IN THE SUPREME COURT OF SWAZILAND

HELD AT MBABANE

Civ. App. No. 52/2013

In the matter between:

STEFANUTTI STOCKS (PTY) LIMITED		**Appellant**
And		
GOVERNMENT OF THE KINGDOM OF SWAZILAND	**1st**	**Respondent**
ATTORNEY GENERAL	**2nd**	**Respondent**
CONSTRUCOES GABRIEL A.S. COUTO S.A.	**3rd**	**Respondent**

Neutral citation: ***Stefanutti Stocks (Pty) Limited v Government of the Kingdom of Swaziland & 2 Others (52/2013) [2013] SZSC 64 (29 November 2013)***

Coram: **A. M. EBRAHIM JA, E. A. OTA JA and LEVINSOHN JA**

Heard: **12 November 2013**

Delivered: **29 November 2013**

JUDGMENT

LEVINSOHN JA

Summary: **Application for an interim interdict dismissed with costs-Applicant in court a quo applying in terms of Rule 9(1) for leave to appeal against cost order only – asserting that court a quo should have made a special order against the 1st respondent one of the successful parties Application dismissed..**

[1] For ease of reference and for convenience I shall refer to the parties to this appeal by their respective designations in the court a quo.

[2] On the 2nd April 2013 the applicant launched motion proceedings citing the respective respondents wherein it sought an interim interdict restraining the 1st respondent from awarding a contract for the performance of certain works described as "upgrading of MR14 at Siphofaneni, Usutu River Bridge and Mhlatuzane River Bridge to the 3rd respondent.

[3] The applicant's case as it emerged from the founding affidavit was in broad outline as follows.

[4] On 17th April 2012 a works procurement notice appeared in the press inviting tenders for the performance of the above mentioned works. The applicant obtained the necessary tender documents. These set forth the instructions and rules pertaining to the submission of tenders. In terms of

these all persons intending to submit a bid were required to attend a site meeting and intending tenderers would receive a certificate testifying to the fact that they had attended.

[5] The instructions to tenderers detailed the various documents that were to be supplied as well as setting forth information regarding the tenderers' qualifications and experience and in particular experience as the prime contractor in the construction of at least three projects of the same nature and complexity comparable to the present project. The said instructions emphasised that a submitted tender was deemed to comply if it satisfied all the conditions, procedures and specifications in the tender dossier.

[6] Clause 24 of the said instructions provided that the sole award criterion would be the price and the contract would be awarded to the lowest compliant tender.

[7] The applicant avers that in a document described as "Practical Guide" the contracting authority is required to write a standard letter to those tenderers whose tenders are judged to be not administratively compliant. This letter is to set forth reasons why the tender was not administratively compliant.

[8] The applicant submitted its tender document on 21st July 2012.By letter dated 20th November 2012 the applicant was informed that its tender was not successful for the reason that it was not considered administratively compliant inasmuch as the applicant did not include all the requested information. The letter also informed the applicant that the 3rd respondent had won the bid –its tender price being EUR 17,571,964.47.

Significantly, this was some EUR 704372.14 more than the applicant's tender price.

[9] The applicant replied to this letter on 18th December 2012. It noted that the 1st respondent had not provided it with reasons as to why the tender document was non compliant. The applicant recorded as follows:

> "*6. It is our intention to 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.*
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> *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.*"

[10] The applicant received a reply to this letter some two months later-on 22nd February 2013.In that letter the 1st respondent set out reasons why the bid was unsuccessful. Reference was made inter alia to the applicant's lack of experience in the construction of works of a similar

nature. It was also averred that the present applicant had not attended the site meeting-a necessary administrative requirement.

[11] On the 7th March the applicant replied to the above letter. It called upon the 1st respondent to produce the minutes of the evaluation committee.

[12] Some three and a half weeks later on 3rd April the applicant launched an application in which it cited the three respondents. It sought an interdict restraining the 1st respondent from awarding the contract to the 3rd respondent and correspondingly the 3rd respondent from proceeding with the works.

