



IN THE HIGH COURT OF SWAZILAND
JUDGMENT

Case No: 499/2013

In the matter between:

STEFFANUTTI STOCKS (PTY) LTD

APPLICANT

and

GOVERNMENT OF THE KINGDOM OF SWAZILAND
THE ATTORNEY GENERAL
CONSTRUCOES GABRIEL A.S. COUTO S.A.

1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT

Neutral citation : Stefanutti Stocks (Pty) Limited v Government of Swaziland,
Attorney General and Construcoes Gabriel A.S. Couto S.A.
(499/2013) [2013] SZHC 160 (26 JULY 2013)

Coram : MABUZA J

Heard : 27/6/2013

Delivered : 26/7/2013

Summary : **Interdict – Public tender – whether or not Applicant has satisfied all the requisites for an interim interdict – Grant of interdict within discretion of Court – discretion to be exercised judicially – Consequences of interdict – balance to be struck between the interests of the Applicant, the Respondents and the public at large – Considerations of pragmatism and practicality underlying decision - Interim Interdict refused – Application dismissed.**

JUDGMENT

MABUZA J

- [1] The Applicant herein seeks an interdict against the 1st Respondent from awarding or proceeding with the award of the contract or tender pending the final determination of its appeal and pending any review of the 1st Respondent's decision in respect of that appeal.
- [2] The Applicant further seeks an interdict against the 3rd Respondent from proceeding with works in respect of the contract or tender.
- [3] The Applicant is a company incorporated in the Republic of South Africa under registration number 2003/022221/07 with its principal place of business at Protec Park, Corner of Zurfontein Avenue and Orange Drive, Chloorkop, Kempton Park, South Africa.

The 1st Respondent is the Government of the Kingdom of Swaziland and the 2nd Respondent is the Attorney General of Swaziland in his representative capacity of the Government of Swaziland.

The 3rd Respondent is a company whose principal place of business is at Siphofaneni, Swaziland. It is the winner of the tender which is the subject matter of these proceedings.

[4] On the 17th of April 2012, the Government of Swaziland hereinafter referred to as the Contracting Authority) advertised a tender in the press for the upgrading of the MR 14 road at Siphofaneni and the D50 St. Philips Road, as well as the construction of the Usuthu and Mhlathuzane River Bridges. The contracting authority in the tender notice was stated to be represented by the Principal Secretary of the Ministry of Economic Planning and Development Mr. Bertram Stewart. The project is financed by the European Union (EU).

[5] Tenderers who expressed interest in tendering were given documents which constituted the tender, the principal document being Annexure DD4 of the founding affidavit. Annexure DD4 comprises of instructions which set out the rules for the submission, selection and implementation of contracts under the call for tenders in conformity with the Practical Guide to contract procedures for EU external actions which was applicable to the call for tenders in this matter.

- [6] The Applicant submitted its tender document under cover of a letter dated the 21st July 2012. The Applicant says that it fully complied with all the requirements of the tender. The Applicant's price to complete the work was the amount of EUR16,867,592.33. In paragraph 6 of the covering letter the Applicant also refers to the minutes of the clarification meeting and site visit and acknowledges receipt of the "minutes of clarification meeting and site visit".
- [7] In order to be considered eligible for the award of the contract, Tenderers had to provide evidence that they met the selection criteria outlined in section 16 of the works procurement notice. Section 16 (3) of the Works Procurement Notice read together with clause 12.2.3 of the Instruction to Tenderers (page 38 of Book of Pleadings) provides that Tenderers should have completed at least three projects with at least one in the SADC region, of the same nature/amount complexity comparable to the works concerned by the tender over the last five years which involve significant construction of earthworks, chemical stabilization of soil, bridge construction, incremental launching of bridges, bituminous paved roads and surfacing, as

evidenced by form 4.6.4 and 4.6.5 references and certificates from the relevant contracting authorities.

- [8] Clause 12 of the Instruction to Tenderers outlines the information or documents to be supplied by the Tenderer including evidence of relevant experience in execution of works of a similar nature, including the nature and value of the relevant contracts as well as works in hand and contractually committed (Form 4.6.4).
- [9] In an attempt to satisfy the requirements outlined in both the Works Procurement Notice and Clause 12.2.3 of the Instructions to Tenderers the Applicant furnished the Tender Evaluation Committee with Annexure “DD19 (of the Book of Pleadings) entitled “Experience as Contractor.” In Annexure “DD19” the Applicant purports to set out a list of contracts of a similar nature and extent performed during the past 5 years. However the information supplied in Annexure “DD19” does not reflect evidence of experience as the prime contractor in at least three projects of the same nature/amount/complexity comparable to the works concerned by the tender over the last five years which involve incremental launching of bridges as required.

