IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU **C OF A (CIV) NO.: 73/2018**

In the matter between:

LESOTHO MILLENIUM DEVELOPMENT AGENCY **APPELLANT**

AND

PRESSED IN TIME (PTY) LTD **1ST RESPONDENT**

THE PYRAMID (PTY) LTD **2ND RESPONDENT**

CORAM: DAMASEB AJA
MUSONDA AJA
CHINHENGO AJA

HEARD: 22 OCTOBER 2019

DELIVERED: 1 NOVEMBER 2019

SUMMARY

Appeal against costs – *Appellant not challenging substantive orders but only orders of costs without obtaining leave first – Such not permissible – Appeal struck off the roll.*

ORDER

The appeal is struck off the roll.

JUDGEMENT

PT Damaseb AJA

Introduction

[1] The appellant (LMDA) is a statutory body established in terms of the Millennium Challenge Account (MCA) Lesotho Authority Act 1 of 2008. Its primary aim is to implement the Government's *Health Facilities Maintenance Programme* which is aimed at ensuring sustainability of the health systems and infrastructure in the Kingdom.

[2] On 22 June 2018, LMDA issued and published an invitation letter to interested service providers to tender for the procurement of linen and laundry services for 10 health centres and Mokhotlong Hospital. Local service providers were invited to submit both technical and financial proposals. The deadline for the submission of the proposals was 16 July 2018.

[3] Both respondents, among others, expressed interest and submitted their proposals in terms of the procedures and guidelines issued by LMDA. On 10 September 2018, after concluding the evaluation of the proposals, LMDA announced its intention to award the tender to The Pyramid (Pty) Ltd (Pyramid)

and not to Pressed In Time (Pty) Ltd (PIT). Interested service providers were invited to challenge the award within 5 calendar days.

[4] On 13 September 2018, PIT challenged the decision and raised two grounds for the challenge. For the purposes of the appeal it is unnecessary to spell out what those grounds are. LDMA rejected the grounds of challenge and made it clear that the tender would be awarded to Pyramid.

The review application

[5] Dissatisfied with the response from LMDA, PIT launched an urgent application to stay the awarding of the tender to Pyramid pending the finalisation of the review application. PIT had sought to have the decision reviewed on the basis that it is irregular and in violation of the tender specifications. It also sought an order that it be declared the successful bidder. At the hearing, PIT abandoned the latter relief and only proceeded with the alternative prayer that LDMA be ordered to re-evaluate the bids.

[6] Three parties were involved in the review application brought by PIT: LDMA as the first respondent and Pyramid as second respondent and PIT as the applicant. Both LDMA and Pyramid had opposed the application for review brought by PIT. PIT achieved success in the review; meaning Pyramid could not be awarded the tender.

[7] The present case is not so much about whether or not the tender was properly awarded or whether the High Court was correct in setting aside the award. It is unnecessary therefore to discuss in detail the review grounds and the court's reasoning in setting aside the tender award.

[8] When PIT challenged the award of the tender, Pyramid raised an objection *in limine* that PIT lacked *locus* in two respects: that prior to the bidding process PIT had been struck off the register of companies[1] and therefore could not have tendered as it had no status in law and could also not have litigated as a non-existing legal entity. In other words, that it could not, without legal status, acquire rights and obligations under law.

[9] LDMA had pleaded on the merits of the review application and advanced reasons why it should not be granted while Pyramid had pleaded both the *locus* point and on the merits.

[10] For completeness, and in order to properly understand the order subsequently granted by the High Court, PIT had, *inter alia*, sought the following relief in its notice of motion:

> *"(b) That the decision (or intent) of [LDMA] to award the Tender for the Provision of Linen and Laundry Services for 10 Health Centres and Mokhotlong district to [Pyramid] be reviewed, corrected and set aside for being irregular and in violation of the …Tender Specifications.*

[1] In terms of s .. of the Companies Act 18 of 2011.

c) That [Pressed In Time] be declared the lawful victor for the same Tender; alternatively: the process be ordered to start de novo before a different Evaluation Team.

d) Cost of suit against any Respondent that might oppose this application."

[11] The review was heard on the pleadings as they stood and after hearing the matter, the High Court issued an order (without written reasons) setting aside the tender and granting consequential relief in the following terms:

"1. Application for review succeeds with costs.
2. Prayer 2 (c) is granted only in the alternative.
3. 2nd Respondent [Pyramid] is awarded costs."

[12] The effect of the order as it stands, therefore, is that PIT succeeded on the merits in that it had the decision of LDMA reviewed and set aside. PIT was awarded a costs order under the first part of the order and Pyramid was awarded costs consequent upon the the remitting of the matter to LDMA for re-evaluation.

[13] As regards para 2 of the order, the court appears to be saying, if one has regard to the prayers asked for by PIT, that in addition to setting aside the tender, the process would start *de novo* before a different Evaluation Team.

