

**HIGH COURT
(BISHO)**

CASE No: 769/02

In the matter between:

RHI JOINT VENTURE Applicant

and

**THE MINISTER OF ROADS AND PUBLIC
WORKS, EASTERN CAPE** First Respondent

THE PREMIER OF THE EASTERN CAPE Second Respondent

BASIL READ (PTY) LTD Third Respondent

**THE CHAIRMAN OF THE PROVINCIAL TENDER
BOARD FOR THE EASTERN CAPE** Fourth Respondent

**JUDGMENT
(on the Application for Leave to Appeal)**

EBRAHIM J:

1. This is an application for leave to appeal in which the third respondent, who was one of the unsuccessful parties in the main application, seeks leave to appeal against the whole of the judgment of this Court, delivered

on 18 March 2003. For the sake of convenience I shall refer to the parties as they were cited in the main proceedings. The application, which was opposed by the applicant, was argued on 6 May 2003 and dismissed with costs. In view of the urgency of the matter the Court rendered its decision immediately, without furnishing reasons, and undertook to hand down the reasons by not later than 31 May 2003. These now follow.

2. In the Notice of Application the third respondent has stated that leave to appeal is being sought against the whole of the judgment of this Court. However, this is not substantiated by the grounds of appeal enumerated therein. It is evident from these grounds that the application is directed at only a part of the Court's judgment. In addition, it is confined to the issue of the calculation of the points that were awarded to the tender of the third respondent.
3. Mr van Rooyen, who appeared for the third respondent at the stage when the leave to appeal was argued, was asked by the Court to clarify the position. He confirmed that the Court's decision to set aside the decision of the Tender Board, and consequently prayer (a) of the Court's order, was not being challenged by the third respondent. In effect, therefore, and contrary to the wording in the notice, the third respondent was seeking leave to appeal only paragraph (b) of the Court's order, and that part of paragraph (c) that operated against the third respondent in respect of costs.

4. The primary question which is to be considered in an application of this nature is whether there is a reasonable prospect of success on appeal. See *van Heerden v Cronwright and Others* 1985 (2) SA 342 (T) at 343C-G. I turn now to consider this.
5. Mr van Rooyen submitted that both the third respondent and the applicant disputed the correctness of the points that had been awarded to them in respect of their tenders. It is so that in the main application the applicant asserted that the Standing Tender Committee should have awarded its tender higher points in respect of two aspects, namely, the extent to which 'the tendered Contract Participation Goal' and 'the tendered Contract Local Resource Goal' exceeded a specified minimum. But, this was not the basis upon which the applicant had sought to review, and have set aside, the Tender Board's decision to award the tender to the third respondent. On the contrary, the crucial issue that the Court had to determine in the main application was whether the factors, which the Tender Board had relied upon for its decision, qualified as objective criteria in terms of s 2(1)(f) of the Preferential Procurement Policy Framework Act 5 of 2000.
6. It should be noted that neither the first respondent, nor the fourth respondent, disputed the correctness of the points that had been awarded to the tenders of the third respondent and the applicant. Further, it was common cause between all the parties that the applicant's tender had obtained the highest points while that of the third respondent was the second highest.

7. Mr van Rooyen submitted further that the third respondent 'tendered on the basis that it would achieve 40% for Contract Participation Goal'. While this may have been the expectation of the third respondent it was, by no means, what the tender actually achieved when it was evaluated by the Standing Tender Committee. The report of the Standing Tender Committee stated that the third respondent had indicated in its tender 'that should they be awarded the contract, they intended forming a Joint Venture with two other companies, namely BR-Llima Projects (Pty) Ltd and Newport (Pty) Ltd, for the performance of the work'. In view of this information the Standing Tender Committee investigated the two companies and thereafter concluding that the third respondent did not qualify for 40% in respect of the Contract Participation Goal. This led, the Standing Committee to rule:

'..... in terms of Clauses 2.1 and 2.11 of the TP1(APP1) document, that BR-Lima Projects (Pty) Ltd, by virtue of the 30% ownership held by Basil Read (Pty) Ltd, is not an "Independent Enterprise" and can therefore not claim Affirmable Business Enterprise status. The 20% participation and the associated points have therefore not been granted in the adjudication process and the 4,4 points awarded were calculated using the 20% participation by Newport (Pty) Ltd.'