[10] In a letter dated 30th August (Annexure “DD14”) the Tender Evaluation Committee sought clarity from the Applicant regarding evidence of experience as a contractor wherein incremental bridge launching was used by the Applicant. In response to the clarity sought by the Tender Evaluation Committee the Applicant furnished the Tender Evaluation Committee with Annexures “DD17.1 to “DD17.41” under cover of their letter dated 4th September 2012. The information provided in Annexure DD17.1 to DD17.41 spans over pages 68 – 108 of the Book of Pleadings and purports to consist of evidence of experience in incremental bridge launching by the Applicant.

[11] However, the information supplied in Annexures “DD17.1 to “DD17.41 was disregarded by the Tender Evaluation Committee on the basis that it was never part of the initial tender documents supplied by the Applicant. The basic rules governing the award of the contract as outlined in Clause 2.8.2 of the Practical Guide to Contract Procedure For European Union External Actions prohibits the amendment of the tender dossier so as to ensure transparency and equal treatment of Tenderers.

[12] Since Annexure “DD17.1 – “DD17.41” was never part of the tender dossier initially submitted by the Applicant, it was found to be an amendment of the initial tender dossier as the Applicant sought to supply new information instead of clarifying its experience in incremental bridge launching in light of the information contained in Annexure “DD19” that formed part of the Tender dossier it had initially submitted and was rejected by the Evaluation Committee. Consequently the only document that was left for consideration by the Evaluation Committee in respect of experience as contractor was Annexure “DD19” which has no evidence of experience in incremental bridge launching and yet this is one of the vital requirements for the award of the contract. Because of lack of evidence of experience in incremental bridge launching and the failure to attend the mandatory information meeting and site visit contrary to section 6 of the Instructions to Tenderers the applicants bid was rejected and the award to the 3rd Respondent was approved on the 26th September 2012.

[13] The Applicant feels aggrieved by the failure not to be awarded the tender and contends that it qualified to be awarded the tender because of substantive compliance with the tender requirements namely:

(a) Its representatives attended the site meeting on the 15th May 2012 this being one of the requirements. It was represented by Mr. Billy Howe of S & B Civils Roads a Division of the Applicants. Evidence of proof of attendance is the certificate which was furnished by the Contracting Party being Annexure “DD5” (at page 48 of the book of pleadings).

(b) Evidence of relevant experience in terms of Clause 12.1.9 which states:

“evidence of relevant experience in execution of works of a similar nature, including the nature and value of the relevant contracts, as well as works in hand and contractually committed (Form 4.6.4). The evidence shall include successful experience as the prime contractor in construction of at least three projects of the same nature and complexity comparable to the works concerned by the tender during the last five years;”

(c) They complied with the requirement of technical and professional capacity as required by Clauses 3, 4 and 5 of information to be supplied by the Tenderer in particular Clause 3 at page 38 of the book of pleadings which reads:

“Have completed at least 3 projects, with at least one in SADC Region, of the same nature/amount/complexity

comparable to the works concerned by the tender over the last 5 years which involve significant construction of earthworks, chemical stabilization of soil, bridge construction, incremental launching of bridges, bituminous paved roads and surfacing. As evidenced by form 4.6.4 and 4.6.5 and references and certificates from the relevant Contracting Authorities.”

- (d) When the Evaluation Committee requested them to provide further clarification in terms of Clause 21.4 which provides that

“The Contracting Authority reserves the right to ask a tenderer to clarify any part of this offer that the evaluation committee may consider necessary for the evaluation of the offer. Such requests and the responses to them must be made in writing. They may in no circumstances alter or try to change the price or content of the tender, except to correct arithmetical errors discovered by the evaluation committee when analyzing tenders.”

- (e) They complied with Clause 22.1 which deals with the examination of the administrative conformity of tenders and argue that in terms of Clause 22.2 the Evaluation Committee must evaluate only tenders considered substantially compliant in terms of Clause 22.1. Clause 22.1 states the following:

Examination of the administrative conformity of tenders

“The aim at this stage is to check that tenders comply with the requirements of the tender dossier. A tender is deemed to comply if it satisfies all the conditions, procedures and specifications in the tender dossier without substantially departing from or attaching restrictions to them.

Substantial departures or restrictions are those which affect the scope, quality or execution of the contract, differ widely from the terms of the tender dossier, limit the rights of the Contracting Authority or the tenderer’s obligations under the contract or distort competition for tenderers whose tenders do comply. **Decisions to the effect that a tender is not administratively compliant must be duly justified in the evaluation minutes**”. (My emphasis)

The evaluation committee will check that each tender:

- has been properly signed;
- includes a correct tender guarantee (if required);
- all the elements in the administrative compliance grid are acceptable;
- has complete documentation and information;

- substantially complies with the requirements of these tender documents.

