REPUBLIC OF SOUTH AFRICA

IN THE SOUTH GAUTENG HIGH COURT

(JOHANNESBURG)

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

07 June 2013

Date **Signature**

CASE NO: 17413/2013

In the matter between

STEFANUTTI STOCKS CYCAD PIPELINES JOINT VENTURE Applicant

And

RAND WATER BOARD First Respondent

T JULIUS CONSTRUCTION (PTY) LIMITED Second Respondent

FAST MOVE ELECTRICAL CC Third Respondent

MINISTER OF WATER AFFAIRS AND FORESTRY Fourth Respondent

AND **CASE NO: 17414/2013**

STEFANUTTI STOCKS (PTY) LIMITED Applicant

And

RAND WATER BOARD First Respondent

MAPITSI CIVIL WORKS AND SUPPLIERS (PTY) LIMITED Second Respondent

MINISTER OF WATER AFFAIRS AND FORESTRY Third Respondent

AND **CASE NO. 17415/2013**

STEFANUTTI STOCKS (PTY) LIMITED Applicant

And

RAND WATER BOARD First Respondent

LENONG CIVIL ENGINEERING CONTRACTORS (PTY) LIMITED Second Respondent

KING CIVILS LETTAM JOINT VENTURE Third Respondent

LUBBE CONSTRUCTION (PTY) LIMITED Fourth Respondent

MINISTER OF WATER AFFAIRS AND FORESTRY Fifth Respondent

J U D G M E N T

WEINER, J:

[1] This matter concerns 3 applications under case numbers: 17413/2013, 17414/2013 and 17415/2013. Case 17413 deals with the applicant as a joint venture being Stefanutti Stocks Cycad Pipeline's joint venture. The other 2 applications refer to Stefanutti Stocks (PTY) Ltd as the applicant.

[2] The applicants in all 3 matters seek to interdict the implementation of tenders awarded by the 1st respondent to the successful tenderer. The interdicts are sought on an interim basis and it is trite that, at this stage, the applicant has to demonstrate that they have a *prima facie* right to the relief that they seek. The relief is sought pending the outcome of review applications to be instituted by the applicants in each of the matters.

[3] In the matter in which the applicant is a joint venture, it was raised by the respondents that the joint venture did not enjoy legal capacity and standing. The applicants have argued that the joint venture has *locus standi* in that it is akin to a partnership and that a partnership always has *locus standi* in matters in which they are cited. The 2 parties to the joint venture entered into a joint venture agreement and it is apparent that the joint venture was created for a common purpose; in respect of a specific project for gain and; towards which both parties would contribute.

[4] In *Kirsch v CIR 1946 WLD 261 at 263* Malan J stated:

> *"I am of the opinion that a joint venture is merely a partnership for a particular purpose, transaction or speculation but all the essentials for a partnership must be present and that all the consequences of the partnership flow there from."*

[5] In *Bester v Van Niekerk 1960 (2) SA 779 (A) at 783 to 784* it was held as laid out in Pothier;

"*First, that each of the partners brings something into the partnership or binds themself to bring something into it, whether it be money or labour or skill. The second essential element is the business should be carried on for the joint benefit of both parties. The third is that the object must be to make a profit. Finally, the contract between the parties should be a legitimate contract. When all these 4 essentials are present, in the absence of something showing that the contract between the parties is not an agreement of partnership, the Court must come to the conclusion that it is a partnership. It makes no difference what the parties have chosen to call it, whether they call it a joint venture or letting and hiring, the Court must decide what is the real agreement between them.*"

[6] In my view, the applicants, in the case involving the joint venture, have established that the joint venture has *locus standi* in the sense referred to above.

[7] The second point raised by the respondents, in regard to the *locus standi* of the applicant, is that the applicants lack *locus standi* because they did not pass the prequalification hurdle at the tender stage. The applicant contends that this would lead to the absurdity that if the applicants wish to take a respondent on review, because of its irregular proceeding, it cannot do so because they have been excluded from a tender process by virtue of the irregular proceeding.

