

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA,  
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 46994/2012

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED. ✓
26/10/16	
Stein	

In the matter between:

HALL LONGMORE (PTY) LTD

Applicant

and

RAND WATER

First Respondent

MINISTER OF WATER AND SANITATION

Second Respondent

AFRICA PIPE INDUSTRIES (PTY) LTD

Third Respondent

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J U D G M E N T

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SUMMARY

Urgent application to interdict performance of tender for supply of pipes.

Applicant's tender (below the minimum estimate provided) automatically excluded.

Third respondent's tender (also below the minimum estimate) accepted. Third respondent awarded contract.

Tender to be set aside if awarded unlawfully even if third respondent is an innocent party.

Applicant challenging award at earliest opportunity.

Balance of convenience and irreparable harm to applicant and third respondent assessed. Third respondent contending that if contract is implemented damages will be suffered.

Manufacturers of pipes providing affidavit that it would only manufacture the order once and would supply whichever party is successful in the review.

Prospects of success and balance of convenience favouring applicant.

Tender set aside.

## **WEINER, J:**

### **BACKGROUND**

- [1]. The applicant applies for an interim interdict, as a matter of urgency, pending an expedited review against the decision by Rand Water to award Africa Pipe Industries Propriety Limited ("API") a tender, reference number: RW01152/14 ("the tender").
- [2]. The applicant sought the following relief: -
  - 2.1. Pending the final determination of the relief set out in part B of the notice of motion (the review and the setting aside of the tender):
    - 2.1.1. Rand Water be interdicted from taking any steps to give effect to the tender, including concluding, finalising or signing a contract with API;

- 2.1.2. Rand Water be interdicted from executing, making payment under and/or otherwise carrying out its obligations under any contract concluded with API arising from the tender;
- 2.1.3. API be interdicted from concluding, finalising or signing a contract with Rand Water arising from the tender.
- 2.1.4. API be interdicted from implementing, executing and/or otherwise carrying out its obligations under any contract concluded with API arising from the tender.

### CHRONOLOGY

- [3]. On 6 October 2015 the contract was put out for tender. The tender was for the supply, delivery and storage of 16,735 meters of 2 millimetres outside diameter steel pipes for the Van Dyk Park to Rynfield S4 pipelines. The deadline for the tender applications was 30 October 2015, and the applicant submitted its tender on that day. Thereafter, the following material occurrences which underlie this dispute took place:-
  - 3.1. The original date set out for the award of the tender was 11 December 2015; no award was made.
  - 3.2. On 28 January 2016, Rand Water requested the applicant to extend the validity of its tender by 60 days; this was agreed to.
  - 3.3. On 6 February 2016, the applicant received a request to withdraw its proposed deviations, which was done.
  - 3.4. On 25 February 2016, the applicant requested a second extension of validity for its tender offer.

- 3.5. On 11 and 14 March 2016, the applicant received a request for further information from Rand Water, regarding shareholder structure, Tax and BEE certificates, which were provided.
- 3.6. On 7 April 2016, the applicant was called to a clarification meeting with regards to storage costs. No other queries were put to the applicant.
- 3.7. On 18 April 2016, API was informed by Rand Water that it was successfully awarded the tender. API and Rand Water concluded a contract on that day (the contract).
- 3.8. On 4 May 2016, the applicant was notified that it had been unsuccessful, in terms of a letter that was dated 29 April 2016. There were no reasons or explanations in the letter.
- 3.9. On 6 May 2016, applicant's attorney wrote to Rand Water requesting reasons and further requested Rand Water to suspend its decision, in the interim.
- 3.10. On 9 May 2016, Rand Water acknowledged receipt of the request but directed the applicant to comply with the provisions of the Promotion of Access to Information Act<sup>1</sup> ("PAIA").
- 3.11. On 11 May 2016, Rand Water offered a meeting for the following day which was accepted by the applicant.
- 3.12. This meeting took place, but there was no resolution reached at the meeting.
- 3.13. On 16 May 2016, applicant's attorneys again requested urgent reasons following the 13 May meeting.
- 3.14. On 17 May 2016, Rand Water acknowledged receipt of the letter and stated that reasons would be forthcoming. On the same day, the applicant wrote to

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<sup>1</sup> No 2 of 2000

Rand Water to inform them that proceedings would be launched on the following day. A similar letter was also sent to API via email on the same day.