If a tender does not comply with the requirements of the administrative compliance grid, it may be rejected by the evaluation committee when checking admissibility.”

- (f) They further complied with Clause 24 which is the award Criteria and which states that:

“The sole award criterion will be the price. The contract will be awarded to the lowest compliant tender”.

The Applicants contend that as the criteria was the lowest price they met this criteria being the lowest price at EUR16,867,592.33 for the whole project.

- [14] The Applicants argue that their right has been violated by the award to the 3rd Respondent which did not tender the lowest price. Consequently they wish to appeal the decision of the Contracting Party in awarding the tender to the 3rd Respondent and depending on the outcome of that appeal, they intend to file for a review should the decision of the appeal not favour them.

[15] The provision for appeal is set out in Clause 29 (at page 47 of the book of pleadings) which states:

“Tenderers believing that they have been harmed by an error or irregularity during the award process may file a complaint. See further section 2.4.15 of the Practical Guide to contract procedures for EU external actions”.

Section 2.4.15 of the Practical Guide makes provision for petitioning the Contracting Party. Once the petition has been lodged the Contracting Party must reply within 90 days of lodging of the complaint.

[16] On the 20th November 2012, the Contracting Party wrote to the Applicant and advised it that its tender was not successful for the reason that it was not considered administratively compliant as the Applicant had not included all the requested information. The letter further disclosed that the tender had been awarded to the 3rd Respondent for an amount of EUR17,571,964.47.

The letter further stated:

“Without prejudice to other legal remedies, we draw your attention to section 2.4.15 of the Practical Guide available to you in the event you

so desire to appeal against this decision. Attached to this correspondence is the original copy of your tender guarantee”.

[17] Section 2.4.15 of the Practical Guide provides as follows:

2.4.15 APPEALS

“Tenderers believing that they have been harmed by an error or irregularity during the award process may petition the Contracting Authority directly. The Contracting Authority must reply within 90 days of receipt of the complaint.”

[18] The contract awarding the tender to the 3rd Respondent was signed by it on the 2nd December 2012 and by the Contracting Party represented by the Principal Secretary Mr. Bertram Stewart on the 5th December 2012.

[19] On the 8th December 2012, the Applicant wrote to the Contracting Party wherein they communicated their intention to appeal and hereunder are excerpts of that letter (Annexure DD21)

“3. We note that the reason given is that our tender (“was not considered administratively compliant as [we] did not include all the requested information”).

4. Unfortunately, this information does not inform us of where exactly our tender was administratively non-compliant and what information in particular was not included.
6. It is our intention to formally launch an appeal in terms of section 2.4.15 of the practical guide however, we would request as a matter of extreme urgency that you furnish us with full details of the extent to which our tender was not considered administratively compliant and the information that was not included. Upon receipt of this information, we will then formally lodge our appeal.
7. In the meantime, we suggest that the award of the contract be suspended until such time as the appeal has been heard and to that extent, we await your urgent confirmation that that will be done by no later than close of business on 18 December 2012 failing which, we will have no alternative but to apply to Court on an urgent basis for an interdict stopping the award to Construcoes Gabriel A.S. Couto S.A.
8. We have copied this letter to the European Union for their information and record purposes and we look forward to your response hereto as a matter of some urgency”.

The Applicants did not receive a response to this letter.

[20] On the 20th February 2013, the Applicant again wrote to the Contracting Party (Annexure DD22). In that letter the Applicant raised a concern that the Contracting Party had not responded to its letter dated 8th December 2012. In its letter dated 20th February 2013, the Applicant noted that in terms of the provisions of the Practical Guide to Contract Procedures the 3rd Respondent had 180 days from the date of the award to commence work on the project and the 180 days ended on the 28th June 2013 and that provided enough time to deal with the appeal before the 3rd Respondent commenced with the work if only the Contracting Party would provide the necessary information and not hold up the project. Pertinent paragraphs in this letter read as follows:

“7. We have been instructed by our clients to pursue the appeal and to the extent that it is necessary, launch an application out of the High Court for an order staying the process until such time as our client’s appeal has been exhausted”.

“10. We therefore call upon your office to furnish a response to our client’s attached letter by providing the requested information by no later than the 28th of February 2012 failing which, our client will apply to Court for appropriate relief without any further notice nor delay”.

“11. All our client’s rights remain reserved”.

