

IN THE HIGH COURT OF SOUTH AFRICA
NORTH GAUTENG HIGH COURT, PRETORIA

CASE NO: 19577/09

In the matter between:

DEMOCRATIC ALLIANCE

Applicant

and

**THE ACTING NATIONAL DIRECTOR OF
PUBLIC PROSECUTIONS**

First Respondent

**THE HEAD OF THE DIRECTORATE OF
SPECIAL OPERATIONS**

Second Respondent

JACOB GEDLEYIHLEKISA ZUMA

Third Respondent

and

RICHARD MICHAEL MOBERLY YOUNG

First Intervening Party

CCII SYSTEMS (PROPRIETARY) LIMITED

Second Intervening Party

**THIRD RESPONDENT'S HEADS OF ARGUMENT:
INTERVENING APPLICATION**

THE ISSUE:

1.

The Intervenors seek to join in the Democratic Alliance's Review application. The general contentions regarding the Reduced Record and the other obstacles to the DA'S review are equally applicable in considering the Intervenors' application. Since all parties are represented by the same legal representatives we do not repeat those contentions which we contend are applicable *mutatis mutandis* to the Intervenors e.g. if there is no Record to be produced, the entire application should fail. We only address some considerations specific to the Intervenors herein.

2.

They must show a direct and substantial interest in the subject matter of the Review application and in the order sought, transcending a mere financial interest.

See: **UNITED WATCH & DIAMON CO (PTY) LTD AND OTHERS V**

DISA HOTELS 1972 4 SA 409 (C) 416B

MIDDELBURG RUGBYKLUB V SUID-OOS TRANSVAALSE

RUGY-UNIE EN 'N ANDER 1978 1 SA 484 (T) 489D

**SUID-AFRIKAANSE VERENIGING VAN MUNISIPALE
WERKNEMERS V STADSRAAD VAN PIETERSBURG
(MINISTER VAN STAAT KUNDIGE ONTWIKKELING EN
BEPLANNING TOETREDEND) 1986 4 SA 776 (T) 780**

**HENRI VILJOEN (PTY) LTD V AWERBUCH BROTHERS 1953
(2) SA 151 (O) at 168 – 170**
**NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS V ZUMA
2009 (2) SA 277 (SCA) at 308G.**

3.

They must show that they have a legal interest in the subject matter of litigation that may be prejudicially affected by the judgment of the Court.

4.

As stated in **HARMS CIVIL PROCEDURE (B.12.3)**: “... the tests of a direct and substantial interest in the subject matter of the action (**application to review**) is the decisive criterion.”

5.

There must at least be *prima facie* proof of the interest and the right to intervene. The Court has a discretion to allow joinder or not.

See: HELDERBERG LABORATORIES CC AND OTHERS V SOLA TECHNOLOGIES (PTY) LTD 2008 2 SA 627 (C), at para 36 .

6.

It is submitted that the intervening applicants have met none of these tests. The reasons for this are as follows.

LOCUS:

7.

The manifest purpose of the intervention application emerges in para 6 (page 7) of the founding affidavit:

“Applicant disputes the contention on behalf of the First Respondent that it lacks standing in the main application, as will be confirmed by it in an affidavit of Mr Selfe which will be delivered together with this affidavit. Nevertheless, in order to obviate any possible difficulties in this regard, CCII Systems and I seek to intervene as Second and Third Applicants. As will become apparent from what follows below, there can be no serious dispute about our standing.”

8.

The contentions re abuse made in the DA heads are equally applicable hereto but the aforesaid statement is indeed an acknowledgement of abuse – the true reviewing party is the DA and will remain the DA – the Intervenors are to be the face of this review. The DA is and will patently remain the true reviewer – not the belated Intervenors whose delay is simply unreasonable if it was in their own right (Compare **CHAIRPERSON, STANDING TENDER COMMITTEE AND OTHERS v JFE SAPELA ELECTRONICS (PTY) LTD AND OTHERS 2008 (2) SA 638 (SCA) par 28**). Compare also **NEDCOR BANK LTD AND ANOTHER v GCILITSHANA AND OTHERS 2004 (1) SA 232 (SE)..“I hear the voice of Jacob in the hands of Esau” par [36] [39]**.

