REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 75 OF 2015

RUHRPUMPEN GLOBAL LIMITED…….....PLAINTIFF

VERSUS

ZAKHEM INTERNATIONAL CONSTRUCTION LIMITED……1ST DEFENDANT

KENYA PIPELINE COMPANY LIMITED……..…….....2ND DEFENDANT

RULING NO. 2

1. The plaintiff filed a Chamber Summons on 24th February 2015, pursuant to Sections 1A, 1B and 3A of the Civil Procedure Act, as read together with Order 40 Rules 1 and 2, and Order 51 of the Civil Procedure Rules.

2. The application was filed under a Certificate of Urgency, and it sought the following reliefs;

> *"1. **THAT** this application herein be certified urgent and heard ex-parte in the first instance.*
>
> *2. **THAT** pending the hearing and determination of the application herein the Honourable Court be pleased to issue an interim injunction restraining the Respondents either jointly or severally or through their agents and or servants or any person claiming under or through them; from conducting, facilitating any evaluation or accepting any bid other than the bid by the Plaintiff with regard to the supply of booster and mainline pumps.*
>
> *3. **THAT** the Honourable Court be pleased to issue a temporary injunction restraining the Respondents either jointly or severally or through their agents and or servants or any person claiming under or through them; from signing, executing or concluding any agreement or contract with any party, individual and or company regarding the supply of booster and mainline pumps pending the hearing and final determination of the suit herein.*
>
> *4. **THAT** the Honourable Court be pleased to issue any other and further orders that it considers appropriate.*
>
> *5. **THAT** Costs be in the cause"*

3. The brief history behind the substantive claim which the plaintiff lodged against the Defendants, as well as in respect to the application for the interlocutory injunctive relief, can be traced to the decision by the **KENYA PIPELINE COMPANY LIMITED** to replace the pipeline between Nairobi and Mombasa.

4. An audit commissioned by the Kenya Pipeline Company Limited had revealed the need to address the concerns relating to safety and reliability of the current pipeline, which ferries petroleum products.

5. Secondly, it was clear that the demand for petroleum products in Kenya and within the East African Region exceeded the quantum which was being ferried through the existing pipeline.

6. After conducting a vigorous tendering process, Kenya Pipeline Company Limited awarded to **ZAKHEM INTERNATIONAL CONSTRUCTION LIMITED** the Main Contract. It was an express term of the Main Contract that Zakhem would obtain materials for the project, from manufacturers picked from the Kenya Pipeline Company Limited's *("KPC's")* List of Approved **MANUFACTURERS.**

7. Among the items required for the Main Contract were **BOOSTER** and **MAINLINE PUMPS.** Those two components were essential and critical, for they are the ones that would drive the petroleum products from Mombasa to Nairobi.

8. Therefore the end-user of the pipeline was keen to ensure that Zakhem procured the correct quality of the two kinds of pumps.

9. On or about 22nd June 2014, Zakhem submitted an inquiry to **RUHRPUMPEN GLOBAL LIMITED** (hereinafter ***"RUHRPUMPEN")*** in respect to;

a) Submerged pumps;

b) Booster pumps;

c) Main-line pumps; and

d) Other kinds of equipment.

10. It is common ground between all the 3 parties to this application that the inquiry was not limited to **RUHRPUMPEN.** Other potential suppliers were also asked to place their bids.

11. It is common ground that Zakhem received bids from the following 3 bidders;

i) Flowserve;

ii) Ebara Corporation; and

iii) Ruhrpumpen.

12. Both Flowserve and Ebara Corporation later abandoned their bids, leaving Ruhrpumpen as the sole bidder.

13. As the plaintiff was then the sole bidder, they expected the Defendants to enter into a contract with them.

14. However, the KPC declined the plaintiff's bid.

15. According to Ruhrpumpen, their bid was rejected on the grounds that they were not on the list of approved manufacturers. The list in question was maintained by KPC.

16. The plaintiff's position was that KPC was clearly wrong to assert that Ruhrpumpen was not on their list of approved manufacturers. Therefore, the plaintiff was convinced that the decision by KPC's Managing Director, to reject the plaintiff, was without basis, onerous and oppressive to Ruhrpumpen.

17. The plaintiff submitted that the decision made by **KPC** constituted a subversion of the legitimate expectation of the plaintiff.

