

IN THE APPEAL COURT OF LESOTHO

HELD AT MASERU

C OF A (CIV)/80/2019

In the matter between:

CCA/0122/2018

QINGJIAN GROUP CO. LTD

APPELLANT

and

PROCUREMENT UNIT

1ST RESPONDENT

PPAD

2ND RESPONDENT

MINISTRY OF PUBLIC WORKS

AND TRANSPORT

3RD RESPONDENT

PS MINISTRY OF PBLIC WORKS AND

TRANSPORT

4TH RESPONDENT

YAN JIAN CONSTRUCTION (PTY) LTD

5TH RESPONDENT

ATTORNEY GENERAL

6TH RESPONDENT

CORAM: DR KE MOSITO P

P T DAMASEB AJA,

M H CHINHENGO AJA

Enrolled: 15 May 2020

Delivered: 2 June 2020

Summary

Appellant losing tender in 2012 to construct Senate Building for Parliament for failure to meet tender specifications -tender not proceeded with and preferred tenderer not called to sign construction contract for almost five years – Tender cancelled but on challenge by one tenderer High Court directing that tender process must continue; Ministry in bona fide misunderstanding of court judgment ordering a re-evaluation of original tender and including appellant’s bid in new evaluation despite earlier disqualification and awarding contract to appellant;

On court clarifying its judgment Ministry revoking award to appellant; Appellant applying to High Court for award to be restored to it; Court dismissing application on grounds award to appellant granted in disregard of High Court judgment;

On appeal judgment of High Court upheld and appeal dismissed with costs

CHINHENGO AJA:-

Introduction

1. This appeal is concerned with one issue only. That issue is whether the appellant is correct in its assertion that it secured a contract from the respondents to construct a new Senate Building in Maseru following upon tender proceedings that it alleges were terminated in its favour. If it did not secure a contract, *cadit quaestio*.

2. The grounds of appeal confirm my assessment that the issue for decision is but one. They read –

“1. The learned judge erred and misdirected himself in holding as he did that the appellants received an offer as a result of a departure from the meaning of a judgment of the court of law in a certain case being CCA/0093/14 [*Flash Construction (Pty) Ltd v The Principal Secretary, Ministry of Public Works and Transport & 5 Others* CCA/0093/14];

2. The learned judge erred and misdirected himself in holding as he did that the Appellant won the bid as a result of a re-tender in as much as no re-tender was called.

3. The learned judge erred and misdirected himself in misinterpreting the judgment in CCA/0093/14 as he did to mean that the judgment precluded re-evaluation in as much as the judgment precluded re-tendering.

4. The learned judge misdirected himself in holding that the offer and acceptance by the appellant is of no consequence.”

3. It can be seen that these grounds of appeal, each on its own or all of them together, revolve around the question whether or not a contract was entered into between the parties, that being the basic contention of the appellant. The appellant had sought, by notice of motion in the High Court, for an

order calling upon the respondents to show cause why the following substantive relief should not be granted -

“(b) The 1st to 3rd respondents shall not be interdicted from signing a written contract with the 6th respondent [5th respondent on appeal] relating to the tender of the construction of the new Senate Building pending the outcome of the proceedings in CCT/0369/2018.

(c) The decision of the 1st respondent to nominate the 6th respondent shall not be set aside for want of compliance with the law of contract and procedures outlined in the Public Procurement Regulations 2007.”

History of dispute

4. It necessary that I set out the history of the dispute between the parties in order to show that this appeal revolves around the one issue whether or not the parties entered into a contract from which the respondents are not entitled to resile.
5. The history of this matter begins in July 2012 when the respondents put out a tender for the construction of a new Senate Building (“the July 2012 tender”). It is not in dispute that the appellant failed to be nominated as the preferred bidder when the bids were adjudicated upon. Its tender was rejected for non-compliance with certain specified requirements. The 5th respondent won the tender. There followed a long period during which, among other things, the July 2012 tender was cancelled, a judgment in a related matter, *Flash Construction (Pty) Ltd v The Principal Secretary, Ministry of Public Works and Transport & 5 Others* CCA/0093/14 was handed down, a change of guard occurred

at the Ministry of Public Works and Transport in 2017 when the 4th respondent took over as Permanent Secretary, a re-evaluation of the July 2012 bids was undertaken by the respondents and the tender for the construction of the Senate Building was awarded to the appellant.