9.

Before considering the basis of *locus* with reference to the Founding papers (**MISTRY'S** case), the obvious feature of the application to intervene is that the Applicants nowhere state: **“The Third Respondent’s corrupt conduct which was the subject matter of the Decision caused CCII to lose the contracts it tendered for.”** If that was the case, it was an extremely simple one to make. It was not made because it is not the case.

10.

The following facts and circumstances must be taken into account in the determination of whether the intervening applicants have *locus standi* at all in these proceedings:

- (a) The first intervenor ("**Young**") is a director and shareholder in the second intervenor ("**CCII**"). Accordingly, he clearly has no interest in his personal capacity as the wrong complained of is against CCII, as acknowledged by Young (third respondent's answering affidavit, paragraphs 14 - 16, pages 91-92).
- (b) The wrong that is complained off against CCII is that it was not chosen to provide its computerized system of data distribution for corvettes in the German Frigate Consortium ("**GFC**") (page 93, para 21);
- (c) That award was granted to ADS after a tender system and the award was made by Cabinet in 1998 (pages 93-94, paras 23-24).
- (d) The prosecution has never contended in the Shaik or Zuma prosecutions that the award to GFC (or any guise thereof) was improper or in any way tainted by corruption (page 94, para 25; pages 97-98, paras 33-34).

- (e) The Joint Investigation – Strategic Defence Procurement Packages Report, after considering the complaints of CCII found that it was not unusual or otherwise improper to award the tender to GFC (third respondent's answering affidavit, pages 95-97, paras 29-31) – that the guise of the successful tenderer is alleged to be difficult as alleged in reply, makes no difference.

- (f) The third respondent only became a member of Parliament when he was appointed as Deputy President on 17 June 1999, when the wrong complained off by CCII had been perpetrated by 24 May 1999 (page 97, para 32).

- (g) The intervening parties themselves acknowledge that the Third Respondent had no personal knowledge about misconduct in the Arms Deal (page 2 of "RRMMY12", founding affidavit, at page 62).

11.

Young and CCII did not disclose in their founding affidavits that they instituted proceedings against the State and ADS and entered into a settlement agreement in which the State paid approximately R15 million without any admission of liability. Consequent thereon, Young and the State Agencies issued a joint statement on the settlement (pages 101-103, paras 45-46, read with "D" at page

210). Any possible commercial interest or prejudice that Young and CCII may have had in the Arms Deal has thus been extinguished.

12.

We do not repeat but rely on the cases cited in the main heads of argument in respect of the DA's lack of *locus standi* but draw attention in the case of this intervention application to **FRANCIS GEORGE HILL FAMILY TRUST v SOUTH AFRICAN RESERVE BANK AND OTHERS 1992 (3) SA 91 (A)**, at **101 A-D**, quoting **ATTORNEY-GENERAL OF THE GAMBIA v NJIE [1961] 2 All ER 504 (PC)**:

“They do not include, of course, a mere busybody who is interfering in things which do not concern him; but they do include a person with a genuine grievance because an order has been made which prejudicially affects his interests”.

13.

Based on the foregoing and the applicable tests it is submitted that all that Young and CCII equate to are mere busybodies meddling in affairs which do not concern them. They lack locus standi and accordingly have not met the tests to

be admitted as co-applicants. The application to intervene ought to be dismissed on these bases alone.

14.

However, given that this Court has a discretion in deciding whether to permit Young and CCII to intervene, we nevertheless pursue the same issues raised in the main heads in these proceedings to assert that the intervention has no merit as the main application, albeit in the context of the Rule 6(11) application has no prospects of success.

15.

In so far as the abuse and substantial delay is concerned what is significant in the context of Young and CCII is that the ostensible purpose of the application to intervene in the main application is to embarrass the Government.

16.

We otherwise stand by the submissions raised under the various headings in the main heads of argument in respect of the DA Rule 6(11) application and submit

that these arguments apply with equal force against the Young and CCII and that the application falls to be dismissed on these further bases.

K J KEMP SC

A A GABRIEL

21st May 2010

Chambers, Durban.