[21] The Contracting Party responded by letter dated 22 February 2013 (Annexure DD23). This letter addressed the Applicants concerns as follows:

“Reason why you were unsuccessful

Our letters to unsuccessful tenderers comply with the policies and practices of the funding organization, which is the European Union, which entails providing explanations according to a predetermined list of options in their template. However, we wish to elaborate that your tender was not considered administratively compliant for the following main reasons:

1. Section 12.1.9 of the Instructions to Tenderers required tenderers to provide “Evidence of relevant experience in execution of works of a similar nature, including the nature and value of the relevant contracts, as well as works in hand and contractually committed (Form 4.6.4). The evidence shall include successful experience as the prime contractor in construction of at least three projects of the same nature and complexity comparable to the works concerned by the tender during the last five years”. A major aspect of the works requires experience in incremental launching of bridges and this was outlined as a selection criterion in Section 16 of the Procurement Notice. After careful review of your tender and subsequent clarifications, the Evaluation

Committee concluded that you did not provide satisfactory evidence of this experience by the legal entity submitting the tender i.e. Stefanutti Stocks (Pty) Limited.

2. Section 6 of the Instructions to Tenderers and the Minutes of the Clarifications Meeting issued by the Contracting Authority specified that Tenderers were obliged to attend the mandatory information meeting and site visit. A site inspection certificate is issued in the name of the tenderer. As reflected in the Minutes of the Clarification Meeting, the attendance register signed by Tenderers and the second original of the Site Inspection Certificate, the mandatory information meeting and site visit was not attended by Stefanutti Stocks (Pty) Limited”.

[22] This letter further stated that the award decision was made after careful consideration of adherence by tenderers to the administrative requirements in the Instructions to Tenderers and the objective selection criteria outlined in section 6 of the Procurement Notice and that this decision was further reviewed and approved by the European Union in line with its rules and procedures, and that the awardees had satisfied all necessary criteria as a whole

[23] The Applicant upon receipt of the Contracting Party's letter dated 22 February 2013 wrote back on the 9th March 2013. In its letter the Applicant stated that they were not convinced with the explanations contained in the Contracting Party's letter of 22 February 2013, and stated that they wished to investigate the matter further. The Applicant further noted that clause 22.1 of the Instructions to Tenderers clearly stated that:

“... (decisions) to the effect that a tender is not administratively compliant must be duly justified in the valuation minutes”.

[24] Having cited the above extract, the Applicant stated that it was entitled to disclosure of all the information in respect of the evaluation and such information had to be set out in the minutes of the Evaluation Committee as set out in the extract above. The Applicant further pointed out that it required the minutes in order to pursue an appeal which it intended to lodge. The Applicant further stated:

“We call upon your ministry to advise the company which was awarded the contract, not to proceed with the works until our client has completed its appeal. In that regard, we wish to record that we are in the process of preparing an application to Court to interdict the works whilst our client is following the appeal processes as set out in the instruction to tenderers.

We await receipt of the minutes as a matter of some urgency to enable us to embark upon the appeal exercise.

All our client's rights remain reserved".

[25] The Applicant says that to date it has not received any minutes of the Evaluation Committee except a grid with regard to administrative compliance and a worksheet for technical compliance which are annexed to Mr. Stewart's answering affidavit of the 3/6/2013 as Annexure "AG2" (at pages 190 -196 of the book of pleadings). The Applicant's further complaint is that it has taken the Contracting Party three months to respond to its letter of March 2013.

[26] It is against this background that the Applicant wishes to launch its appeal and or review. The Applicant concedes that the appeal is already compromised by the opposition stance already taken by the Contracting Party through the affidavit deposed to by Mr. Stewart. The appeal would be made to and heard by Mr. Stewart who has already made adverse findings in his affidavit.

[27] The Applicant in its heads of argument summarize the reviewable reasons for the decision of the 1st Respondent's answering affidavit is as follows:

- “1. Price was not the sole award criterion but there were “a host of other factors”. It is submitted that the price was indeed the sole criterion provided there was administrative compliance.
2. The 1st Respondent repeatedly questions “the legal entity” involved in the tender whereas it was fully informed of the group identity of which the Applicant is a member. Clarification was provided to the 1st Respondent at its request and there is no justification for disqualification on this ground.
3. Information and documentation supplied in respect of Form 4.6.4 was supplied after a request by the 1st Respondent and there is accordingly no merit in the contention that the initial tender was “amended”.
4. The finding that the Applicant did not have experience in incremental launching of bridges was based on the 1st Respondent's finding with regard to the “legal entity” involved and ignores the evidence supplied. It is submitted that his finding has no merit”.

[28] It is the Applicant's submission that the decision of the Government as the Contracting Party is reviewable as an administrative decision hence the present application and that it has satisfied all the requisites of an interdict and should be granted the application.

