IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C OF A (CIV) 17/2016

In the matter between

SMALLY TRADING COMPANY (PTY) LTD T/A SMALLY UNIFORM & PROTECTIVE CLOTHING **APPELLANT**

And

LEKHOTLA MATŠABA & 10 OTHERS **RESPONDENTS**

CORAM: FARLAM, AP
CHINHENGO, AJA
GRIESEL, AJA

HEARD: 10 OCTOBER, 2016

DELIVERED: 28 OCTOBER, 2016

SUMMARY

Public Procurement Regulations 2007 – whether court's jurisdiction to hear cases relating to the invalid award of a tender or invalid

withdrawal of an uncompleted process deferred until domestic remedies exhausted.

JUDGMENT

FARLAM AP:

[1] This is an appeal against a decision of **Chaka-Makhooane J**, sitting in the High Court, dismissing with costs an application brought as a matter of urgency by the appellant, Smally Trading Company (Pty) Ltd, against the respondents, inter alia for: (1) a rule nisi calling upon them to show cause why an interim interdict should not be granted against the first eight respondents, restraining them from performing certain actions in pursuance of a tender, MPPS 05/2015/2016, relating to the supply of police uniforms awarded to the second and fourth respondents, pending the final determination of the application; (2) the setting aside of the award of the tender to the first, second, third and fourth respondents, by what was described as a '*selective tender*'; (3) the setting aside of the withdrawal of an earlier tender relating to the same tender, i.e., 05/2015/2016, issued as part of a public tender process, which was communicated to the public by an advertisement published in the issue of the Lesotho Times Newspaper dated 7-13 January 2016; and (4) an

order directing that the earlier public process tender be reinstated to the stage where it was prior to the withdrawal.

[2] Without filing any papers in response to the application, the respondents, apart from the ninth and tenth respondents, raised numerous grounds of opposition to the application, one of which was that the court had no jurisdiction to hear the matter, because, so it was argued, the appellant should have followed the process outlined in the Public Procurement Regulations 2007 (published in Legal Notice 1 of 2007).

[3] The judge, relying on the decision of this Court in **Attorney General and Others v Kao LAC** (2000-2004) 656, upheld this objection and held that '[the] court does not enjoy the necessary jurisdiction to hear this matter as provided for in the Regulations'. As **Mr Phafane KC**, who appeared for the fifth to eighth and eleventh respondents, pointed out the ground on which the application was dismissed was not that the court lacked jurisdiction completely but that its jurisdiction was delayed until appellant had exhausted the internal domestic resolution

mechanisms provided by the Public Procurement Regulations.

[4] The respondents who participated in the appeal, first to eighth and eleventh respondents, contended that the appeal had become, as it was put, *'academic and moot'*. This submission was based on the fact that the uniforms which were the subject of the two tender processes, the public one and the *'selective'* one, had been supplied and paid for with the result that there was no existing or live controversy between the parties.

[5] Counsel for the appellant submitted that this was not so. He conceded that his client could not obtain an order which would enable it to supply the uniforms to which the tender related but he said that if the appellant was able to show that the withdrawal of the public tender was unlawful and that the tender it had submitted before the withdrawal would have been accepted the appellant would have an action for damages. He submitted that issues raised in respect of the illegality of the withdrawal of the public tender and the institution of the *'selective'* process (of which the appellant was not informed) were matters of

controversy between the parties. He submitted that if the judge's order based on her finding that her jurisdiction was ousted were set aside on appeal the case should go back to the High Court for the issues I have mentioned to be considered.

[6] **Mr Phafane** submitted that those issues could be raised in the appellant's action for damages. This submission amounted a concession that there were still matters in actual controversy between the parties which had been issues in the case before **Chaka-Makhooane J** and were still live. In my view this concession was fatal to the contention that the appeal was moot, see in this regard **Coin Security Group (Pty) Ltd v SA National Union for Security Officers and Others** 2001 (2) SA 872 (SCA), **National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs** 2000 (2) SA 1 (CC) at 18 (fn 18) and the as yet unreported decision of this Court in **Lesotho National Development Corporation v Maseru Business Machines and Others,** C of A (CIV) 38/2015, delivered on 6 November 2015.