18. Furthemore, the decision by **KPC** was seen as the intention of KPC to precipitate the breach of the contract between Zakhem and Ruhrpumpen.

19. As far as the plaintiff was concerned, the Managing Director of KPC was hell bent on ensuring that the contract for the supply of Booster pumps and of mainline pumps was awarded to Ebara Corporation.

20. The plaintiff therefore filed suit against the defendants seeking the following reliefs;

> *"a) A declaration that there exists a contract between the Plaintiff and the Defendants for the supply of booster and mainline pumps.*
>
> *b) A permanent injunction restraining the 1st Defendant from breaching the contract between itself and the plaintiff and further restraining the 2nd Defendant, in particular the Managing Director, from inducing breach of contract.*
>
> *c) A declaration that the decision of the 2nd Defendant's Managing Director and his calculated induce of bleach (sic!) of contract in refusing to accept the bid of the plaintiff was unfounded, illegal and oppressive.*
>
> *d) Costs of the suit".*

21. When the plaintiff was canvassing the application for an interlocutory injunction, it submitted that there was a contract between the plaintiff and Zakhem. The said contract was said to be binding on both Zakhem and **KPC.**

22. If KPC was permitted to induce Zakhem to breach the contract, the plaintiff would suffer irreparable loss.

23. Ruhrpumpen was therefore asking the court to stop Zakhem from breaching the contract, and KPC from inducing Zakhem to breach the contract.

24. Ruhrpumpen reasoned that they had demonstrated a *prima facie* case through putting forward a case which raised triable issues. The plaintiff submitted that the issues they raised ought to be investigated at the trial of the main suit, because the said issues were neither frivolous nor vexatious.

25. The first issue which the plaintiff alluded to was that there was a contract between the plaintiff and the 1st Respondent, Zakhem.

26. The genesis of the contract was traced back to 22nd June 2014, when Zakhem sent out an invitation for offers in respect to the supply of submerged pumps, booster pumps and main line pumps.

27. Ruhrpumpen sent its offer to Zakhem, and the said offer was received. However, Zakhem requested Ruhrpumpen to revise the offer, so that the offer could be within *"the mentioned"* range.

28. On 26th August 2014 the plaintiff sent a revised offer to Zakhem. It was the submission of Ruhrpumpen that;

> *"The revised offers were stated in the email based on the representation by the 1st*

Respondent that the Applicant would in no uncertain terms get the contract".

29. Presuming that Zakhem had made a representation to Ruhrpumpen that the revised offer would have been accepted by Zakhem, it would, in my considered opinion, imply that as soon as Ruhrpumpen presented the revised offer to Zakhem, it would be accepted.

30. However, that was not to be. Ruhrpumpen went on to state, at paragraph 27 of its submissions, as follows;

> *"The 1st Respondent further requested for a more revised offer from the Applicant and this was communicated by the 1st Respondent in an email by Nicole Zakhem for the 1st Respondent".*

31. Clearly therefore, Ruhrpumpen was mistaken when it had thought that Zakhem had committed itself to accepting the revised offer.

32. Nonetheless, when Zakhem requested for a more revised offer, Ruhrpumpen provided it. By sending a more revised offer, Ruhrpumpen was acknowledging that the earlier offer had not been accepted.

33. Zakhem's response to the further revised offer was by an email dated 12th September 2014, in which Zakhem said the following to Ruhrpumpen;

> *"Dear Mr. Moreira,*
>
> *Reference our phone conversation and emails exchange; please be advised that we anticipate to carry out a final audit with you before the end of the month as we have sent our preliminary recommendation to the client.*
>
> *(I am expecting the **USD 376,990** of discount after final negotiations with you before month ending).*
>
> *We hope that the Client does not have any serious clarifications regarding the technical submissions…"*

34. In the opinion of the plaintiff, the revised offer was duly accepted. However, even the plaintiff did acknowledge the following, in its submissions at paragraph 29;

> *"The Applicant's revised offer to the 1st Respondent was duly accepted and parties planned to have a meeting to agree on the final terms of the contract".*

35. On a prima *facie basis,* when parties are yet to agree on the final terms of a contract, there would not yet be a contract in place.

36. But then the plaintiff pointed out that on 25th September 2014, there was a communication indicating that the revised offer had been accepted.