[29] I turn now to consider whether or not the Applicant has satisfied all the requirements of an interdict. I am assisted in this regard by the submissions of Mr. Kuny S.C.

A prima facie right.

The Applicant has set out facts in its affidavit that it has a right of appeal in terms of Clause 29 of the Instructions to Tenderers. In the appeal the Applicant seeks to attack the validity of the award of the tender to the 3rd Respondent rather than to the Applicant.

[30] There is no doubt that the Applicant does have a prima facie right of appeal in terms of Clause 29 of the Instructions to tender and which right it has clearly set out in its founding affidavit. The Applicant has also established a right to petition the Contracting Party, this right appears ex-facie the tender documents.

[31] The award of the tender to the 3rd Respondent was approved on the 26th September 2012. The Contracting Party wrote to the Applicant on the 20th November 2012 informing it of its failure to win the tender and advising it of its right of appeal in terms of section 2.4.15 of the Practical Guides to Tenderers. In terms of that section the Applicant had 90 days within which to lodge its appeal from the 20th November 2012 when the decision that it had failed to win the tender was communicated to it but it failed to lodge an appeal. The Applicant says that it had asked the Contracting Party to furnish it with reasons before it could lodge an appeal. Since at that time and even to date the Applicant believes that the sole award criteria was the price and that the contract would be awarded to the lowest compliant tender, the Applicant knew that it was the lowest tender, it could have used this information to formulate its ground of appeal and even a review to this court. Once either the appeal, petition complaint or review had been lodged the Contracting Party would have had to state fuller reasons for rejecting the Applicant's tender; and in a review application in its answering affidavit. The Applicant has to date not filed an appeal nor a review.

[32] The Applicant has further shown that it has a right to the review of the Contradicting Party's decision whether after the decision of appeal or immediately to this Court in terms of section 53 of the Rules of this Court.

[33] However, it is in my view too late to lodge an appeal or a review. Any such course of action has been overtaken by events as the contract with the 3rd Respondent who is an innocent third party has been signed and works have begun. The contract which was signed and awarded to the 3rd Respondent, required it to commence work on the 2nd of April 2013 and complete the contract within 18 months from such commencement, during October 2014.

[34] Prayer 1.1 of the Applicant's Notice of Motion seeks to interdict the 1st Respondent from awarding or proceeding with the award of the contract to the 3rd Respondent. The contract was awarded to the 3rd Respondent during December 2012 after the parties thereto had signed it. The present application was unfortunately only launched during April 2013, when the proverbial horse had bolted from the stable and the *prima facie* right has been effectively incapacitated.

Irreparable harm and balance of convenience

[35] The applicant believes that it would suffer irreparable harm if the interdict is not granted because it believes that there are prospects of success on review. The Applicant has not fully stated how it would suffer irreparable harm. However it may be presumed that the irreparable harm referred to is by way of a financial loss by not having been awarded the contract and the alleged balance of convenience to itself if it is not awarded the contract.

[36] On the other hand the third Respondent after the contract was granted to it embarked on full scale preparations for commencing the work, initially by the beginning of March 2013 which date was later changed to 2 April 2013. It has to date incurred costs of approximately EUR687,173.00 and has already received an advance payment in the amount of EUR687,173.00 has been paid out. The costs amounting to EUR687,173.00 are set out in Annexure “CGC3”.

[37] The third Respondent has already employed technicians from Portugal and many workers have been engaged locally in Swaziland and are already working. Guarantees have been obtained and furnished to the Contracting Party and the necessary insurance policies have been taken out. Equipment has been acquired and other costs have been incurred. It has also established

a provision of monthly costs of EUR193,067.27 per month relating to the maintenance of the contractors establishment on site starting in May 2013 See Annexure “CG4” which is a timeline and summary of what has already taken place following the award and conclusion of the Agreement on 7th December 2012 to date.

[38] The works herein which are the subject matter of this application constitute the second phase of a road building project. Both the first and second phases are sponsored by the European Union. In the first phase, the European Union was the Contracting Authority and that tender was won and awarded to the third Respondent. The European Union is now a donor for the second phase and the Government of Swaziland is the Contracting Authority.

[39] It would seem therefore that the loss to the third Respondent compared to the Applicant would be enormous were I to grant the interdict. It is further apparent that the balance of convenience favours the third Respondent and not the Applicant. It is further clear to me that the road as pointed out by Mr. Kuny and Mr. Khuluse which the whole project relates to and its predecessor is essential for the use of sugar farmers and sugar production in

the area; sugar being Swaziland's largest agricultural export and earns a large amount of foreign currency.