[7] Before the question as to whether the judge correctly held that her jurisdiction had been delayed can be considered it is necessary to set out the relevant provisions of Public Procurement Regulations, 2007.

[8] Regulation 3(1) reads as follows:

> '***Procurement Unit***
>
> *3. (1) There is established a Procurement Unit to be known as the Unit which shall be an individual or a group of individuals authorized to carry out public procurement.'*

Regulations 54, 55 and 56 read as follows:

> ***'Submitting complaints to the Unit***
>
> *54.(1) A tenderer, a trade association, an auditor of the Government or any group with a legitimate interest in the object of the contract may submit a written complaint to the Unit not beyond 3 calendar months following the date of contract award and any supporting evidence shall be enclosed with the complaint.*
>
> *(2) The Unit shall notify all tenderers about the nature of the complaint and invite tenderers whose interest might be affected by a respective decision, to the complaint proceedings.*
>
> *(3) Failure of the notified tenderers to participate in the complaint proceedings will prevent the tenderers from bringing further complaints concerning the same subject matter.*

(4) The Unit shall review and make a decision on the complaint in 10 working days after the submission of the complaint and where the complaint is not accepted as valid, the decision shall state the justification for non-acceptance, but, where the complaint is accepted as valid, the decision shall state how the complaint will be rectified.

(5) The Unit shall not enter into a contract in respect of the tender in question after receiving a complaint and until such time as the complaint is resolved, either through a decision by the Unit or where such a decision is unacceptable to the complainant through a decision by the Appeals Panel, except where suspension of the tender process would be against the public interest, the Minister shall be the arbiter of whether the tender process is in the public interest.

(6) Where it is decided to continue the tender process, the justification and the decision to continue to place the contract shall be provided in writing to the complainant at least 5 working days prior to the time the decision comes into force, the decision shall be made available publicly through the mass media and on the procurement web-page.

(7) Any further redress shall be pursued through the Appeals Panel or through the Courts of Law.

Complaints regarding the Units' decision

55.(1) The complainant may appeal to the PPAD within 5 working days where:

(a) the complainant does not agree with the decision of the Unit.

(b) the Unit did not issue a decision within the specified time, or

(c) the Unit entered into a contract before its decision on the complainant, unless not entering into the contract is against the public interest.

(2) PPAD shall consider a complaint and issue the following decision where it considers that the Unit breached these regulations:

(a) nullify or modify illicit actions or decisions of the Unit wholly or partially;

(b) declare which provision of these regulations should apply in a given case; or

(c) instruct the Unit to carry out the tender process after the breaches are rectified.

(3) Until a ruling is issued for the complainant, PPAD may issue a decision to temporarily suspend the implementation of the Units' decision or action in the following cases:

(a) a ruling in favour of the complainants' interest is more justifiable.

(b) the decisions are to be suspended, tenderers may incur significant losses; or

(c) the suspension would cause significant loss to the Government or other tenderers.

(4) [PPAD] shall seek an opinion from the independent Appeals Panel for reviewing the complaint related to the tender process authorized for contracting and the decision of PPAD shall be based on the Appeals Panel opinion.

(5) The Appeals Panel shall comprise 3 independent experts who shall be selected according to the following procedures within 5 working days following the submission of the complaint:

(a) the complainant and the Unit shall each select an expert;

(b) both experts shall select a third expert, where the two experts do not agree on the choice of the third expert, the Minister shall nominate the third expert; and

(c) the three experts shall nominate one of them to the chairperson.

(6) The operational procedures of the Appeals Panel shall be produced by PPAD and be promulgated through the mass media and on the web-page of the Ministry.

