

THE COURT OF APPEAL OF LESOTHO

HELD IN MASERU

**C OF A (CIV) 53/2015
CCA/0136/2014**

In the matter between:

DRYTEX (PTY) LTD LESOTHO

APPELLANT

And

**PYRAMID LAUNDRY SERVICES
(PTY) LTD**

1ST RESPONDENT

MINISTRY OF HEALTH

2ND RESPONDENT

THE PRINCIPAL SECRETARY

FOR MINISTRY OF HEALTH

3RD RESPONDENT

ATTORNEY GENERAL

4TH RESPONDENT

CORAM: MOKGORO AJA,
CLEAVER AJA,
CHINHENGO AJA

HEARD : 15 April 2016

DELIVERED : 29 April 2016

SUMMARY

Application to set aside the award of a tender - Although application not couched in the form of a review, in substance it was a review and treated as such - Application of the provisions of the Public Procurement Regulations 2007

JUDGMENT

CLEAVER AJA

- [1] This is an appeal against a judgment of the High Court dismissing an application by the appellant who had sought, on an urgent basis, an order declaring a contract entered into between the First and Second Respondents to be invalid. Pending determination of the application an interdict preventing the First Respondent from supplying services to the Second Respondent in terms of the contract had also been sought.
- [2] Although the application was enrolled for hearing on 26 September 2014, the High Court did not rule on the urgency of the matter until 20 October 2014, when it ruled that the matter was not urgent. The application was ultimately heard on 27 April 2015

and judgment dismissing the application with costs was handed down on 17 September 2015.

[3] The appellant was one of three tenderers who responded to an invitation by the Second Respondent to tender for a contract to provide laundry services in Botha-Bothe, Leribe, Berea, Mafeteng and Mohale's Hoek Hospitals. In June 2014 the Appellant was notified by the Second Respondent that the contract had been awarded to the First Respondent.

[4] The appellant's objection to the award, which had been rejected by the Second Respondent, was then referred to the Director of the Procurement Policy and Advice Division ("PPAD"). After investigating the appellant's complaint the Director of the PPAD found that after a full evaluation of the Technical and Financial aspects of the three tenders the scores awarded to the tenderers were the following:

The Appellant	M93.80
Ipeleqeng Enviro Care (Pty) Ltd	M74.39
The First Respondent	M71.80

After this recordal, the Director's Savingram of 26 August 2014 addressed to the Head of Procurement Unit - Ministry of Health in the relevant part, reads:-

"The above clearly means Drytex Lesotho (Pty) Ltd (the Appellant) with the highest score should be the preferred bidder to be awarded the contract.

The reason of the Tender Panel to decide that Pyramid Laundry Services (PTY) Ltd (The First Respondent) Should be a preferred bid because (sic) 'is a local company wholly owned by Basotho Nationals who have adequate experience to execute work of this nature and magnitude' and 'that it was decided that for fair distribution of work it will be appropriate if a different company could be awarded this contract in order to distribute wealth among local companies' are irrelevant considerations.

These decisions are in direct contradiction to the principle of fairness and transparency. There is nowhere in the set evaluation criteria where they were to be applied. They are extraneous to the matter in hand".

.....

RECOMMENDATION

Procurement Policy and Advice Department (PPAD), in terms of section 29(5), recommends that the contract be awarded to Drytex Lesotho (Pty) Ltd as they are the highest ranked tenderers, in accordance with the relief sought.

[5] Section 29(5) of the Public Procurement Regulations, dealing with the evaluation of tenders, reads:-

“The Unit shall select appropriate factors to be taken into account in evaluating the whole life costs of the overall tender as opposed to the initial cost of purchase”.

[6] The Second Respondent did not follow the PPAD’s recommendation but instead concluded a contract for the supply of the services with the First Respondent, prompting the appellant’s application to the High Court for, *inter alia*, an order that the contract be declared void.

[7] The reason for the High Court’s dismissal of the application is not easy to discern, but appears to be this. The Second Respondent could accept or reject the PPAD’s recommendation, and having rejected it, the contract which it concluded became valid and binding, and could not be cancelled by the court. Revoking a contract which had already been signed and awarding it to the Appellant, would, in the view of the Court, have amounted to the Court making a

contract for the Appellant, something which the court could not do. Unfortunately the cardinal prayer for the contract to be declared void was not fully dealt with. Towards the end of judgment the Judge *a quo* expressed the view that the Appellant should have come to court on appeal rather than to seek an order of cancellation of a valid contract, but it is not clear what weight she attached to that view.