[40] It is clear that the damages that the Applicant has suffered are nominal compared to those that the third Respondent would suffer were I to grant the interdict that the Applicant seeks. The Applicant's damages can be computed up to and including the lodging of the tender, Mr. Henwood and Mr. Flynn's costs up to and including this application. Any such damages the Applicant may claim by bringing a civil action in due course against the first Respondent. It is therefore incorrect for the Applicant to state that it has no other satisfactory remedy available to it.

Review and Appeal

[41] I have indicated above that an appeal to the Contracting Party seems futile and a waste of time in view of the Contracting Party's already stated position in the answering affidavit deposed to by Mr. Bertram Stewart, but Mr. Flynn preferred to have his client's options open and that his client would appeal more for form rather than substance and that the reasons furnished by the Contracting Party in dismissing the appeal would possibly found grounds for review to this Court.

[42] The first ground that that the Applicant wishes to review is the finding that the Applicant is not the same legal entity that attended the obligatory classification meeting and site visit.

[43] The Applicant says that S & B Civils is a division of the Applicant and therefore representatives from that Company who attended the site meeting represented the Applicants. This submission is denied by the Contracting Party. Authority that the citation S & B Civils is “a division of the Applicant” is not competent is found in the case of **Volkskas Bank** (in Divisie Van Absa Bank BPC) v **Pietersen** 1993 (1) SA 312 at 313 per Conradie J:

“The Court, on the return date of a provisional order of sequestration, drew attention to the fact that the citation of the applicant as ‘Volkskas Bank, a Division of Absa Bank Ltd, a registered commercial bank...’, was not competent. The Court pointed out that in our law there was no legal persona such as a division. If a company wished to allege that it carried on business under another name, then it should do so in comprehensible language, and not create the impression that the other name is a legal persona. If the ‘division’ is still a company and the expression ‘division’ is intended to refer to a

subsidiary, it should, of course, be cited as a company with a share capital or as one limited by guarantee”.

[44] The second ground is that the Applicants failed to provide clarification when asked to do so by the Evaluation Committee instead the information they furnished was new and effectively amended the tender. The Applicants wish to review this finding & say that the information they supplied (Annexures 17.1 – 17.41) was for clarification purposes as requested which information relates to their experience as a contractor. A perusal of the information supplied in Annexures 17.1 – 17.41 reveals for example that item 17.29 which is a picture of King Shaka Bridge does not refer to any experience as a contractor as required by Form 4.6.4. It is new information which was not in the initial documents submitted with the Applicants tender. The bridge K109 over N1, Gauteng shown at Annexure 17.30 is not reflected in their Annexure “DD17.1 which details their experience in bridge incremental launching. All of the bridges shown do not appear on Annexure DD 17.1. The information above was furnished long after the details of the tender were supplied. In fact Annexure DD 17.1 referred to above was signed on the 4th September 2012. This would mean that the Applicant took advantage of the request for clarification by the Evaluation Committee and submitted documents that had nothing to do with the tender. The tenders were

considered during August 2012 as reflected in Annexure “AG1”, is a worksheet drawn up by the Evaluation Committee and has a brief description of the tenders considered by it. Column 8 thereof shows that the Committee did consider the information initially supplied by the Applicant. With respect to the Applicant that column says:

“Evidence of relevant experience in execution of works of a similar nature including the nature and value of the relevant contracts, as well as works in hand and contractually committed. The evidence shall include successful experience as the prime contractor in construction of at least three projects of the same nature and complexity comparable to the works concerned by the tender during the last five years”.

The Evaluation Committee concluded as follows:

“YES FOR ROAD EXPERIENCE HOWEVER FOR BRIDGE INCREMENTAL LAUNCHING EXPERIENCE: 1) THE BRIDGES IDENTIFIED UPON CLARIFICATION DO NOT MATCH THE ORIGINAL FORM 4.6.4 AND THEREFORE NOT CONSIDERED: 2) ARE BY ENTITIES (STOCKS CIVILS KZN AND STEFANUTTI CIVILS) WHICH ARE OUTSIDE THE STEFANNUTI STOCKS (PTY) LTD LEGAL ENTITY THOUGH PART OF THE HOLDING COMPANY. THIS ALSO APPLIES TO THE K109 WHICH UPON CLARIFICATION WAS COMPLETED OUTSIDE THE LAST 5 YEARS”.