Lodging a complaint to the courts

56. (1) The complainant may lodge a complaint to the Courts of Law where –

(a) Appeals Panel did not make a ruling within the specified time; or

(b) the complainant is not satisfied with the ruling of the Appeals Panel.

(2) Complaints related to the tender shall only be lodged with the Courts of Law after a contract has been signed.'

[9] The case quoted by the judge **Attorney General and Others v Kao**, supra does not provide support for her decision. The statutory provision there under consideration, section 25 (1) of the Labour Code Order 1992, as amended by Act of 1997, read as follows:

> *'The jurisdiction of the Labour Court shall be exclusive as regards any matter provided for under the Code, including but not limited to trade disputes. No subordinate court shall exercise its civil jurisdiction in regard to any matter provided for under the Code.'*

This Court held, following the wording of the section, that the Labour Court had exclusive jurisdiction over labour disputes and that the High Court jurisdiction was ousted.

[10] The leading case in South Africa on the exclusion or deferment of the ordinary jurisdiction of the courts where domestic remedies are provided by a statute, regulation or the constitution of a voluntary association is **Welkom Village Management Board v Leteno** 1958 (1) SA 490 (AD), where the legal position was expounded by Ogilvie Thompson JA, at 502 C-503 C, as follows:

> *'It is not a general rule of law "that a person who considers that he has suffered a wrong is precluded from having recourse to a Court of law while there is hope of extrajudicial redress" (per VAN DER HEEVER, J.A., in the* **Bindura** *case, supra, at p.362). Whenever domestic remedies are provided by the terms of a Statute, regulation or conventional association it is necessary to examine the relevant provisions in order to ascertain in how far, if at all, the ordinary jurisdiction of the Courts is thereby excluded or deferred. In* **Shames v South African Railways and Harbours**, *1922 A.D. 228, much relied upon by Mr Miller, a dismissed railway servant – who, because he was a servant of the Crown, would at common law have been dismissible at will – had certain*

remedies available to him by Statute; and it was held that he was not entitled to have recourse to the Courts except on the ground of some illegality or irregularity in the proceedings, and then only when such irregularity or illegality had been persisted in until the final stage and he had exhausted his statutory remedies. For, as SOLOMON, J.A., put it at p236 of the report, "**non constat** *that, if he had appealed to the various tribunals which under the Act are open to him, the irregularity complained of may not have been set right and justice done to him".*

The conclusion thus reached was, however, found to be a necessary implication from the terms of the relevant Statute (see **Jockey Club of South Africa and Others v Feldman**, *1942 A.D. 340 at pp. 351/2). The rule of* **Shames'** *case, as interpreted by the majority of this Court in* **Feldman's** *case, accordingly is that the Court's jurisdiction is excluded only if that conclusion flows by necessary implication from the particular provisions under consideration, and then only to the extent indicated by such necessary implication (see also the* **Bindura** *case supra at pp 362/3). In* **Dumah v Blom**, **N.O. and the Klerksdorp Municipality**, *1950 (1) S.A. 274 (T), and* **Semena v de Wet and Another**, *1951 (2) S.A. 444 (T) – which were both concerned with location regulations – it was held that, on the particular facts, the rule of* **Shames'** *case had no application. In* **Golube v Oosthuizen and Another**, *1955 (3) S.A. 1 (T), certain location regulations provided that a person refused a site permit by the superintendent might "appeal to the Council, whose decision shall be final". DE WET, J., after stating – with respect, correctly stating – the effect of the relevant authorities, held that he could find no reason to imply an intention in the particular regulations before him that the Courts' jurisdiction should be limited in the sense that the Court should only be entitled to entertain review proceedings after the aggrieved person had exhausted his remedies under the regulations. In the course of his judgment the learned Judge expressed the view that:*

"The mere fact that the Legislature has provided an extra-judicial right of review or appeal is not sufficient to imply an intention that recourse to a Court of Law should be barred until the aggrieved person has exhausted his statutory remedies."