[8] Before dealing with the merits of the appeal it is necessary to say something about the form in which the application was couched. What the appellant sought in substance, although not in form, was a review of the administrative decision of the Second Respondent to award the contract to the First Respondent and an order declaring the award void. Precisely the same issues which would have been canvassed in a review of the decision are canvassed in the papers and the parties who would have been involved in a review of the decision are also the parties to the application. It is of course so that had the application been couched in the form of a review,

the Second Respondent, the Ministry of Health would have been the principal respondent. The court *a quo* was advised that Second, Third and Fourth Respondents were no longer defending the application and would abide the decision of the court. The grounds upon which the application was based, which in my view were sufficient to sustain a review application, were fully set out in the founding papers and even though the First Respondent chose to defend the application and the Second Respondent did not, I am of the view that the court *a quo* should have treated the application as a review. After all, the main prayer was for the contract between the Second and First Respondents to be declared null and void and to be revoked by the court.

- [9] The case for the Appellant is that in awarding the contract to the First Respondent the Second Respondent breached important provisions of the Public Procurement Regulations 2007 and that as a result the court should have declared the contract void. The First Respondent supported the decision of

the Tender Panel, it being contended further on its behalf that a valid contract had been concluded with the First Respondent which the court could not cancel.

[10] The PPAD was established by Legal Notice No. 1 of 2007 which contains the Public Procurement Regulations 2007. In terms of the Notice PPAD is a department in the Ministry of Finance and Development Planning.

[11] Under the heading **Functions of the PPAD** Regulation 6(1) provides:

“PPAD shall be a Division within the Ministry responsible for the development of the public procurement system by securing legality, accountability, efficiency, transparency and overall value for money in the implementation of public procurement and by stimulating a competitive environment with equality of treatment among bidders in the public procurement process, whilst taking due regard of the government’s policy and aims in respect of local preference schemes”.

Regulation 6(2) provides inter alia, that:

“The PPAD shall:

- (b) Provide advice and support to the Ministry on all aspects of procurement legislation, policy and implementation;*
- (c) Monitor compliance with procurement policies and these regulations;*
- (f) Provide instructions and guidance on the inclusion of standard and quality assurance systems in specifications and contract material and their implementation in consultation with the Director of Standards and Quality Assurance, Ministry of Trade and Industry, Cooperatives and Marketing.*
- (k) Establish the criteria and process for the assessment of suppliers to become eligible to compete for the Government business;*
- (m) Set up an Appeal Panel to deal with the complaints and appeals from suppliers and companies, and PPAD shall provide the Secretariat service to the Appeal Panel.*

The role of the PPAD in setting and maintaining standards in the public procurement system is therefore of great importance.

[12] The Regulations contain detailed provisions as to the manner in which tenders are to be evaluated with Regulation 29(4) providing:

“The key criterion in evaluating apparently compliant tenders shall be the tendered price” and,

Importantly Reg. 30(1) reads:-

“the Unit shall invite the tenderer who has satisfied the requirements specified and submitted the most favourable tender to enter into a contract”.

[13] The initial decision to award the contract to the First Respondent was made by the Tender Panel which furnished the following reasons for its decision:-

- *“Drytex was initially awarded contract NO. 27-2007/08 to provide laundry services for Queen II Hospital from November 2007 up to September 2011 when the hospital was closed.*
- *They were also awarded contract No.:15-2009/10 to provide laundry services to 5 government Hospitals from January 2010 up to June 2013 therefore it was decided that for fair distribution of work it will be appropriate if a different company could be awarded this contract in order to distribute wealth amongst local companies.*
- *It was noted that Drytex track record was not satisfactory as they did not perform their duties and responsibilities diligently in executing Contract No.:15-2009/10.*
- *It was also purported Drytex vandalised some machines when their contract expired in June 2013.*

- *The Pyramid Laundry Service is a local company wholly owned by Basotho Nationals who have adequate experience to execute work of this nature and magnitude”.*

[14] The Appellant was not satisfied with the reasons given and complained to the PPAD. As a result the director of PPAD on 10 July 2014 called on the Procurement Unit – Health in writing to convene a meeting with the Appellant to discuss the matter in order to resolve the complaint. The ensuing meeting did not resolve the matter and as previously indicated the Appellant then filed an objection with the PPAD against the award. This resulted in what was termed a Dispute Resolution Meeting on 15 August 2014. It was attended by representatives of PPAD, the Procurement Unit, the Applicant, and the Ministry of Health.