[13] The 3rd respondent opposed the application and delivered an answering affidavit. . The 3rd respondent's contentions centred mainly around the issue of the balance of convenience or prejudice. It averred that such balance was clearly in its favour. It pointed to the various costs incurred in preparing to implement the works and indicating the adverse effect that a delay in implementing the contract would have In short, its case was that the court ought to refuse an interim interdict.

[14] Initially the 1st respondent did not deliver an opposing affidavit. Somewhat belatedly, on 3rd June 2013 it did so. The 3rd respondent's principal contention was that the applicant had not complied with the stipulated tender requirements. It is unnecessary in this summary to traverse these allegations. In answer to the applicant's contention that it was entitled to have sight of the evaluation minutes the 1st respondent pointed out that the information justifying the decision of the evaluation committee was contained on a worksheet which it annexed as "AG1"

[15] On 27th June 2013 the application came before Mabuza J in the court a quo. In a well reasoned judgment the learned judge concluded that the applicant had not made out a case for an interim interdict and dismissed the application with cost. With respect, in my view, that conclusion was unanswerable –more particularly in regard to the balance of convenience which had tilted decisively in favour of the 3rd respondent.

[16] The applicant in the proceedings before us does not seek to challenge the court a quo's refusal to grant an interdict. It has however moved this court for leave to appeal in terms of Rule 9(1) of the rules of this Court against the court a quo's costs order.

[17] The applicant's principal submission is that the court in the exercise of its discretion in awarding costs should have made a special order against the 1st respondent. The rationale for this was as follows. The 1st respondent ought at an earlier stage to have put up the evaluation committees' worksheet giving the full reasons for its decision to reject the tender. Its failure to do so timeously prejudiced the applicant. It was effectively disabled at an early stage from seeking remedies and redress by way of appeal or review. In the result this was a case where the court ought to have departed from the usual rule namely that a successful party gets its costs. Its displeasure at the 1st respondent's conduct ought to have been reflected in an order that it to bear the costs or some portion thereof.

[18] There is no indication in the learned judge's judgment that this point was raised before her. Mr. Flynn, who appears for the applicant before us, conceded that the issue was not expressly raised. It seems to me at the outset that this feature presents the applicant with an insurmountable hurdle. The applicant had sought an interdict against the 1st respondent. The learned

judge concluded that a case had not been made out and refused the relief. On any footing the 1st respondent was manifestly the successful party and inevitably costs would follow the result. It is only in very special circumstances that a court would depart from course. I venture to suggest that those alleged special circumstances should have been raised before the court a quo and the learned judge in the exercise of the discretion which she undoubtedly has would have pronounced on the issue. A court of appeal would then have been in a position to test whether the said discretion had been judicially exercised or not. It seems to me that it is not open to us as an appellate tribunal or in fairness to the court a quo, to revisit this issue as if we are now sitting at first instance.

[19] In any event, even on the assumption that we were entitled to consider the point, I would have ruled that a case had not been made out for any special order. In my opinion the chronology of events summarised above indicates that the applicant did not display the necessary vigilance in pursuing its cause. It seems to me that the applicant, who in December 2012 had threatened an urgent application, simply delayed doing anything. Its assertion that it needed information from the 1st respondent to consider its position is in my opinion simply a red herring. It clearly took the view that there had been compliance with the tender procedure. It could have made these allegations in support of an interim or temporary interdict at a very early stage before the balance of convenience shifted decisively away from it. In that application a court would have weighed its allegations against those made by the respective respondents to determine whether the applicant had made out a prima facie case though open to some doubt. In any event in its letter dated 22nd February 2013 the 1st respondent did provide full information and reasons for the rejection. On a conspectus of all the

evidence on record I am satisfied no special circumstances were shown to exist that would justify a special order as to costs.

[20] In the result the application in terms of Rule 9(1) is dismissed with costs.

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P. LEVINSOHN

JUSTICE OF APPEAL

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I agree **A. M. EBRAHIM**
JUSTICE OF APPEAL

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I agree **E. A. OTA**
JUSTICE OF APPEAL

For the Appellant: **Mr. E. J. Henwood**

For the Respondents: **Mr. L. R. Mamba**