3.15. On 18 May 2016, these proceedings were launched. Affidavits were then filed, some of them later than the dates proposed in the notice of motion, *inter alia*, because the officials of API were apparently overseas.

[4]. As will appear from the foregoing, the contract with API and Rand Water has already been signed, and accordingly, the applicant sought leave to amend the relief that it sought, by interdicting Rand Water and API from further implementing any obligations and/or rights under the contract.

#### REJECTION OF APPLICANT'S TENDER

[5]. It appears to be common cause that the applicants tender was automatically rejected on the basis of Rand Water's Financial Tolerance Principle ("FTP") i.e. its price was more than 25% cheaper than a predetermined estimate in the tender ("the estimate").

[6]. The applicants grounds of review are:

6.1. Firstly, that such automatic rejection in terms of Rand Water's FTP is unlawful and contrary to the relevant procurement legislation, the relevant regulations and Rand Water's own tender documents.

6.2. Secondly, application of the FTP was fundamentally flawed because the price for steel in the estimate was in excess of any steel price over the past years.

6.3. Thirdly, API's tender was also more than 25% cheaper than the estimate, but API was not automatically excluded. API's tender was R168 228 349.00 and therefore below the minimum threshold, applicant contends that it too should

have been automatically excluded as well, if the FTP was universally applied. Applicant accordingly contends that the failure to exclude API on this basis is unlawful, arbitrary, irrational, unreasonable and procedurally unfair.

### THE TENDER

- [7]. As stated above, the tender was for the supply of steel pipes for the S4 pipeline (the S4 pipeline). The installation of the pipes was subject to a separate tender process, which had been suspended by Rand Water due to an irregularity. Applicant accordingly contends that there is no immediate prospect of the pipes being installed.
- [8]. It is common cause that the price constitutes 90/100 points under the relevant procurement law and in respect of the remaining 10 points, namely B-BBEE, both the applicant and API scored equally.
- [9]. The applicant accordingly contends that the rejection of its tender was only due to the FTP, to automatically exclude any tendering that was 25% below Rand Water's estimate. The estimate was approximately R225 million. The minimum financial threshold determined by Rand Water for the tender price was R168 767 872.00. Any tender below that price was automatically excluded, according to Rand Water.
- [10]. The applicant's tender price was the lowest. It was approximately R154 million. It contends that there were good reasons for this; mainly that the price of steel, at the time of the tender, was extremely low and that Rand Water's estimate was flawed in a number of respects. It did not take into account the low steel price, as

steel price had never been at the price level that was utilised for the estimate. Despite having numerous discussions with the applicant from the time that the tender was first submitted until the time API's tender was accepted, Rand Water did not enquire from the applicant on what basis it utilised such a competitive steel price.

### INTERDICTIONARY RELIEF

- [11]. Our courts have held that it is incumbent on the person challenging a tender award to seek appropriate interdictory relief at its earliest opportunity. See *Chairperson: Standing Tender Committee and Others v JFE Sapela Eletronics (Pty) Ltd and others*<sup>2</sup>. The applicant accordingly applies as a matter of urgency to this Court.
- [12]. Applicant states that if interim relief is not granted, then the unlawful decision will be allowed to stand. Accordingly, even on an expedited review timetable, applicant contends that by the time the review is heard, a review tribunal will be unlikely to set aside the tender, even though it has been unlawfully awarded because the contract would have been completed.
- [13]. Further, applicant contends that there is no urgency in the supply of the pipes, in view of the fact that the installation tender has been withdrawn. That tender will only be awarded, even on Rand Water's optimistic timetable, in September 2016. Applicant further submits that Rand Water will incur further unnecessary costs, in that, if the pipes are manufactured now, they will have to be placed in storage (with consequent costs) until completion of the installation tender and process.