Discretionary nature of remedy

[45] This Court has a discretion whether or not to grant an interdict which is to be exercised judicially upon consideration of all the facts: In **Olympic Passenger Service (Pty) Ltd v Ramlagan** 1957 (2) S.A. 382 at 382 Holmes J said:

“It thus appears that where the applicant’s right is clear, and the other requisites are present, no difficulty presents itself about granting an interdict. At the other end of the scale, where his prospects of ultimate success are nil, obviously the Court will refuse an interdict. Between those two extremes fall the intermediate cases in which, on the papers as a whole, the applicant’s prospects of ultimate success may range all the way from strong to weak. The expression “prima facie established though open to some doubt” seems to me a brilliantly apt classification of these cases. In such cases, upon proof of a well grounded apprehension of irreparable harm, and there being no adequate ordinary remedy, the Court may grant an interdict – it has a discretion, to be exercised judicially upon a consideration of all the facts. Usually this will resolve itself into a nice consideration of the prospects of success and the balance of convenience – the stronger the prospects of success, the less need for such balance to favour the applicant: the weaker the prospects of success, the greater the need for the balance of convenience to favour him. I need hardly add that by balance of convenience is meant the prejudice to the applicant if the interdict be refused, weighed against the prejudice to the respondent if it be granted”.

[46] It is also trite that the Applicant bears the onus not only of persuading the court that it is entitled to an interdict, but also in any subsequent proceedings of persuading the court, not only that the award of the tender to the third respondent was irregular, but that the award of the tender should be set aside. The Applicant bears a very heavy onus in this regard and it is one which it is unlikely to discharge.

[47] In exercising its discretion the court must inter alia consider the prejudice that would be caused if an interdict is withheld, against the prejudice that would be caused to the respondents, if it is granted. This is sometimes referred to as the balance of convenience. See **Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton, and Another** 1973 (3) SA 685 (A) at 691C –G:

“The granting of an interim interdict pending an action is an extraordinary remedy within the discretion of the Court. Where the right which it is sought to protect is not clear, the Court’s approach in the matter of an interim interdict was lucidity laid down by Innes, J.A., in **Setlogelo v Setlogelo**, 1914 A. D. 221 at p. 227. In general the requisites are –

- (a) a right which, “though prima facie established, is open to some doubt”;
- (b) a well grounded apprehension of irreparable injury;
- (c) the absence of ordinary remedy.

In exercising its discretion the Court weighs, inter alia, the prejudice to the applicant, if the interdict is withheld, against the prejudice to the respondent if it is granted. This is sometimes called the balance of convenience.

The foregoing considerations are not individually decisive, but are interrelated; for example, the stronger the applicant’s prospects of success the less his need to rely on prejudice to himself. Conversely, the more the element of “some doubt”, the greater the need for the other factors to favour him. The Court considers the affidavits as a whole, and the interrelation of the foregoing considerations, according to the facts and probabilities; see *Olympic Passenger Service (Pty.) Ltd. v Ramlagan*, 1957 (2) S.A. 382 (D) at p. 383 D-G. Viewed in that light, the reference to a right which, “though prima facie established, is open to some doubt” is apt, flexible and practical, and needs no further elaboration”.

The facts in *casu* demonstrate that far greater prejudice will be caused if an interdict were granted, measured against the prejudice if an interdict is not granted.

[48] The “prejudice” that would be caused by the granting of an interdict must be considered not only in relation to the harm that would be caused to the third Respondent (which will be great) but also generally to the community and the economy of Swaziland. The social and economic consequences of interdicting the construction of bridges and roads which facilitate the transportation of farming produce (and in this instance sugar and sugar cane), more cost effectively have already been dealt with above. The importance of the project is not disputed by the Applicant and it can accordingly be accepted that the parties agree that construction which is presently underway has important benefits for the economy of Swaziland and is in the public interest.

[49] Since the decision in **Oudekraal Estates (Pty) Ltd v City of Cape Town and Others** 2004 (6) SA 222 (SCA) it has become a trite principle that administrative action in respect of which an irregularity is alleged (which could vitiate such administrative action), exists in fact and it has legal consequences that cannot simply be overlooked and, such administrative action remains valid until set aside. The court has a discretion in this regard which the court in *Oudekraal* expressed at para [36] at 246D as follows:

“It is that discretion that accords to judicial review its essential and pivotal role in administrative law, for it constitutes the indispensable moderating tool for avoiding or minimizing injustice when legality and certainty collide”.

[50] It has been firmly established in decisions of the Supreme Court of Appeal in South African that in appropriate circumstances a court will decline to set aside tender proceedings, even when there has been a flaw in the process by which the decision to award a tender is arrived at. See **Moseme Road Construction CC and Others v King Civil Engineering Contractors (Pty) Ltd and Another** 2010 (4) SA 359 (SCA), **Chairperson, Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others** 2008 (2) SA 638 (SCA), **Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency**, unreported, referred to as [2012] ZAGPPHC 185, 28 August 2012 available on line – <http://www.saflii.org/ZA/cases/ZAGPPHC/2012/185>. **Millenium Waste Management v Chairperson, Tender Board-Limpopo Province & Others**, 2008 (2) SA 481 (SCA).