It is, I think, clear from the context in which this statement appears that what the learned Judge intended to convey was that the mere existence of a domestic remedy did not conclude the question, since it is in each case necessary to consider all the circumstances in order to determine whether a necessary implication arises that the Courts' jurisdiction is either wholly excluded or, at least, deferred until the domestic remedies have been exhausted. So understood, I am in agreement with the learned Judge's above cited statement."

[11] In my view there is no reason to believe that on this point the Law of Lesotho is different. I do not agree with the contention advanced by **Mr Phafane** that in Lesotho it is not necessary to investigate whether, in the absence of an express provision on the point the exclusion or deferment is a '*necessary implication from the particular provision under consideration, and then only to the extent indicated by such necessary implication.'*

[12] **Mr Phafane** referred to **Tlaba and Others v Kuleile and Others** LAC (1990-1994) 560. In that case it was held that the appellants, who had applied in the High Court for an order directing the members of the executive committee of a private school to convene an annual general meeting of the school and, on their failure to do so, authorizing the appellants themselves or any of them to convene the meeting, should in terms of article 7 of the

constitution of the school have demanded the calling of a special general meeting. *'To summon such a meeting'*, said **Leon JA**, with whom **Steyn JA** and **Browde JA** concurred, (at 565 D-E) *'where an annual general meeting would have been insisted on, was a matter of ease.'*

[13] In my view the need to exhaust domestic remedies was a matter of necessary implication and the fact that a finding to that effect was not stated does not indicate that the court was of the view that the law of Lesotho differs from the law of South Africa on this point. If they had been of that view I am satisfied that they would have said so and given their reasons for so holding.

[14] As **Ogilvie Thompson JA** said in the passage quoted above the fact that there is a domestic remedy is not in itself a sufficient reason for excluding or deferring the court's jurisdiction: in every case all the circumstances must be considered.

[15] Regulation 56 (2) of the Public Procurement Regulations expressly provides for the deferment of the court's jurisdiction to hear a case involving a complaint

relating to a tender until the relevant contract has been signed.

[16] It is difficult to see on what basis it can be held that in addition to this express provision there is scope for the necessary implication of a further deferment until after the internal remedies provided for in regulations have been exhausted. The facts of this case illustrate the problems that can be created if the additional deferment contended for were upheld. If the court can only be approached after the exhaustion of the internal complaints procedure the contract complained of may well have been performed (particularly where a *'selective'* process is followed) with the result that if the court proceedings are decided in the complainant's favour the ministry may be liable to pay damages to the complainant despite the fact that it has already received and paid for the goods covered by the tender.

[17] Furthermore in terms of regulation 54 (7) the court's jurisdiction is not deferred where a complaint has not been upheld by the Unit and it is decided to continue the tender process because the regulation specifically

provides that *'(a)ny further redress shall be pursued through the Appeals Panel or through Courts of Law.'*

[18] In the circumstances I am of the view that the appeal must succeed with costs.

The following order is made:

1. (a) The appeal is allowed with costs including those occasioned by the employment of two counsel.

   (b) All the respondents, except the ninth and tenth, are ordered, jointly and severally, one paying the others to be absolved, to pay such costs.

2. The order of the court *a quo* is altered to read:

   '(1) The respondents' objection to the jurisdiction of the court to hear this matter is dismissed with costs.

   (2) All the respondents, except the ninth and tenth, are ordered jointly and severally one

paying, the others to be absolved, to pay the costs.'

I.G. FARLAM
ACTING PRESIDENT

I agree:

M. CHINHENGO
ACTING JUSTICE OF APPEAL

I agree:

B. GRIESEL
ACTING JUSTICE OF APPEAL

For the Appellants:	Adv E H Phoofolo KC, with Adv M S Rasekoai
For the1st to 3rd Respondents:	Adv Shale Shale
For the 4th Respondent:	Adv E T Potsane

For the 5th – 8th and 11th Respondents: Adv S Phafane KC