6. The detailed chronology of the above events is difficult to clearly understand, but it is as follows.
7. There were eight tenderers for the construction of the Senate Building. The appellant, the 5th respondent and Flash Construction were among them. The appellant and another foreign company, China Shanxi Construction, were disqualified for failure to submit all their tender documents in the English language and authenticated by the Chinese Embassy in Maseru. Five of the tenderers met all the technical requirements and were accordingly evaluated financially. In this financial evaluation Flash Construction was the second lowest bidder and the 5th respondent came up as the lowest and best bidder. The evaluation team recommended the 5th respondent in glowing terms:

“Yan Jian Group [5th respondent] has a vast experience in construction as shown by their record period of the last three years. Over the last three years the total turnover of their projects is M2 401 353 540.46. Yan Jian Group has just completed the project of the National Assembly for the new Lesotho Parliament, to the value of M106 059 180.97 through its branch Yan Tai Construction. The new Senate is going to be constructed just behind the new National Assembly and this National Assembly will be in operation by then as it was just opened this month. Yan Jian Group can be best suited for this project and its project manager is the

same person who managed the construction of the National Assembly. Furthermore Yan Jian Group is the lowest of the three tenderers.

Departmental recommendation

In light of the above analysis and consideration, we would like to propose that the tender for Yan Jian Group to the tune of M84 564 207.22 inclusive of VAT be considered for the award.”

8. It is important to understand the reason for the disqualification of the appellant at this stage because that reason features prominently in the appellant’s submissions on appeal. It is stated in the papers before us that some of the appellant’s tender documents were not translated into the English language and authenticated by the Chinese Embassy as required in the tender specifications. When the tender panel noticed this they took those papers to the Chinese Embassy to have them translated into English and certified. It is stated that the Chinese Embassy refused to do so and told the officials to advise the appellant to bring the papers to the Embassy itself. The appellant only did so on or about 13 September 2012, which was about one month after its disqualification from the tender process on 15 August 2012. This is what the 4th respondent later considered as an unfair basis for disqualifying the appellant: an omission which he thought could have been rectified without excluding the appellant’s bid from being evaluated.
9. The construction contract was, however, not awarded to the preferred bidder, the 5th respondent. The 4th respondent, then a different Permanent Secretary, cancelled the entire

tender process on or about April 2014 and issued instructions for a re-tender of the project. This prompted Flash Construction to approach the High Court challenging the decision of the 4th respondent. Flash Construction was dissatisfied with the manner in which the events were unfolding in relation to the tender for the Senate Building and thus applied, by way of a review, for the decision to cancel the tender and re-tender to be set aside. The 5th respondent was joined as a party to those proceedings.

10. The relief that Flash Construction sought was for an order interdicting the respondents from proceeding with or receiving, opening or considering tenders they had received for the construction of the Senate Building; setting aside the 4th respondent's decision to cancel the July 2012 tender process on the basis that that decision was irregular and therefore unlawful, and declaring the decision to re-tender consequent upon the decision to cancel also irregular and unlawful.

11. The matter came before CHAKA-MAHKOOANE J in the Commercial Court. The learned judge heard the matter on 15 November 2015 and handed down her decision on 13 May 2016. She held that the new invitation to tender and the decision to cancel the July 2012 tender were both unlawful and set them aside. Her Ladyship's decision has been interpreted differently by the parties, hence the appellant's grounds of appeal 1 and 3 are concerned with the

interpretation thereof. Before dealing with the judgment of her Ladyship it is necessary to advert to the correspondence that passed between the appellant and the office of the 4th respondent. That is the correspondence upon which the appellant relies for the assertion that the respondents should be bound to the contract entered between them and specifically perform on it.