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<sup>2</sup> 2008 (2) SA 638 (SCA), paragraph 20 - 29

[14]. API does not, in effect, contest the grounds of review. It contends that it has begun implementing the tender and therefore the interim relief is academic. It also states that it, as an innocent recipient of the tender, it will incur R100 million in damages, if the interdict is granted.

[15]. Accordingly, the court is enjoined to assess the balance of convenience and irreparable harm of the three parties involved in this scenario.

#### BALANCE OF CONVENIENCE

[16]. Rand Water contends that the tender award should not be interdicted because the installation tender will be awarded in September 2016 and the pipes should be ready for installation by that date. The interdict and review will delay this.

[17]. The applicant contends that, on Rand Water's timetable, the installation will only be completed in two years' time, that is, in June 2018.

[18]. Further, the applicant submits that Rand Water delayed the matter in firstly, not notifying those that were unsuccessful; secondly, by not providing the applicant with reasons as requested. Thirdly, they failed to inform the applicant that the contract had in fact been signed on the 28 April 2016.

[19]. Rand Water's only alleged prejudice is that the provision of the pipes and the installation for the S4 pipeline is of public interest, in that those persons affected should be provided with the water which the pipeline is intended to provide. However, in view of the fact that the installation pipeline tender has not yet been awarded, that the pipes only take four months to manufacture, and that the



review is to be expedited, this prejudice does not outweigh that of the other parties in this matter. In the present situation, where tenders have already been delayed on numerous occasions, it is self-serving for Rand Water to now rely upon urgency and the public interest in implementing the tender.

[20]. The balance of convenience must therefore be assessed between the applicant and API. This Court must weigh the prejudice to be suffered by the applicant if the relief is not granted, against the prejudice of API if the relief is granted. If there is greater prejudice to API if the interdict is ordered then the relief must be refused; see *Olympic Passenger Service (Pty) Ltd v Ramlagan*<sup>3</sup>.

[21]. In *Eriksen Motors Ltd v Protea Motors, Warrenton and Another*<sup>4</sup> it was held that in the exercise of the court's discretion, the stronger the prospects of success, the less the need to show a balance of convenience in favour of the applicant. The applicant contends that its grounds of review are such that the prospects of success are strong.

[22]. In *Marinpine Transport (Pty) Ltd v Local Road Transportation Board*<sup>5</sup>, Broome J stated that:

*"If the applicant ultimately succeeds in its appeal to the Commission the prejudice that it would have experienced would be substantial. Furthermore, it would appear to me that, by operating unlawfully... the second respondent is obtaining an unfair advantage which may tell against the applicant at the appeal."*

<sup>3</sup> 1957 (2) SA 382 (D) at 384H -385A

<sup>4</sup> 1973 (3) SA 685 (A) at 691 C-E

<sup>5</sup> 1984 (1) SA 230 (N) at 234 D – E

It is pertinent to bear in mind that there is no allegation that API was in any way acting unlawfully. The alleged unlawful action is that of Rand Water. Despite this, API, in law, has no right to a tender that has been unlawfully and improperly determined. The default position is that such tender must be set aside, even though API is not a guilty party. See *All Pay Consolidated Investments Holdings (Pty) Ltd and Others v Chief Executive Officer of South African Social Security Agency and Others*<sup>6</sup>.

[23]. API contends that the contract has already been implemented and that its business will suffer catastrophic losses if the tender does not go ahead.

[24]. The applicant contends that, according to the documents supplied by API (and in particular, the Conceptual Sales Order), it has only received a preliminary offer from ArcelorMittal (the supplier of the steel) and that this order has not been confirmed. This, according to the applicant, is the manner in which its contractual relationship with ArcelorMittal is governed.

[25]. This is disputed by API. They state that the Conceptual Sales Order is the final order. It cannot be assumed that the applicant and API have the same contractual relationship with ArcelorMittal, in so far as this particular practice is concerned.

[26]. Both parties were invited to further amplify their papers by providing some evidence from ArcelorMittal as to what the present situation is.