[14] Pyramid which, because of the High Court's order, lost out on the tender did not appeal the order but LDMA did. LDMA's

grounds of appeal which were lodged without the benefit of the written reasons read as follows:

> *"1.The Learned Judge in the Court a quo erred and/or misdirected herself in awarding costs to the Second Respondent herein, which was a Co-Respondent with the Appellant in the Court a quo. From the written Order of Court and verbal ruling of the Court a quo, there is no basis and/or justification for granting such costs Order in favour of the Second Respondent.*
>
> *2. The learned Judge in the Court a quo erred and misdirected herself by disregarding her judicial discretion of traversing the point in limine relating to locus standi of [Pressed In Time], which point would determine whether the proper parties were before the Court. The Court a quo consequently granted costs to the First Respondent, which on the pleadings did not have any legal standing in Court.*
>
> *3. The Learned Judge in the Court a quo erred and/or misdirected herself by failing to evaluate the merits of the case and assessing whether the case was not a fit one for an order that each party should bear its own costs taking into account the fact that no gross irregularities were identified by the Court a quo to have been committed by [LDMA] hence the Court a quo adopted what it termed the middle ground approach by ordering a re-evaluation.*
>
> *4. Alternatively, the Court a quo ought to have awarded a certain percentage of the costs to the First Respondent herein since it did not attain substantial success in the case, that is, provided the Court a quo would have found it to have the necessary legal standing to sue."*

[15] The appeal was set down in the absence of the judge's written reasons prompting the appellant in its written heads of argument

to say that its heads of argument were prepared in the absence thereof. In the event, the judge's written reasons were filed on the eve of hearing with the explanation that it was the written reasons for the '*ex tempore* judgment' given when the order was announced. The order in the written reasons reads thus:

> *" (a) The application for the review succeeds with costs.*
> *(b) Prayer 2(c) is granted only in the alternative.*
> *(c) The 2nd Respondent is awarded costs only to the extent of the abandoned portion of prayer 2(c) (in the main application).[2]"*

[16] Mr *Shale* for the appellant was caught by surprise when the court advised him of the existence of the reasons and that in paragraph 5 thereof it says the following about the *locus* objection which had been raised by Pyramid:

> *"[5] On the point in limine of the applicant's locus standi, even though the respondents felt very strongly about it, I decided in the interest of justice to accept that the deponent in the founding affidavit was the one who had appeared before the tender panel on behalf of the applicant and because the issues raised in the main application were important, this matter was then decided on the merits in the main application and not on the points in limine, which points would not have necessarily been dispositive of the matter."*

[17] Mr *Shale* for LDMA opted to press the appeal without first considering the reasons and to see if LDMA would approach the

[2] This para (c) has obviously been revised if one has regard to para (c) of the initial order. But nothing turns on that for the purpose of the present appeal as no issue has been made by LDMA on appeal.

appeal differently having now seen the reasons. The appeal therefore falls to be determined on the existing grounds.

[18] We pointed out to Mr *Shale* that if one reads the grounds of appeal against the backdrop of the initial order of the court, the appeal appears to be against a costs order only and therefore fell foul of s 16 of the Court of Appeal Act 1979 which states:

> *"(1) An appeal shall lie to the Court-*
>
> *(a) from all final judgments of the High Court*
>
> *(b) by leave of the Court from any interlocutory order, an order made ex parte or an order as to costs only".*

[19] The matter is compounded by the following considerations. Not only does LDMA not challenge the substantive order setting aside the tender and remitting it for re-evaluation *de novo*, but during argument Mr *Shale* submitted that LDMA was prepared to live with the substantive orders – especially because Pyramid had abandoned (and the court a *quo* had not granted) the prayer asked for by PIT that the tender instead be awarded to it.

[20] All told, LDMA's real complaint is directed at the costs order against it granted by the High Court.

Disposal

[21] Whichever way the matter is approached, the appeal grounds do not assail any of the two substantive orders granted by the High Court. In one respect, it is suggested that had the court dealt with

the issue of PIT's, the order of costs in favour of PIT and in another it is suggested that a different kind of order could have been made such as that each party bear its own costs.

[22] The problem with that is that the issue of *locus* goes to the heart of whether or not the substantive relief should have been granted in the first place. If PIT had no status in law it could not tender and it could also not sue. Yet, LDMA has accepted the substantive orders which, at PIT's behest, invalidated the award and ordered reconsideration by LDMA even with PIT participating therein. This all demonstrates that LDMA's real complaint is the orders on costs.

[23] As this court said in *Minister of Foreign and International Relations v Bothata Tsikoane and 3 Others*[3]:

> *"[10] In my opinion the words 'final judgment' in section 16(1)(a) of the Court of Appeal Act refer to orders and not reasons given by the court in the course of making interlocutory orders, ex parte orders or costs orders.*
>
> *[11] It is a well-established principle in our law that appeals cannot be noted against the reasons for the judgment but only against the substantive order made by a Court.*

[24] As I have shown, except for the order relating to costs, LDMA does not challenge any of the substantive orders granted by the High Court in the initial order. As I understood Mr *Shale* during

[3] (C of A (CIV) No. 7/2015) [2016] LSCA 18 (29 April 2016).

oral argument, the order of costs granted in the event must have resulted from a faulty reasoning in relation to the *locus* issue. That still amounts to faulting the court's reasoning process and not a substantive order.

[25] At the hearing, it became evident that LDMA was also concerned about the costs order contained in para 3 of the initial order which was not even directed at it. Pyramid's lawyer who attended the hearing on a watching brief, confirmed their understanding was that the costs in favor of Pyramid were to be paid by PIT because of its abandonment of the main relief under prayer (c) as it had caused Pyramid to deal with that main relief only to abandon it at the hearing.

[26] LMDA required leave to pursue its appeal against the costs order in favour of PIT contained in para 1 of the initial order. It did not and this court has no jurisdiction to entertain it. The appeal falls to be struck off and since no party has opposed the appeal, no order as to costs will be made.

The Order

[27] The appeal is struck off the roll.

PT DAMASEB
ACTING JUSTICE OF APPEAL

I agree,

DR P MUSONDA
ACTING JUSTICE OF APPEAL

I agree,

M H CHINHENGO
ACTING JUSTICE OF APPEAL

For the Appellants: Adv. S Shale

For the 1st Respondent: Adv. S Tsabeha