney and

client. The court shall not grant the application unless it is satisfied that the applicant will be prejudiced in his case if it be not granted.(my emphasis)

[26] Mr Mkize submitted that applicants' replying affidavit introduces new matter and amounts to the complete abandonment of applicants' cause of action and submitting it with a complete new cause of action. Mr Botes disagrees. I, for the reasons that will follow also disagree.

[27] Mr Mkize submitted that applicants based their cause of action on incorrect statute namely **Preferential Procurement Policy Framework Act 5 of 2000,** the regulations promulgated in accordance therewith and practice note SCM5 of 2006. Mr Botes conceded that the Act Regulations and the practice note were incorrectly cited.

[28] Respondents in their answering affidavit, cited the correct legislation being the **Local Government Municipal Finance Management Act 53 of 2003,** the Municipal Supply Chain Management Regulations and the Supply Chain Management Policy. Applicants concede that that is in fact so. Respondents and their counsel are, however, unhappy with the reason furnished for the wrong citation by applicants. This, in my view, is of no consequence.

[29] It is important to keep in mind what applicants' case is. Their case is that the Bid Adjudication Committee which represented second respondent failed and/or neglected to afford first applicant a reasonable and/or fair opportunity to address the issues raised in its letter dated 22 February 2012 (Annexure "VIP 4") to founding affidavit. Applicants contend that first applicant was denied a reasonable and/or fair opportunity to place its case before fourth and fifth respondents and to ventilate thoroughly and/or comprehensively. Effectively, applicants' case is that the *audi*

alteram partem rule was not observed by the committee and effectively by second respondent. Second respondent effectively had no valid and enforceable right in law when it took the decision and finally decided to submit applicants' names to first respondent (the Department of National Treasury) for purposes of placing them on the data base of restricted suppliers which is kept and/or administered by first respondent.

[30] Respondents, in their answering affidavit, specifically referred to PAJA and dealt with section 7 thereof. Mr Botes submitted that applicants, as a result, were entitled to deal with the provisions of PAJA in their replying affidavit. This, according to Mr Botes does not amount to introducing new matter or changing the cause of action.

Erasmus: Superior Court Practice at page D1-66 states that a court will more readily allow an applicant in his replying affidavit to utilize and enlarge upon what has been revealed by the respondent and to set such additional ground for relief as might arise therefrom".(my emphasis) **(See Registrar of Insurance v Johannesburg Insurance CO LTD (1) SA 1962 (4) SA 546 (W).**

This shows that the rule that all the necessary allegations upon which applicant relies must appear in his founding affidavit, as he will not generally be allowed to supplement the affidavit by adducing supporting facts in a replying affidavit is not an absolute one. **(See Shepherd v Mitchell Cotts Seafreight (SA) (Pty)Ltd 1984 (3) 202 (TPD at 205F and Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd 2013 (2) SA 204 (SCA) at 212B-C and Shakot Investments (Pty) Ltd v Town Counsil of the Barough of Stranger 1976 (2) SA 701 (D).** This is so because Rule 6 (15) uses the word "may" which denotes

that the court in exceptional circumstances has a discretion to allow new matter in a replying affidavit.

[31] The questions which call for answers are:

(1) whether the fact that applicants referred to incorrect legislation is fatal.

(2) whether applicants introduced new matter and that that amounted to abandoning their cause of action and substituting same with a completely new cause of action.

[32] When answering the first question it is important to remind ourselves that although applicants had initially relied on incorrect legislation, respondents rectified that by referring to the relevant legislation. This however, does not, change the cause of action in applicants' matter. All it does, in my view, is to show whether what applicants complain about was justifiable in terms of the correct legislation.

The question, in my view, is whether applicants' founding affidavit contains sufficient allegations for the establishment of their case. This, the affidavit, in my view, has achieved. The facts in the founding affidavit disclose that applicants set out their full case in the affidavit and thereby shifting the onus to respondents. This is what applicants needed to establish and they have done exactly that. Reference to incorrect Act, Regulations and practice note, in my view, has adequately been cured. I do not, therefore, regard the wrong citation of the law as fatal as the cause of action and the facts remain the same.

[33] As far as the second question is concerned, respondents, as shown above, introduced PAJA in paragraphs 20.2 and 21 of their answering affidavit. All applicants did, after reference was made to PAJA by respondents, was

to enlarge on what respondents had touched on. The facts were there. It was only applicants who had not specified the relevant sections of PAJA. This, in my view, did not amount to abandoning the cause of action by applicants and substituting that with a completely new cause of action. The sections which applicants refer to in the replying affidavit are merely in line with the aspects which applicants deal with in their founding affidavit.

[34] Section 6 (2) (a) (1) relates to an administrative action which was not authorised. This has to do with the decision/resolution which was on 23 July 2012 taken by the Bid Adjudication Committee which it was not authorised at the time, to take or adopt. Section 6 (2) (f) (i) deals with an action which contravenes a law or is not authorised by an empowering provision. These are administrative actions which a court or tribunal has the power to judicially review.

[35] Section 3, too, has a bearing on the facts contained in applicants' founding affidavit. Section 3 (2) (b) (1) (ii) and 3 (2) (b) (1) (v) in particular deal with "a reasonable opportunity to make misrepresentations and adequate notice of the right to request reasons in terms of section 5. Mr Botes submitted that applicants were justified to deal with the sections of PAJA in their replying affidavit and that their reply ought not to be struck out in its entirety. I agree. Applicants have not changed their cause of action which, in my view, has through and through remained the same.

[36] Applicants introduced no new matter which amounted to a complete change of their cause of action.

[37] The facts of this case are akin to the facts of the case of **Chairman State Tender Board v Digital Voice Processing (Pty) Ltd 2012 (2) SA 16** in which the State Tender Board had taken a decision to blacklist a

company. On discovering the blacklisting, the company approached the High Court and successfully challenged the decision as procedurally unfair administrative action under section 6 of PAJA. The current case, in my view, is no different.

The application to have the entire replying affidavit of first to ninth applicants (in the main review application) attested to and/or commissioned on 18 June 2014 and served on respondents on 18 June 2014 struck out of the record of evidence should, in my view, fail.

COSTS

[38] Mr Mkize, upon taking instructions, appeared not to have problems regarding the issue of costs.

[39] **I, in the result, make the following order:**

1. **The second point *in limine* is dismissed with costs.**

2. **The interlocutory application initiated by the second to the fifth respondents (in the main review application) to strike the applicant's replying affidavit from the record is dismissed.**

3. **The Second, Third, Fourth and Fifth respondents in the main review application are ordered to pay the costs of the interlocutory application including the costs consequent upon employment of senior counsel.**

MW MSIMEKI
JUDGE OF THE GAUTENG DIVISION, PRETORIA

Heard on:	26 & 27 JANUARY 2016
For the Applicant:	Adv F W BOTES
Instructed by:	WWB BOTHA ATTORNEYS
For the Respondents:	Adv L P MKIZE
Instructed by:	NKOSI NKOSANA INC
Date of Judgment:	