37. A perusal of that email shows that it was written by Moreira, to Nicole Zakhem. This is what was said;

> *"Dear Nicole,*
>
> *We acknowledge receipt of your email and thank you for accepting our revised offers. As discussed in our telecom, we would appreciate to meet you and Zakhem management either in Beirut or Nairobi to discuss your request and the way forward".*

38. The communication from the plaintiff cannot, on a *prima facie* basis, constitute an acceptance by Zakhem.

39. On the other hand, it cannot be denied that on 12th September 2014, Zakhem had told Ruhrpumpen that the Consulting Engineer had approved the plaintiff's complete presentation. But in that very same communication, Zakhem informed Ruhrpumpen that;

> *"Regrettably, KPC management disapproved our request. In the circumstances, there is nothing we could do to change the decision".*

40. The fact that **KPC** disapproved the revised offer appears to have been appreciated by Ruhrpumpen, as the plaintiff cited at paragraph 38 of the written submissions, when it quoted the following words from annexture *"RM5";*

> *"Flowserve, named as **KPC's** preferred vendor was requested to update and validate their offer. However, they declined our request due to reasons which were duly communicated to you in time. Subsequently and pursuant to your recommendation, we approached Ebara Corporation, whose Agent in Kenya had hiked the prices beyond any acceptable level due to undisclosed reasons. As a consequence we seized (sic!) negotiations with the agent and demanded to deal with the vendor. Regrettably our request was declined. Then we approached the third vendor, Ruhrpumpen who were responsive and which we recommended and has been disapproved".*

41. Zakhem had recommended the applicant, but their recommendation was disapproved.

42. From my reading of that email coupled with the earlier one, in which Zakhem had told Ruhrpumpen that it had sent its preliminary recommendation to the Client, it would appear, on a *prima facie* basis, that all along, Zakhem had made it known to Ruhrpumpen that the final decision on who was to be awarded the contract was the Client, **KPC.**

43. Having recommended Ruhrpumpen to the Client, Zakhem expressed the hope that the client would not have any serious clarifications regarding the technical submissions.

44. Ruhrpumpen may have remained as the only vendor, because, in its view, it had no worthy competitor, but that was not necessarily an automatic conclusion that the plaintiff had clinched the contract.

45. The second issue raised by the plaintiff was in relation to the Clients List of Approved manufacturers. The plaintiff said that it was on the list of Approved manufacturers. However, the defendants deny that assertion.

46. At that stage, the plaintiff pointed out that;

> *"41. In the instant case, the Applicant through its Representatives, Rhine Ruhr Limited which is on the list of approved manufacturers by the 2nd Respondent, sent offers to the 1st Respondent".*

47. Of course, the parties do not agree on the question, which ought to be so straight forward. Ruhrpumpen was either on the list or it was not.

48. It does appear to me that Ruhrpumpen is acknowledging that its name does not appear on **K P C's** list of approved manufacturers. But **RHINE RUHR LIMITED** was on that list.

49. Assuming that Rhine Ruhr Limited was an agent of **RUHRPUMPEN,** as submitted by the plaintiff, the court would still need to interrogate the question as to whether or not that meant that the plaintiff was on that list.

50. But, in the meantime, and in the literal sense, it would appear that the plaintiff was not on the 2nd defendant's list of approved manufacturers. The onus will thus be upon the plaintiff to later prove that it was on the said list.

51. I am alive to the fact that Zakhem expressly stated that the recommended vendor was included in the list of **KPC** renowned manufacturers. That statement may assist the plaintiff. But that alone may not be conclusive, if indeed the plaintiff was not on **KPC's** list of approved manufacturers.

52. The plaintiff submitted that it had a contract with Zakhem.

53. The plaintiff believed that the Managing Director of **KPC** had no role in the approval, if any, of the plaintiff as the supplier of the Booster Pumps and the mainline pumps. If any such approval was necessary, the plaintiff believes that that role could only have been played by the engineers of **KPC.**

54. The plaintiff emphasized that the materials it was offering to the project were of a quality that was more superior than had been offered by the competition. For instance, the pumps were flame proof, whilst those offered by Ebara Corporation were said to be susceptible to fires.

55. Of course, if **KPC** were to choose materials or equipment which were susceptible to fires, whilst rejecting materials and equipment which were flame proof, that would constitute an action which was against public interest.

56. Therefore, whatever **KPC** does or will do, the people of Kenya and all persons who live in or visit this great country expect that such actions will be in tandem with their expectations and aspirations.