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<sup>6</sup> 2014 (1) SA 604 (CC)

[27]. The applicant and API filed further affidavits in regard to the damages that API may suffer as a result of a cancellation or suspension of the contract with ArcelorMittal. In API's affidavit, filed on 1<sup>st</sup> June 2016, reference is made to the fact that on 30 May 2016, a day before the hearing of the matter, API received a letter from Mr Koos Fourie ("Fourie") of ArcelorMittal stating *inter alia* that "*the order confirmations indicate that the orders are all live in our production system. Requests for amendments or cancellations cannot be entertained from now*". Fourie deposed to a confirmatory affidavit on 31 May 2016 (the day of the hearing). Neither of these documents were placed before the court prior to the filing of API's supplementary affidavit on the 1<sup>st</sup> June 2016. In the affidavit, Fourie confirmed that API is and will be held liable for the payment of all products regarding the orders placed.

[28]. API's representative, Van Nieuwenhuizen, set out, in the Supplementary Affidavit, that he was surprised to receive a call on the 1<sup>st</sup> June 2016 from ArcelorMittal's sales manager Rudolph Steyn ("Steyn") stating that one of the shareholders in the applicant, one Barnes, have met with ArcelorMittal's chief executive officer that morning. ArcelorMittal's CEO advised Barnes that ArcelorMittal would only be holding API liable for approximately 700 tons of steel orders, that is approximately R7 million Rand. Steyn apparently refused to give Van Nieuwenhuizen the CEO's contact details. As a result, API's attorney contacted ArcelorMittal's legal adviser, one Motsonoeng, who advised the attorney that ArcelorMittal would in fact be holding API liable for the costs of the full order of R100 million.

[29]. The applicant filed a further affidavit on 2 June 2016. In reply to the supplementary affidavit of Van Nieuwenhuizen, the applicant annexes to its affidavit, a further affidavit from the CEO of ArcelorMittal, one Subramanian. He states in his affidavit the following:-

29.1. ArcelorMittal's has no intention to be dragged into the litigation as both the applicant and API are customers of ArcelorMittal.

29.2. On the 1<sup>st</sup> June 2016, because of the disputes between the parties, he approached API and proposed to them that ArcelorMittal hold back on the manufacturing and delivering of the remaining order for a period of 30 days in order to allow the court process to run its course. API however rejected the proposal on the basis that they will be pressurised by Rand Water to commence manufacturing and delivery as soon as possible.

29.3. Accordingly, ArcelorMittal has no other option but to proceed with the manufacturing and delivery of API's outstanding order.

29.4. The applicant has placed an order with ArcelorMittal for the same steel requirements as API, subject to the applicant being successful in the challenge on the tender. ArcelorMittal will not produce the same steel requirements twice and therefore the stocks which they produce will either be for the applicant or for API.

[30]. The applicant contends that what appears from the affidavit of Subramanian is that API was approached to agree to a delay of the order but that Rand Water is insisting that the order be proceeded with immediately, despite the present proceedings. API is accordingly pursuing its order with ArcelorMittal.

[31]. It also appears from Subramanian's affidavit that ArcelorMittal is seeking a reasonable solution and has confirmed that it presently holds steel orders from both parties, but that it will only produce and sell steel to the party that is ultimately successful with the tender.

[32]. The applicant contends that, if the court grants an order interdicting the further performance of the contract, API would be legally prohibited from performing and as such there could be no basis for ArcelorMittal to claim damages in the circumstances.

[33]. It appears that the applicant and API were the two lowest tenders received by Rand Water and the likelihood is that one of them will be awarded the contract in the event that the review process either succeeds or fails.

[34]. Applicant refers to the fact that Rand Water has denied making any upfront payment, but it significantly does not deny that one will be made. API does not deal with this at all. Applicant contends that API, in placing its steel order, has provided for the delivery of the steel within a three week period from 11 June to 30 June 2016. In this period, API will have to pay for all of this steel at a cost of approximately R116 million Rand in less than a month. This full payment must be made before it has fabricated or delivered any pipes to Rand Water. Applicant contends that the only way that this can be done is if Rand Water makes payment for the steel upfront.