Correspondence resulting in alleged contract between appellant and respondents

12. The deponent to the appellant's founding affidavit, Jongbo Zhang, was niggardly with the facts in the affidavit. He did not relate several events that took place between 2012 and 2017. He devoted three short paragraphs to that long and relevant history of this matter, clearly preferring to start his narration from 2017 and almost ignoring events of more than 4 years from when this matter started. His short narration is at para 4.1 to 4.3 of the founding affidavit:

“4.1 The Ministry of Public Works and Transport invited tenders to bid for the proposed construction of the new senate of the parliament of Lesotho. In so doing the 1st respondent complied with regulation 7 of Public Procurement Regulations 2007.

4.2 In 2012, the applicant was not considered to be the preferred bidder; in essence the whole tender process was cancelled sometime in 2017. I attach hereto a letter of Regret from the 1st respondent and mark it “QJ1”. The said letter detailed the reasons for the cancellation being that the scope of work had increased.

4.3 It transpired that prior to the said cancellation, court proceedings in the case of CCA/0093/2014 ensued wherein a judgment was obtained the terms of which were that the

above cancellation as per the letter of regret be revoked and the tender process be extended. Accordingly, in compliance to the said judgment, another letter eliciting the 3rd respondent's decision to award the tender and complete the tender process was made thus quashing or revoking the initial letter "QJ1". I attach the said letter and mark it "QJ3".

13. The appellant deals with the correspondence that passed between it and the 4th respondent's office leading to the conclusion of the contract that it alleges should be upheld.
14. The appellant attaches to the founding affidavit several annexures to prove that it was awarded the contract by the respondents. The first one addressed to it by "Procurement Manager-MoPW&T" is "QJ1" dated 24 July 2017 and reads-

"Letter of Regret

Re: Construction of new Senate for Parliament of Lesotho

Further to a tender you submitted on Wednesday 15th August 2012 for the above mentioned project, you are hereby regrettably notified that the project has been cancelled due to the fact that the scope of the project has been increased thus the estimate for it has changed as well as causing a variation value to be more than 15% of which the Procurement Regulations 2007 do not allow for the project to proceed."

15. By letter dated 9 August 2017, "QJ2", the 4th respondent, Principal Secretary of the Ministry, advised the appellant as follows-

"Re: New Senate Building Tender

The above matter bears reference.

The Ministry of Public Works and Transport kindly request to revoke the letter we wrote to your company informing you

of rejecting all tenders for proposed New Senate Building Tender. This is due to the fact that as the Ministry we had overlooked the May 2016 judgment of the commercial court (CCA/0093/2014) which is something which should not be countenanced. The court showed in CCA/0093/2014 that a tender process can legally be extended. In particular, the court was making reference to this tender in question.

We therefore have decided to award the tender and complete the tender process. The Ministry therefore apologises for inconvenience we may have caused. ...”.

16. On 8 September 2017, the “Procurement Manager-MoPW & T” sent a letter, “QJ3”, to the appellant in these terms:

“Letter of Offer

Re: Proposed Construction of New Senate Building for Parliament of Lesotho

This serves to inform you that you have been awarded the tender for the construction of the above mentioned works to the sum of M75 589 613.49 [... in words].

Since the project was tendered for on 15th August 2012, it was estimated that the construction period will be two years. This means that the rates were fixed for that two years. The tender is only being awarded 5 years later, therefore the Ministry applied an escalation factor to every bidder with a 1.4509 factor.

Please note that all matters concerning a contract will be considered after debriefing process which is 15 days from now in terms of clause 32 of the Public Procurement Regulations 2007. You will remain as the preferred bidder during a period of 15 days starting from the date of this letter within which to confirm your position to enter into a contract agreement. The period ends on 29th September 2017.

We trust you will find this in order and treat accordingly.”

17. The appellant accepted the offer by letter dated 28 September 2017 “QJ4”. The acceptance letter was received by the Ministry on the same day. Thereafter nothing happened. The appellant, through its lawyers, approached

the Ministry by letter dated 12 January 2018, complaining that there had been no progress after they accepted the offer and that the meeting which had to take place on 29 September 2017 had not been called. The letter contained a veiled threat to the Ministry, for it stated-

“The conduct of the Ministry, is under the circumstances a flagrant disregard of the Public Procurement Regulations No.1 of 2007 in particular sections 30(3) and 32(1) which are both couched in peremptory terms thus not permitting the Ministry any other option save to proceed and engage client on the project.