8. The amended calculations, upon which the third respondent relied in substantiation of its averment that it should have been awarded 7 points, instead of 1,4 points, for the Contract Participation Goal, are flawed. There is manifestly no indication that at the stage that the Standing Tender Committee evaluated the tender that it qualified to be awarded the maximum of 7 points. The report of the Standing Tender Committee makes this patently clear.

9. It has been contended on behalf of the third respondent that the letter informing it that its tender had been accepted (Annexure BJ1 in the main application) is confirmation that its tender was accepted on the basis of a 40% Contract Participation Goal for Affirmative Business Enterprises participation. I do not agree. The letter conveys to the third respondent that the tender was being awarded to it on the condition that it complied with a 40% Contract Participation Goal and not that the tender had actually achieved this percentage when it was evaluated. It is evident, too, that the first and fourth respondents have not identified themselves with the interpretation which the third respondent seeks to place on this letter. The letter conveyed, *inter alia*, the following:

'Your accepted tender is based on a 40% Contract Participation Goal targeting of an ABE. (TP1). You are required to provide the Department with the following completed documents, within two weeks of receipt of this letter, in support of your proposal:

- CPG Implementation Plan (Annex B of TP1 (APP1): 1998)
- ABE Declaration Affidavit (Annex C of TP1 (APP1): 1998)
- Joint Venture Disclosure Form (Annex E of TP1 (APP1): 1998)

In addition we require **proof of the PDI shareholding** in the Joint Venture companies.

- (ii) Your accepted tender is based on a Local Resource Goal of 40% and as such you are required to provide the Department with the following completed document within two weeks of receipt of this letter:

- Local Resource Goal Implementation Plan (Annex B of TP4 (APP4):1998). Note that the Local Resource Goal is to be achieved by the same method as per your tender.'

10. In regard to correcting and/or setting aside the calculation of the points awarded to its tender, even if it could be said that there was no need for the third respondent to have sought such an order, the fact remains that the calculations submitted by the third respondent are premised on incorrect

assumptions. In addition, neither the first respondent nor the fourth respondent have provided support for the contention that the points were incorrectly calculated. I am not persuaded that the Standing Tender Committee erred in its calculation of the points, either in respect of the tender of the third respondent or that of the applicant.

11. Mr Kemp SC, who appeared for the applicant, submitted that the third respondent should be refused leave to appeal as there was no reasonable prospect of the appeal succeeding. He emphasised that the Standing Tender Committee, with the concurrence of the consulting engineers, determined the points that were awarded to the third respondent's tender in accordance with the tender rules. These were considered by both the Department of Roads and Public Works and the Tender Board and accepted as being correct. The Tender Board's decision was based on the points as determined and it had not misdirected itself in this respect. The Tender Board's decision was, therefore, not open to review on this ground. The misdirection of which the Tender Board was guilty was that, in awarding the tender to the third respondent, it relied on other considerations that manifestly did not qualify as objective criteria. I agree with Mr Kemp's submissions.
12. In the absence, therefore, of a proper case having been made out for the points to be recalculated, no purpose would have been achieved in the matter being referred back to the Tender Board for reconsideration of the award of the tender.

13. Leaving aside the third respondent's attack on the calculation of the points, it was not suggested, when the main application was heard, that the matter should be referred back to the Tender Board as it was open to it to consider the award of the tender on some other basis. Clearly, it would not, in the circumstances of this matter, have been proper for the Tender Board to have done so.
14. After due consideration of each of the grounds for leave to appeal, as well as Mr van Rooyen's submissions on behalf of the third respondent, I am not persuaded that there is a reasonable prospect that another Court might come to a different conclusion. Accordingly, the application of the third respondent for leave to appeal to the full Court of this Court, alternatively the Supreme Court of Appeal, was refused.
15. In regard to costs, it is trite that costs should follow the result unless there are cogent reasons why this should not be so. In the present case there are none and the applicant is therefore entitled to have costs awarded in its favour.
16. For the aforesaid reasons the Court dismissed the third respondent's application for leave to appeal, with costs, on 6 May 2003.


JUDGE Y EBRAHIM
JUDGE OF THE HIGH COURT, BISHO

26 MAY 2003

I concur


JUDGE C. S. WHITE
ACTING JUDGE PRESIDENT OF THE HIGH COURT, BISHO

26 MAY 2003