[35]. Applicant accordingly submits that the way in which API's alleged damages can be dealt with, if the contract does exist, is that Rand Water, at its direct expense can pay for the steel, which will be stored by ArcelorMittal pending the

determination of the expedited review. This steel will either be used by the applicant or API. The reason for this is that all orders of this type are placed through ArcelorMittal. Ultimately whichever party is successful in the review of the tender will simply take over that order and ArcelorMittal will not suffer any loss.

[36]. There were two other ancillary contracts, one with Phoenix International and another with PTG Marine Coatings. Applicant states that the prejudice arising from the breach of contract with Phoenix International is that the order does not commerce prior to payment in full. API has not alleged that this payment has been paid. Similarly, the same situation applies to the contract with PTG Marine Coatings. The applicant contends that API does not state that if these orders are suspended or cancelled that there will be any penalties. Applicant also contends that effectively there is only one international supplier, therefore the products ordered from Phoenix International will be utilised by whichever party is awarded the tender.

[37]. It is common cause that at this stage no payment has been made by API to ArcelorMittal.

[38]. The applicant has tendered:-

38.1. To purchase the steel from ArcelorMittal if the review is successful and it is awarded the tender. In such a case ArcelorMittal would have mitigated any damages it might suffer as a result of API not continuing with the contract at this point in time

38.2. To purchase any or all steel from the API which API has been lawfully compelled by ArcelorMittal to purchase pursuant to the existing orders.

38.3. To pay any storage costs which ArcelorMittal claims, pending the outcome of the review.

38.4. That if API is prohibited by a court order from performing the contract, ArcelorMittal should be entitled to approach court to show cause why the interim order should be amended or set aside pending the review.

### CONCLUSION

[39]. The applicant has reasonably strong prospects of success in the review by virtue of the fact that the procurement policies, the relevant legislation and regulations as well as Rand Water's own tender documents do not provide that there is an automatic exclusion if the tender falls 25% below the estimate. It clearly states that these estimates will be used to assist in the assessment of the tenders [Emphasis added].

[40]. If the applicant was automatically excluded as the price was too low, API should have similarly been excluded on the same basis.

[41]. The basis of the applicant's lower tender price was based upon the prevailing steel price at the time and the tender documents contain provisions for the fluctuations in the steel price which would have covered such event.

[42]. Rand Water, instead of assessing the price as against the prevailing price, looked only to its estimate which was based on a price for steel which had never been the market price. It further failed to enquire from the applicant the basis upon which it provided for that price for the steel. Although it was not obliged to do so, Rand Water had in the past asked for clarification in regard to certain other aspect of the tenders and could have done so in relation to the price.

[43]. The prejudice to Rand Water, being the delay caused by the review proceedings, would not be undue if an expedited review takes place. In this regard, this Court has taken into account that the present tender was delayed on several occasions and the tender for the installation of the pipes has not yet been awarded.

[44]. Having regard to the information now obtained from ArcelorMittal, it appears that Rand Water is compelling API to continue with the order despite ArcelorMittal's offer to suspend same. This seems to be a clear stratagem on Rand Water's part to oppose the review on the basis that the contract has already been carried out, despite the lack of urgency in the implementation of this particular tender.

[45]. In addition, API will not suffer damages of R100 million as the steel ordered will either be supplied to them or to the applicant, in the event of the review failing or succeeding. Even if neither of the two parties obtain the revised tender award, it is most likely that the party that does receive the tender award will utilise the same steel supplied by ArcelorMittal who is the major supplier in South Africa and accordingly no damages will be suffered in this regard.

[46]. Accordingly, both the prospects of success and the balance of convenience favour the applicant, who is thus entitled to the relief it seeks.

[47]. Accordingly, there will be an order in terms of the draft attached hereto marked "X".



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JUDGE OF THE HIGH COURT  
OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION,  
JOHANNESBURG

**Appearances**

**For the Plaintiff:** Advocate AD Stein

**Instructed by:** Bowman Gilfillan

**For the First Respondent:** Advocate V Maleka SC with M Selo

**Instructed by:** Malebye Motaung Mtembu Inc

**For the Third Respondent:** Advocate M Costa

**Instructed by:** Madeleyn Inc

**Date of hearing:** 31 May 2016

**Date of Argument:** 31 May 2016

**Date of Judgment:** 03 June 2016