[8] The applicant relies on Section 6 of the Promotion of Administrative Justice Act, 3 of 2000, (PAJA) which provides in (1)

"any person may institute proceedings in a Court or tribunal for the judicial review of an administrative action."

[9] The applicant also contends that it is clearly an interested party: it submitted a tender, its tender was evaluated and it has an interest in the award of the tender. The applicant also relies on Section 38 of the South African Bill of Rights, in Chapter 2 of the Constitution, which allows anyone, either acting in their own interest or an association acting in the interest of its members to take action when it is alleged that a constitutional right has been infringed or threatened.

[10] It is the applicants' case that they seek the review and the setting aside of the decisions and the contracts to ensure that the applicants' rights are adequately protected. They also refer to the public interest in that it is taxpayers' money that is used in the payment of tenders and that this should be taken into account. The tender relates to the laying of pipelines meant to cater for the abstraction of water from barrage storage, that is river water. The tender contemplates the putting in place of infrastructure to remove pollutants from the water.

[11] The 1st respondent raised the point that this is a case in which the applicant is acting in its own interest and that, in such a case, the

applicant has to demonstrate more than in a case where the public interest is being protected. The 1st respondent made reference to the case of *Giant Concerts CC and Rinaldo Investments & Others, CCT 25/12 (2012) ZACC 28.* Cameron J delivered the judgment and dealt with cases in which the element of own interest is concerned. In that case, the applicant had never claimed to be acting on behalf of someone else who was incapacitated or as a member of/or in the interest of a group or class of persons or in the public interest. The sole interest it claimed to assert was its own which it correctly described as commercial.

[12] The learned Justice Cameron went on in paragraph 33 to state as follows:

> *"An own-interest litigant does not acquire standing from the invalidity of the challenged decision or law, but from the effect it will have on his or her interests or potential interests. He or she has standing to bring the challenge even if the decision or law is in fact valid. But the interests that confer standing to bring the challenge, and the impact the decision or law has on them, must be demonstrated."*

[34]

> *"Second, it means that an own-interest litigant may be denied standing even though the result could be that an unlawful decision stands. This is not illogical. As the Supreme Court of Appeal pointed out, standing determines solely whether this particular litigant is entitled to mount the challenge: a*

> *successful challenge to a public decision can be brought only if "the right remedy is sought by the right person in the right proceedings". To this observation one must add that the interests of justice under the Constitution may require courts to be hesitant to dispose of cases on standing alone where broader concerns of accountability and responsiveness may require investigation and determination of the merits. By corollary, there may be cases where the interests of justice or the public interest might compel a court to scrutinise action even if the applicant's standing is questionable. When the public interest cries out for relief, an applicant should not fail merely for acting in his or her own interest."*

[13] In my view, the applicant has established that it has standing to act in its own interest, in the sense that it is affected by the outcome of the tender. However, this is also a case in which the Court, even though questioning the applicants' standing, believes that the public interest cries out for relief. This view is enhanced by the fact that the 1st respondent has stated that in case 17415 it has, in fact, withdrawn the tender awarded to the 4th respondent, Lubbe Construction (PTY) Ltd, based upon certain grounds which were not revealed. It appears that the tender was not validly awarded.

[14] There is a second point that is raised, in regard to the *locus standi.* The respondents contend that the applicants have not submitted the correct documentation, thus they were excluded at the prequalification stage and, therefore, have no *locus standi.*

Many documents were referred to in this regard and the applicant has stated that it fully complied with the conditions stipulated in paragraph F 3.13.1 of the tender conditions. In addition, the applicant submitted that all the necessary documents had been duly signed and completed.

[15] The 1st respondent contended that the joint venture no longer has any standing because Clause 6 of the joint venture agreement contemplates that, on the award of the tender, the joint venture would terminate. The applicant contends that, in the case of the joint venture, it relies upon a resolution in terms of which the joint venture was authorized to do all things necessary to challenge the award of the tender. In my view, the joint venture agreement can be interpreted as allowing the joint venture to remain in existence until all processes have been exhausted in regard to the award of the tender and only then would the resolutive condition have been met.