The minutes reveal that the Procurement Manager of the Ministry repeated and relied on the reasons given by the Tender Panel which are set out in para [13]. The Manager of the Appellant was surprised to hear the complaints about the company, since it had a good track record and had had its contract extended.

The only cause for complaint which he knew of was an occasion at the Mafeteng hospital where water had been unavailable. This was rectified within two and a half hours after being advised of the problem. He emphatically denied the allegation of vandalism, contending that his company removed machines belonging to it at one of the work sites to prevent them from being used by a new company which had taken over. The minutes reveal further that the Procurement Manager conceded that he could not dispute the Appellant's answers to the allegations against it. It was after this meeting that the Director of the PPAD issued the Savingram referred to in Para [4].

[15] The fact that the PPAD considered the Tender Panel's desire to promote a local company wholly owned by Basotho nationals to be an evaluation factor extraneous to the matter at hand is highlighted by the provisions of Regulation 12 in terms of which a Procurement Unit must, in evaluating tender proposals, grant a 15 per cent margin of preference

to a Basotho business who can demonstrate a majority shareholding of 51 per cent and above. Smaller margins are granted to lesser shareholdings. Since the legislation contains specific provisions to promote the interests of Basotho nationals in the public procurement system, the Tender Panel and the Second Respondent were clearly not entitled to adopt different criteria to achieve this purpose. The other objections said to exist in respect of the Appellant's businesses were not established at the meeting and the support by the First Respondent of the reasons furnished by the Tender Panel must accordingly fail.

[16] The Regulations contain specific provisions which apply to the Appellants case. Under the heading

INVALID AND VOIDABLE CONTRACTS

Regulation 39 provides:-

“The procurement process shall be regarded invalid and the subsequent contract void or voidable in the following cases:

- (a) The contract shall have been entered into breaching the elements of the law of contract;*

- (b) *The Unit entered into the contract without the approval of the chief accounting officer; or*
- (c) *The Unit entered into the contract breaching the procedure set out under these regulations.*

[17] In my view the failure to comply with the recommendation of the PPAD and the requirements of Regulation 30(1) is a breach of the procedure set out under the regulations and renders the process invalid and the subsequent contract with the First Respondent void. Were this finding not to be made the role of the PPAD as described in Reg. 6(1) would be nullified. These reasons would also in my view satisfy the requirements for a successful review of the decision to award the contract to the First Respondent.

[18] Counsel for the Appellant submitted that in the event of the court finding for her client in respect of the main prayer, the court should grant an order compelling the Second Respondent to enter into the same contract with the Appellant which it had

concluded with the First Respondent, or alternatively order the Second Respondent to call the Appellant for negotiations with a view to concluding a contract with it. With the procurement process having been declared invalid and so much time having elapsed it is not appropriate to make either of the suggested orders and a fresh invitation to enter into a new contract will have to be issued by the Second Respondent.

[19] There is no indication on record that the Second to Fourth Respondents formally opposed the application. They filed no papers but were represented by counsel on 13 October 2014 when the court directed that a meeting of the parties was to be held with a view to resolving the matter. By the time of the hearing these Respondents had indicated that they would abide the decision of the Court. By abiding the decision of the Court and not conceding the correctness of the Appellant's case, it was left to the First Respondent to defend the award of the contract to it by the Second Respondent. In

the circumstances it is only right that the Second Respondent should also be liable for the payment of the Appellant's costs. This will be reflected in the orders which follow.

[20] In para [2] I highlighted the time it took for the Appellant, who had approached the Court for a hearing as matter of urgency, to have the matter heard. Since the application was to challenge a very recent award of a tender, the Appellant had every right to expect to be granted an urgent hearing and it is regretted that he was not afforded that right.

[21] In the result, the following orders are made:

1. The appeal succeeds and the order of High Court issued on 17 September 2015 is set aside and replaced by the following orders.

1. Contract No 1-2014/2015 for the provision of Laundry Services at Botha-Bothe, Leribe, Berea, Mafeteng and Mohale's Hoek Hospital entered into between the Ministry of Health and Pyramid Laundry Services (PTY) Ltd is declared to be void.

2. The First Respondent and the Second Respondent are to pay the Applicant's costs in equal shares.

2. The First Respondent and the Second Respondent are to pay the Applicant's costs in this Court in equal shares.

R.B. CLEAVER
ACTING JUSTICE OF APPEAL

I agree:

J.Y MOKGORO
ACTING JUSTICE OF APPEAL

I agree:

M.H. CHINHENGO
ACTING JUSTICE OF APPEAL

Counsel for the Appellant: M.V. Khesuoe

Counsel for the First Respondent: N.S. Molapo