[51] In **Millenium Waste Management v Chairperson, Tender Board-Limpopo Province & Others** at paragraph 23 the court said:

“To set aside the decision to accept the tender, with the effect that the contract is rendered void from the outset, can have catastrophic consequences for an innocent tenderer, and adverse consequences for the public at large in whose interests the administrative body or official purported to act. Those interests must be carefully weighed against those of the disappointed tenderer if an order is to be made that is just and equitable”.

[52] In **Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency** (an as yet unreported decision) the Supreme Court of Appeal in South Africa found that while the award of a tender was invalid, it should nevertheless not be set aside. In coming to its conclusion the court held at [19]:

“Public procurement is not a mere showering of public largesse on commercial enterprises. It is the acquisition of goods and services for the benefit of the public. What is under attack in this case is SASSA’s performance of that duty on behalf of the public. The interests of SASSA and those of the public are as material to this case as those of Allpay and CPS. When making any value judgments that might be required in this case those interests must also be brought to account.”
[Underlining added]

[53] It has also been said that the public has an interest in the finality of administrative decision and the exercise of administrative functions, and that considerations of pragmatism and practicality might in appropriate cases compel the court to exercise its discretion to decline to set aside an invalid administrative act. See **Chairperson, Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others** (supra) at para [28].

[54] Even if it can be shown that there is an irregularity in the tender process and therefore a possible right to review same, it does not necessarily follow that a declaration of invalidity of a tender award will follow. A court will consider the issues in conjunction with a range of other facts including the wider consequences of its decision. It is submitted in *casu* that considerations of pragmatism and practicality are particularly relevant in the exercise of the court's discretion. The setting aside of the tender award without doubt will have extremely adverse and severely prejudicial consequences not only for the third Respondent, who is an innocent party, but also for the public at large. See **Moseme Road Construction CC and Others v King Civil Engineering Contractors (Pty) Ltd and Another** 2010 (4) SA 359 (SCA).

[55] In *casu* the third Respondent has demonstrated extreme prejudice that it will suffer should the Court grant the interdict sought namely:

- “1. Work on the project commenced on 2 April 2013, and it has accordingly already been underway for some 3 months.
2. the third Respondent has incurred substantial costs (687 173 Euros) in respect of the project.
3. technicians have been employed, equipment has been acquired, guarantees have been furnished and insurance policies taken out.
4. the third Respondent has received an advance payment of 1 757 100 Euros and has established a provision of monthly costs of 193 067 Euros relating to the maintenance of third respondent’s establishment on site.”

[56] As regards the public considerations the third Respondent has shown that:

- “1. Many workers have been engaged locally in Swaziland on the project, and they stand to lose their jobs if an interdict were granted.
2. The road to which the project relates is essential for the use of sugar farms and sugar production in the region.
3. Sugar in Swaziland’s largest agricultural export, a substantial earner of foreign currency and it accounts for a large percentage of the employment sector. The completion of the project will undoubtedly be very substantially delayed, if not permanently thwarted, if an interdict were granted and this will have a deleterious effect on the economy.
4. Delays will result in huge logistical problems in the completion of the project and inevitably cause cost escalations well beyond the present contract price.”

[57] A final consideration to be taken into account is the length of time it will take to process the appeal to the Contracting Party, the review to this Court and a possible appeal to the Supreme Court depending on the outcome of the review in the High Court. Mr. Flynn seems to think that it will take an inordinately short time to accomplish all the above. But we all know that is quite impossible a feat to accomplish in record time. Furthermore there is no guarantee that at the end of it all the tender will be awarded to the

Applicant. In the meantime the ongoing road building and construction work in which the third Respondent is engaged in will in effect be put to a stop. Mr. Kuny is correct that the interdict if granted will have a permanent effect which would be disastrous for the country as a whole.

[58] I do not think it is necessary to set out further reasons why the application for appeal and or subsequent review could not possibly succeed; I do not think that there are prospects of success whichever course of action the Applicant wishes to pursue.

[59] In all the circumstances and due considerations of pragmatism and practicality in the exercise of my discretion and the extreme prejudice likely to be caused were the Court to grant the interdict sought, the application is refused and dismissed with costs. Costs to include those of two counsel for the third Respondent in terms of Rule 68 (2) of the High Court Rules.

Q.M. MABUZA
JUDGE OF THE HIGH COURT

For the Applicant : Mr. P. Flynn; instructed by Mr. Henwood.
For the 1st & 2nd Respondent : Mr. S. Khuluse
For the 3rd Respondent : Mr. D.A. Kuny S.C.; with Mr. S. Kuny
Instructed by Mr. L. Mamba