[16] In regard to the documents which were submitted, the applicant, as stated above, contends that all of the correct documents had been submitted. The respondents contend that the applicant submitted documents relating to Cycad, and not for the present applicant in each matter, and that either Cycad should be the applicant in the interdict and review proceedings or the documentation submitted was not correct. There is also some

argument about whether the applicant had to submit income tax clearance certificates or simply be in possession of them. The applicant has submitted that where a tenderer provides a valid CIB grading certificate, a tax clearance certificate is not necessary.

[17] They also submit that only one party needs to submit the documentation, including the tax certificates, if there is a joint venture, not both. The applicant states that the 1st respondent itself, in its tender evaluation, acknowledged that the applicant in each application had complied in every material respect with the requirements imposed by the invitation to tender. They submit that this must hold good for all tender documents submitted by Stefanutti Stocks in respect of the other contracts.

[18] This, in my view, is an aspect which goes to the merits of whether or not the 1st respondent's actions are reviewable. It is not necessary at this stage to decide whether or not the material tender documents were submitted. On the papers:

18.1. There seems to be a dispute as to which particular documents needed to be submitted.

18.2. The 1st respondent appears to have accepted the documents, that were submitted, as being compliant.

18.3. This is a case, as stated above, where, even if the applicant lacks standing or even if the applicant's standing is questionable, the public interests calls for the matter to be heard.

[19] Finally, there is the point on urgency. It appears that the applicant has been seeking, from the 1st respondent, information in regard to who had been awarded the particular tenders. The applicant was compelled to approach the Court for these documents and information to be provided. The information was made available to the applicants only in the late afternoon on 14 May 2013. The respondent criticizes this in stating that the applicant knew from some time in April who the successful tenderer was. However, I do not believe that the applicant can be punished for waiting for the official confirmation from the 1st respondent before approaching the Court.

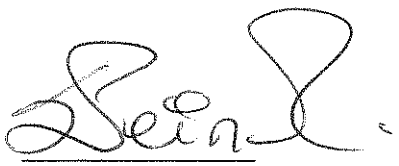
[20] From 15 May 2013, the applicants proceeded to have the application prepared and brought to Court. They launched the application on 21 May 2013 and set it down for 28 May 2013. It was served on 20 May 2013. The respondents were given until 21 May to oppose and to file its affidavit on 23 May 2013 in order that the applicant could reply by 27 May 2013. The applicant states that review proceedings are inherently of an urgent nature

and that it is apparent from the answering affidavits that the execution of the contract has not yet commenced but the commencement thereof is imminent.

[21] On the 1st respondent's version, the costs and wastage of costs will increase and escalate as the contracts progress. The applicant contends that it launched the application as quickly as possible before the commencement of the execution of the contracts. It is correct that the time that they gave the respondents to respond was very limited and that the respondents were only able to file answering affidavits on limited issues. This might have been a case where, for that reason, the applicant could be held not to have complied with the practice manual and the application might have been struck off for lack of urgency. However, I believe that this matter, being of the public interest, calls to be decided upon and a situation needs to be avoided where the review becomes meaningless and of academic interest only because the contracts are substantially executed by the time that the review application is heard.

[22] Accordingly, the following order is made:

1. The matter is urgent and should be dealt with in the urgent court.
2. The applicants' have *locus standi* to launch this application.
3. The application on the merits is postponed to 18 June 2013.
4. Any answering affidavits by any of the respondents' are to be filed by 11 June 2013 and the applicant is to file its reply by 14 June 2013.
5. Full heads of argument are to be filed by all of the parties' on 17 June 2013.
6. Costs are reserved.
7. This order is to be served on all Respondents in all three applications who were not present at the hearing.



Weiner J

Date of hearing: 27 May 2013, 31 May 2013

Date of judgment: 7 June 2013

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