On the basis of the foregoing we are instructed, as we hereby do, to strongly urge you the recipients hereof to expedite the outstanding matters in ensuring that our client is placed in a position where it can resume with the project per the award.

Kindly take notice that client is very reluctant to take this matter to the Courts of Law for intervention as yet, hence our humble request that the matter be resolved at this level.

Kindly note, however, that should no progress be visible within a space of a week from receipt hereof, client will be forced to proceed to the Court and will further claim all costs and expenses associated with the delay.”

18. The appellant’s lawyers did not get a response to their letter. On 12 April 2018 they wrote another letter, “QJ6”, among other things, threatening legal action if the construction site was not handed over to their client within fourteen days.

19. The principal legal officer in the Ministry replied the appellant’s lawyers on 25 April 2018. He advised that certain issues had been raised by the Senate and the Directorate on Corruption and Economic Offences and the latter had ordered that the tender process be stopped until they had completed their investigations. On its part the Senate had

refused to sign and issue Form G-66 to confirm the availability of funds for the construction project, also on suspicion that the tender had not been regularly handled. The principal legal officer concluded his letter by stating -

“... we do not intend in any way to frustrate the progress in this project. We confirm that we are ready to handover site to your client as soon as GP66 is signed by Senate, and the undue delay caused to your client is highly regretted.”

20. On 18 September 2018, the bombshell came: the “Procurement Manager- MoPW & T” sent the following letter, “QJ7”, to the appellant:

“Letter of Regret

Re: Proposed construction of New Senate for Parliament of Lesotho

Further to a tender you submitted on 15th August 2012 for the above mentioned project, you are herewith regrettably notified that your tender was not successful. Tender Panel of the Ministry has accepted Yan Jian Construction’s offer and is therefore the preferred bidder at the tender amount of M84 564 207.22 VAT inclusive.

You are also informed that the initial award has been revoked.

There will be a cooling off period of 15 days starting from the date of this letter within which you may object in writing to the contract being awarded to the preferred bidder.

Please note that debriefing can be arranged after receipt of a request from the unsuccessful tenderer which must take place not later than a month after the contract has been awarded and all unsuccessful tenders are informed.”

21. The appellant responded to the bombshell by letter of its lawyers dated 24 September 2018, “QJ8”, objecting to the course taken by the Ministry and drawing its attention to the fact that the appellant “was the successful bidder in terms of section 30(1) of the Public Procurement Regulations 2007...

more evidenced by a letter from [the] Ministry ... dated 08th September 2018”, and further that the appellant “was still awaiting the debriefing period in terms of s 32(1)” of the Regulations. In another letter dated 3 October 2018 the appellant’s lawyers pressed for a response. When it did not receive it, the lawyers wrote yet another letter, this time containing a formal complaint, dated 11 October 2018. The complaint was:

“3. The sole basis for this complaint is that pursuant to the letter of regret dated 8th September 2018, we were informed that our tender was not successful and further that the Tender Panel of the Ministry of Public Works has consequently accepted the offer of Yan Jian Construction....

4. In terms of the above mentioned letter, it was a requirement that we object in writing to the contract being awarded to Yan Jian Construction, compliance thereto was made yet however to this day, no response was made to the objections raised. ...”.

22. The letter acknowledged that a debriefing was held as a consequence of the Ministry’s letter of 9 October 2018 and that the appellant was advised thereat that its bid had been unsuccessful for the reason that the documents that they tendered were “invalid”. It seems to me that the appellant and the Ministry were at this stage talking at cross-purposes. The Ministry was no doubt referring to the July 2012 tender because they referred in their letter of regret to the appellant’s tender submitted on 15 August 2012. The appellant, on the other hand, was referring to the offer that they had accepted on 28 September 2017. The appellant thus contested the alleged invalidity of the documents that

the appellant had submitted and asserted that their documents were fully compliant. The letter continued:

“8..

(c) the offer which was rendered to us and accepted by us, in terms of the law of contract and was no longer available to be made to any other bidder. The offer and acceptance marked the completion of the bidding process. The dictates of regulation 30(1) of the Public Procurement Regulations therefore applied to us.”

