

**IN THE COURT OF APPEAL OF LESOTHO**

**HELD AT MASERU**

**C of A (CIV) NO.33/2014**

In the matter between

**SEQHIBOLLA LETSIE T/A KPM  
SOLAR ENERGY & ENGINEERING**

**APPELLANT**

and

**LSP CONSTRUCTION**

**FIRST RESPONDENT**

**TRENCON CONSTRUCTION/BUILDING  
WORLD/BELELA JV (In Liquidation)**

**SECOND RESPONDENT**

**MILLENIUM CHALLENGE ACCOUNT  
LESOTHO**

**THIRD RESPONDENT**

**PRINCIPAL SECRETARY MINISTRY OF  
HEALTH**

**FOURTH RESPONDENT**

**ATTORNEY GENERAL**

**FIFTH RESPONDENT**

**DANIEL GERHARDUS ROBERTS N.O**

**SIXTH RESPONDENT**

**CHAVONNES BADENHORST ST. CLAIR**

**COOPER N.O.**

**SEVENTH RESPONDENT**

**MOKHELE MATSAU N.O**

**EIGHTH RESPONDENT**

**MOROESI TAU-THABANE**

**NINTH RESPONDENT**

**CORAM** : SCOTT, AP  
HOWIE, JA  
LOUW, AJA

**HEARD** : 10 OCTOBER 2014

**DELIVERED** : 24 OCTOBER 2014

### **SUMMARY**

*Appellant the subcontractor for the supply and installation of solar geysers in clinics under construction by the contractor – the contractor sequestrated – provisional trustees contracted with new contractor to complete the construction – new contractor requested appellant to quote for installation of geysers at certain clinics but later ordered from another supplier – whether appellant entitled to rely on its contract with insolvent contractor and to insist on the new contractor purchasing from it – whether*

*trustees of insolvent contractor elected to abide by its contract with appellant.*

## **JUDGMENT**

### **HOWIE JA:**

[1] On 13 October 2011 KPM Solar Energy & Engineering (“KPM”), a business owned and operated by Mr. Seqhibolla Letsie, was appointed the domestic subcontractor for the supply, delivery and installation of solar geysers in clinics under construction at various places within the Kingdom. The contractor was a consortium, Trencon Construction/Building World/Belela JV being a joint venture consisting of three companies (“the JV”). The employer was Millenium Challenge Account Lesotho (“MCA”).

[2] On 31 May 2013 the estate of the JV was sequestrated and four provisional trustees were appointed. They secured a new contractor by entering into a contract with LSP Construction Ltd.

[3] When, in due course LSP made arrangements to purchase solar geysers from suppliers other than KPM and have them installed in the clinics involved in MCA's scheme, KPM applied in the High Court for a restraining interdict and an order that "*the respondents be ordered and directed to honour/and or abide by the contract they have*" with KPM. The relevant respondents were LSP, MCA and the provisional trustees. They opposed the application. They said there was no contract between KPM and any of LSP, MCA or the trustees.

[4] The application was dismissed, hence this appeal.

[5] Clearly KPM had no contract with MCA or LSP. Accordingly, counsel for KPM centred her argument before us on an email dated 25 October 2013 from Mr. L. Fourie (on behalf of the supervising engineers involved in the scheme) to MCA with copies, *inter alia*, to KPM and one of the trustees. It reads:

*"The meeting yesterday morning at your office with KPM Solar Energy (Mr & Ms Seqhebolla), Mr Roberts, Mr Ntabane yourself and myself refers.*

*This is to confirm the following being discussed in summary:*

*KPM Solar Energy insist that all orders need to be through themselves and not directly to Selected Energy.*

*KPM Solar Energy insist that they need to do all the installations, in terms of the contract.*

*KPM Solar Energy indicated their capacity for installation will be 4 Health Centres per day. Given that they receive Contractor's programs on Monday, 28 October 2013.*

*A 8 to 10 week lead time is necessary for additional geyser orders, since not enough geysers are currently in stock.*

*Mr Roberts also confirmed that Selected Energy mentioned a possible 5 week lead time, depending on the number of geysers required. (Selected Energy was called by Mr Roberts during the meeting)*

*The Engineer, KPM Solar Energy and Mr Ntabane met directly after the meeting to discuss differences in geyser quantities in stock.*

*All subcontractors will be informed that proposals made in the attached letter are no longer applicable, as per item 1&2 above."*

[6] According to the argument for KPM that communication was evidence that the trustees had

elected to abide by the agreement between KPM and the JV.

[7] As regards the trustees abiding by the JV's subcontract with KPM the founding affidavit contains the following:

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*“It is worth mentioning that while the second respondent was sequestered the subcontract was still in force, as a result all the newly appointed contractors were bound to carry it out, and they did require the necessary quotation for the supply delivery and installation of those solar systems.*

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*12.1 Furthermore, it is of paramount to importance this honourable court that these contractors had to seek the services of the applicant as this was per the specifications from the third respondent.*

*12.2 Again it is worth noting that all the five contractors newly appointed were bound by the contract between the applicant and the second respondent as this emerged from several mediation held between the applicant, Trustees of the second respondent and the representatives of the first respondent. These can be evidenced by numerous correspondences herein attached and marked “KPM2”.*

(One assumes that “*the five contractors newly appointed*” is meant to refer to LSP and the four trustees.)

[9] Ignoring that which is argument in those paragraphs, the allegation relied on in the founding affidavit seems to be that the trustees’ alleged election emerged from “*several mediation*” (presumably several meetings) held between the applicant, the trustees and representatives of LSP as evidenced by attached email correspondence. As already indicated, the only item of that correspondence relied upon before us was the one I have quoted dated 25 October 2013.

[10] That email is not a communication between KPM and the trustees. It is no more than a subsequent record by someone else of things said at a meeting involving various parties. And that which was allegedly said, assuming it to have been acceptably proved, falls short of establishing an election by the trustees (supposedly conveyed by Mr. D. Roberts, one of the trustees, on their behalf) to abide by the JV’s erstwhile contract with KPM. If Mr. Roberts was prepared to consider placement of an order with KPM that is equally consistent with an intention to deal with KPM simply

because it had already been involved up to then rather than to do so in compliance with an obligation to deal with it.

[11] In any event Mr. Roberts has deposed to an opposing affidavit in which he denies an election by the trustees to abide by the contract between KPM and the JV. As is trite, that factual allegation has to be accepted for purposes of deciding this case.

[12] It follows that the appellant did not establish the trustees' election of the KPM-JV contract.

[13] The appeal accordingly fails and is dismissed, with costs.

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**C.T. HOWIE**  
**JUSTICE OF APPEAL**

I agree:

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**D.G. SCOTT**  
**ACTING PRESIDENT**



I agree:

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**W.J. LOUW**  
**ACTING JUSTICE OF APPEAL**

For Appellant : E.M Kao-Theoha

For First Respondent : P.J. Loubser

For the Second and Sixth

to Ninth Respondents: T. Mpaka

For the Third Respondent: C. Edeling