

**IN THE HIGH COURT OF SOUTH AFRICA  
(TRANSVAAL PROVINCIAL DIVISION)**

**CASE NO: 3134/2007**

**DATE: 28/11/2007**

**UNREPORTABLE**

In the matter between

SUKUMA DISTRIBUTORS (PTY) LTD

Applicant

and

MINISTER OF FINANCE

Respondent

—

JUDGEMENT

CORAM

: RABIE J

**Background:**

1. Pursuant to an invitation to tender and a successful bid by the applicant, it concluded an agreement for the supply of various agro chemical products with National Treasury. More particularly the contract involved the supply of agro chemical goods to various departments upon order from such departments and upon which the goods were to be delivered to such departments as in when they have made the orders. The departments, as end-users, would be liable to pay for such goods to the applicant. The contract commenced and the applicant delivered goods to

various State departments and has received payment from these departments.

2.The contract between the applicant and, National Treasury contained a mechanism by which the prices at which the various product would be supplied, could be adjusted. More particularly the contract provided that application for price adjustments had to be made to, considered and granted by National Treasury before effect could be given to these price adjustments in the amounts invoiced to the various state departments.

3.Applicant applied for price adjustments in terms of the provisions of the contract but National Treasury failed to consider, alternatively, failed implement these adjustments.

4.In this application the applicant consequently sought and order either that the National Treasury implement the price adjustments with effect from 1 October 2005, alternatively, that it be ordered to consider the price adjustments with retrospective effect from 1 October 2005. In the event that the National Treasury be ordered to implement the price adjustment with retrospective effect from 1 October 2005, the applicant sought an order for the damages suffered by it as a result of National Treasury's failure to have done so before.

5.The respondent is the Minister of Finance who was sighted in his official capacity as the head of the National Treasury. The National Treasury was established in terms of section 5(1) of the Public Finance Management Act, Act 1 of 1999, and the respondent was appointed as the head thereof in terms of section 5(1)(a) of the Act.

6. In consequence of the National Treasury's failure to grant the price adjustment the applicant sought an order, as indicated before, for the specific performance in terms of the contract, compelling the National Treasury to implement the applicant's request for price adjustments in accordance with annexure "A" attached to the Notice of Motion together with such damages as the applicant suffered as a result of National Treasury's failure to grant the price adjustment. In the alternative the applicant sought an order compelling National Treasury to consider the request for price adjustments. The damages claimed by the applicant, in the event that National Treasury is held compelled in terms of the contract to implement the applicant's request for a price adjustment in accordance with a list annexed as annexure "A", includes a claim for VAT and totals R2 835360,55, being the additional cost of supplies to the applicant from 1 October 2005 to 31 December 2006.

7. As stated before, the applicant is a supplier of a variety of agricultural chemical products to a wide range of customers, including numerous governmental departments and institutions. During the course of 2004 National Treasury issued an invitation to tender for the supply and delivery of pesticides, herbicides, vaccines, and other biological products for a two year period from 1 July 2005 to 30 June 2007. The invitation to tender stipulated, inter alia, that: "(a) all contracts would be subject to the General Conditions of Contract issued in accordance to the Treasury Regulations; (b) any other Special Conditions of Contract will be supplementary to that of the General conditions of Contract. Should there

be a conflict between these two sets of conditions, the terms contained in the Special Conditions of Contract will prevail. (c) Unless prior approval has been obtained from the Chief Director: Contract Management, no adjustment in the contract prices may be made; (d) all other applications for price increase (ie if prior approval had not been obtained) must be substantiated with a controllable auditor's certificate issued by a public auditor. The Tender document stipulates which aspects need to be address in the certificate.

8.The General Conditions of Contract, provides for tenders to submit so called firm or non-firm prices. In casu the applicant tendered non-firm prices. As to the issue of price adjustments to non-firm prices, two scenarios can arise. The one is where the contractor is the manufacturer or were he is an accredited agent for the manufacture. The other is were the contractor is not the manufacturer nor is it an accredited agent for the manufacture. Price increases in these two scenarios are treated differently. Where the contractor is the manufacturer of the supplies, or where it is an accredited agent of the manufacturer, evidence in support of the price adjustments claimed shall be produced to the National Treasury on demand. Where the contractor is not the manufacturer of the supplies, or where it is not the accredited agent of the manufacturer, any price adjustment shall be based on the increase or reduction to the contractor in the net cost of the supplies on which the tender price is based. When any such increase or reduction in costs occurs, the contractor shall submit copies of the quotation or price list with reference to which it calculated its tender prices, as well as the revise

quotation or price list on which its claim is based.

9. There is no dispute between the parties that the applicant is not a manufacturer nor an accredited agent for the manufacturer. A company, Ecoguard Distributors Pty Ltd sourced products which it provided to the applicant. The products were sourced from different manufacturers. In no instance was the applicant appointed by the manufacturer of any of the products, as an agent. The applicant dealt only with Ecoguard Distributors Pty Ltd.