57. Selfish motives and actions which had the potential of being detrimental to the people or to their property cannot be in the interests of the public.

58. But it is not the role of the court to choose for **KPC** the person or persons who have the best quality or most efficient equipment or materials. This court does not have the expertise to establish the best-suited supplier.

59. The process of choosing the best-suited supplier must be left to be determined through the systems and procedures which govern procurement.

60. In this case, I find that the plaintiff has not demonstrated that, on a *prima facie* basis, it has a contract with the Defendants.

61. It does appear to me that the plaintiff may have had good reasons for believing that the 1st defendant would give the contract to it. I say so because the only other 2 bidders appear to have abandoned their quest.

62. But it also appears that both Zakhem and Ruhrpumpen were well aware that **KPC** had the final say.

63. The job which was to be done was that of replacing the pipeline from Mombasa to Nairobi. The end-user of that project was **KPC.** Therefore, whatever the plaintiff was to supply, if they were awarded the contract, was for use on that pipeline. Therefore, there cannot have been any contract between Zakhem and Ruhrpumpen, which was independent of **KPC.**

64. On a prima facie basis, the involvement of **KPC** did not appear to constitute an interference by a third party. KPC appears to have had an important role in the whole contract.

65. The plaintiff has not suggested that there was any contract between it and **KPC.** The only claim against **KPC** was that **KPC** had, through its Managing Director, induced Zakhem to breach the contract with Ruhrpumpen.

66. On a *prima facie* basis, I find that the plaintiff has not established any such inducement. At most, **KPC** could be said to have rejected the recommendations made by Zakhem.

67. It has not been shown that **KPC** had an obligation to accept the recommendations made by Zakhem. Indeed, Zakhem appears to have made it known to Ruhrpumpen that the final decision rested with **KPC.**

68. The plaintiff prayed to this court to stop the defendants from;

> *"Conducting, facilitating any evaluation or accepting any bid other than the bid by the plaintiff, with regard to the supply of booster and mainline pumps".*

69. To my mind, that is a manifest demonstration by the plaintiff that what it had put forth was a bid.

70. In effect, the prayer in the application is inconsistent with the plaintiff's contention that there was already a contract in place.

71. If the process had only got to the stage where there were bids, there does not appear to be a basis upon which the plaintiff can then have acquired a legal right, which would then be amenable to protection through an injunction.

72. On the issue of irreparable loss or injury to the plaintiff, I find that the plaintiff has quantified the materials and equipment which it would have provided to the project. Presumably, the plaintiff would have made a profit from that whole process.

73. If the plaintiff was to ultimately succeed in its substantive claim, I find no reason why it should pose an insurmountable hurdle to quantify the loss which the plaintiff would have suffered. In other words, the plaintiff has not established that if the interim injunction was not granted, it would suffer losses that could neither be quantified nor paid by the defendants.

74. Loss of profits can be addressed by an award of appropriate damages.

75. On the issue of Balance of Convenience, I find that it favours the continuation of the project, rather than putting a stop to it. I so find because, if there were no other bidders left, after the plaintiff's competitors withdrew, and if the plaintiff was not awarded the contract, the procurement process would begin afresh. In those circumstances, if the plaintiff's offer was as competitive as the plaintiff believed, the plaintiff would not be prejudiced if it participated in the process of procurement.

76. The said process needs to be undertaken sooner rather than later, as it would otherwise hold up the bigger project.

77. Delays to the project, whilst waiting for the case to be determined, may well result in price fluctuations that could pose a threat to the whole project. To my mind, therefore, the stoppage of the project could cause greater harm than the risk posed by the possibility that the plaintiff would have to be compensated if their case ultimately succeeded, after the project was completed.

78. In a nutshell, I find no merits in the plaintiff's application. It is therefore dismissed, with costs to the defendants.

79. However, I feel obliged to re-emphasize the fact that this decision cannot be construed by the defendants as permission to act as they please. All the relevant organs and the people of Kenya, including the courts, will continue to keep a close eye on the defendants to ensure that they deliver a quality, efficient and economic replacement to the pipeline.

DATED, SIGNED and DELIVERED at NAIROBI this 27th day of May 2015.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Stephen Kibunja for the Plaintiff

Mwaniki Gacoka for the 1st Defendant

Miss Nyonje for the 2nd Defendant

Collins Odhiambo – Court clerk.