23. They demanded that the respondents recognise that the award to the 5th respondent was null and void.

24. The point that the appellant was oblivious to or simply refused to acknowledge was that Chaka-Mahkooane J’s judgment had directed that the July 2012 tender process be proceeded with from the point when the 5th respondent was declared the preferred bidder. The appellant clearly did not advert to this fact and the fact that its nomination as the preferred bidder only came as a result of a faulty and irregular process that had ignored the existence of her Ladyship’s judgment. The 4th respondent explains the position very clearly at paragraph 8 of his answering affidavit where he says-

“ 8.

Ad para 7

Before answering the subparas in specifics, I wish to lay a brief background which led to the issuance of QJ8.

8.1 It is common cause that at the very inception of the tender, the applicant and others were disqualified for non-conformance with specifications of the tender Document. This was in 2013. They were disqualified because their attachments were not authenticated and translated as

required by the Tender Document. I annex herewith such Tender Document which was an addendum and mark "MP1".

8.2 The company by the name Yan Jian Construction [5th respondent] was recommended the preferred bidder, however it was never awarded the contract. This tender process was cancelled at some stage. Flash Construction, another tenderer, successfully challenged the tender cancellation. Everything remained at halt until 2017 when I assumed office.

8.3 In 2017, I commenced the project process. I learned that some firms including the applicant had been disqualified for failure to comply with the Tender Document "MP1". I made a decision that such companies be given an opportunity to comply. I then ordered a re-evaluation of the tender process thereafter. The re-evaluation was done and the applicant was recommended. When all this was happening, this court had reviewed the decision to cancel the tender. In my *bona fide* understanding of the judgment, I thought I was complying until when the court clarified its judgment that what was envisaged in the judgment was that the tender process should proceed from where they were before cancellation. This means that in view of the decision in CCA/0093/14, we had no alternative but to revoke our offer to the applicant. I annex herewith such judgment and mark [it] "MP2".

25. The 4th respondent states that the offer to the appellant was revoked "by operation of law" because it had come about as a result of a re-evaluation process that the court had disapproved of. This meant that the results of the original process back in 2012/2013 were to be upheld and that, in turn, meant that the 5th respondent remained the preferred bidder with whom the construction contract had to be finalised.

26. The 5th respondent narrates the history of the tender process and points out at paragraph 16 of the answering

affidavit that whilst it was awarded the tender in 2012, it later learnt that the tender process had been cancelled for reasons that it was not advised about. After the cancellation the Chief Accounting officer of the Ministry gave an instruction in 2014 that “a re-tendering” must take place. It is then that proceedings were instituted by Flash Construction in CCA/0093/2014. In October 2016, after the judgment, it learnt that the Ministry had advised the Senate about the award to it of the contract but nothing further happened. Thereafter the Ministry directed that a re-evaluation should take place because some bidders had been unfairly disqualified. A new evaluation team was composed. That team did not take into account a document (Addendum No. 1) which required properly translated and authenticated documents during the initial evaluation process - a requirement that had led to the disqualification of the appellant back in 2012. Thereafter, when the second evaluation team recommended that the tender be awarded to the appellant, the Senate did not approve it. It suspected that the tender had not been regularly handled and that it did not answer to the judgment of the court in CCA/0093/2014.

Judgement in *Flash Construction*

27. I have stated at the beginning of this judgement that the real issue for decision is whether as a matter of fact and law the appellant and the respondents concluded a valid and

binding contract. This brings me to the judgment in *Flash Construction*.

28. The learned judge had before her an application to invalidate the decision cancelling the July 2012 tender process and setting aside the intended re-tendering for the construction project. This is clear from the judgment at paragraph [4], where the judge says -

“The initial tender was publicised around 4th - 9th July 2012 in the following newspapers - the Public Eye, the Sunday Times and the Informative. The tender invitation came with terms and conditions as set out in the publications and they included inter alia, that the preference margins applied by the 2nd respondent had to be complied with in the tender. It is common cause that at some point in November 2013 the tender was cancelled. After the cancellation of the first tender, the respondents re-tendered as per the publication of the 9th May 2014.”