10. Consequently, this was also undisputed, the applicant could apply for a price adjustment in the event that there was an increase in the net cost of the supplies on which its tender price was based.

11. On 21 September 2005 the applicant advised National Treasury that it sought a price adjustment with effect from 1 October 2005. The basis of the request, which is evident from the application for the adjustment, is an increase in the net cost of supplies by the supplier, Ecoguard Distributors Pty Ltd, with effect from 16 September 2005.

12. The applicant attached the following documents in substantiation of its request for a price adjustment: “(a) A public auditor’s certificate verifying that the increase in price applied for by the applicant is no greater as the Rand increase of product cost to the applicant; (b) a list of items on contract with their corresponding increases and a price schedule indicating the tender unit price and the new price per units; (c) a letter from the applicant’s supplier, Ecoguard Distributors

Pty Ltd, giving some background to the increases.

13. The applicant submitted that it had complied to the requirements of the contract which entitled it to a price adjustment. In this regard it was submitted that the applicant supplied an auditor's certificate as envisaged in clause 8.2 of the Special Conditions of Contract read with clause 54.2 of the General Conditions Contract. There is a dispute whether there was compliance with this condition and I shall revert to that below. The applicant further submitted that it provided the prices with reference to which it calculated its tendered price and the prices on which its claim on a price adjustment was based and that a comparison between these two sets of prices was also made. This exercise was not disputed by National Treasury and it was only contended that a controllable auditor's certificate as envisaged in the contract was not provided. The applicant denied that it did not meet the requirements of clause 52.4 and further submitted that the Special Conditions of Contract, and in particular clause 2.3 thereof, only requires that an auditor's certificate be provided. In any event, by 15 March 2006. The applicant had complied with this requirement.

14. In the result the applicant submitted that it was entitled to a price adjustment with effect from 1 October 2005, that being the date by which the pre conditions for a price adjustment in terms of the contract were complied with, and also being the date subsequent to the date on which the new prices were implemented by each supplier. That was also the date on which the firm prices expired and the date on which the applicant requested the price adjustment.

15. The first basis upon which National Treasury initially refused to effect the price adjustment was that it contended that the applicant tendered firm prices. Later, in October 2006 the National Treasury intimated that it was unable to grant the price adjustment because insufficient information had been provided. In effect, National Treasury sought information that could ordinarily be sought from a manufacturer or an accredited agent as envisaged by clause 52.2 read with 52.1 of the General Conditions of Contract. I have already indicated above that the applicant was neither a manufacturer nor an accredited agent. However these are not the reasons now relied upon by the respondent opposing relief sought by the applicant. The above issue is also in dispute between the parties and I shall refer there to below.

16. The respondent opposes the application on two bases. The first relates to the issue of non-joinder. In this regard it was submitted on behalf of the respondent that the respective government departments who had placed orders would be the so-called end users and be liable to pay for such goods to the applicant. It was further submitted that the adjustments of the prices would of necessity require the cooperation of the various departments and any order regarding such adjustments relating to such orders would have to be carried out and given effect to by such departments. Accordingly, so it was submitted, the respective departments were necessary parties that should have been joined in these proceedings and that this court can not make an order in their absence.

17.The second basis upon which the application is opposed, relates to the submission that although the respondent is prepare to consider the price adjustment, it has not been put in a position to make an informed decision in that regard. That is so because the so-called certificate submitted by the applicant as required by the contract, does not give sufficient information so as to enable the respondent to make an informed decision.

18.I shall deal with the aspect of non joinder first. The respondent referred to clause 43.1 of the General Conditions of Contract which provide that a contractor shall be paid by the department concerned, in accordance with the provisions mentioned in the contract, for supplies delivered and services rendered. Reference was also made to clause 43.4 which provides that in a quare concerning the non payment of accounts must be directed to the department concerned and not to the Procurement Administration.

19.It was submitted on behalf of the respondent it acted as a agent for the State Departments that were in need of products but that these departments were separate entities operating separately on their own budget voted for them by Parliament, consequently, so it was submitted, the respondent has no power to interfere with such budget nor that it have any budget concerning the payment of other department's liabilities.

20.It was consequently submitted that the other departments have a direct and substantial interest in any order that this court might make in that any order that this court might make would effect the rights of such departments. If this court makes an order as applied for by the applicant the relevant departments would not be bound by such an order as they had not been joined as parties.



Furthermore, if this court makes an order for the price adjustments in terms of annexure “A” the departments concerned will be prejudiced in that they are the necessary parties to effect such payments. In the result it was submitted on behalf of the respondent that this court ought to refuse to make the order prayed for unless or until such time as all the relevant State departments had been joined in these proceedings.

21.I shall now consider these and other submissions in respect of this issue.

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HEARD ON:	5 SEPTEMBER 2007
FOR THE APPLICANT:	ADV WG La Grange
INSTRUCTED:	BLAKE BESTER INC
FOR THE DEFENDANT:	ADV BR TOKOTA SC
INSTRUCTED:	STATE ATTORNEY
DATE OF JUDGEMENT:	28 NOVEMBER 2007