29. The learned judge then considered the submissions by counsel and the law and came to the conclusion that Flash Construction’s application had to succeed. With all due respect to the learned judge, the rendering of the judgment did not make it very clear what she was ordering should be done: it was clear in so far as the success of the review application was concerned. As stated by the 4th respondent the court later clarified its judgment, an averment not contested by the appellant. In my opinion, and this appears to be accepted by all the parties, the effect of the judgment in *Flash Construction* was to bring back the parties to the first tender process that had recommended the 5th respondent as the preferred winner. The judgment was not

appealed and it stands. It stood as the final position determined by the court when the 4th respondent attempted to embark on a re-evaluation of the tender after he took over as Permanent Secretary of the Ministry in 2017. The importance of the *Flash Construction* judgment is that (and this accords with the general understanding of it) it ordered a return to the position as it was when the 5th respondent was declared the preferred bidder.

Judgment on appeal

30. The learned judge, Molete J, who heard and determined the matter on appeal before us, says the following in clear terms:

“[3] It is true that the immediate impression created is one of respondents who are unreasonably refusing to comply with an agreement therefore causing an inconvenience and substantial loss to applicant; of a tender worth hundreds of millions and profits that would accrue therefrom. On closer evaluation, the scenario changes and it is clear that the whole matter revolves around whether or not applicant had even qualified in the first place to be considered for the tender.

31. He went on to refer to and quote paragraph 8 of the 4th respondent’s answering affidavit. At paragraphs that follow, the learned judge says-

“[6] It seems that only a correct and proper understanding or interpretation of what her Ladyship CHAKA-MAHKOOANE J held in CCA/0093/14 will be the key to resolve this matter. The Principal Secretary owns up to a *bona fide* mistake. Even this court in the present application will not be seen to

depart from the judgment of her Ladyship CHAKA-MAKHOOANE J. ...

[10] In this case what the applicant [Flash Construction (Pty) Ltd] sought to be reviewed was the calling for re-tender and it succeeded, which meant that the process of re-tender was held to be irregular and was nullified. It was during this process of re-tender that the applicant in this matter managed to sneak in and be re-evaluated, resulting in the award to it and the formation of the contract which it insists is being breached and seeks an order of specific performance.

[11] A proper understanding of the ruling in my view is that once the review had succeeded, both the second invitation to tender and the second evaluation report resulting in the award to applicant, must all fall away and be disregarded. They are all part and a result of a process which had been nullified by the court.

[14] This application [Flash Construction application] succeeded. It was as a result of the decision to re-tender that the applicant ended up with the award of the contract from which it had initially been disqualified. The re-tender was declared unlawful and therefore the applicant is left with nothing.

[15] Consequently, the application cannot succeed and it is dismissed with costs."

32. The learned judge's analysis is correct and cannot be faulted. The appellant was awarded the tender as a result of the Ministry's failure to understand the import of Chaka-Makhooane J's judgment, which had ordered that the position as at the time that the 5th respondent was declared the preferred winner be restored and the tender process be proceeded from there. In other words that the respondents were to finalise the tender and sign a contract with the 5th respondent.

33. The appellant's submissions are that the learned judge *a quo* failed to distinguish between a re-tendering process

and a re-evaluation process when that distinction is spelt out in the Procurement Regulations 2007: in the case of a tender procedure under regulation 7 Part III and the Government of Lesotho Procurement Manual. The tender process, it is submitted, ends at the stage “of the filing by potential award winners, of all documents required for the tender” and this “therefore means a re-tender means the commencement of this process afresh.” The re-evaluation process is provided for under regulation 29 and also in the Government Manual. It takes place after the tender process and at the stage when the evaluation team looks at such issues as the technical ability of the tenderer and bid prices, among other things, and is conducted not by the tender panel but by an evaluation team. The submission is also that the judge *a quo* erred in holding that a re-tender was undertaken and the appellant was awarded the tender as a result thereof when in fact the 4th respondent ordered a re-evaluation and the appellant was awarded the tender as a result such re-evaluation. That being the case, it is submitted for the appellant that the question arises as to whether in conducting a re-evaluation the 4th respondent departed from the judgment of Her Ladyship CHAKA-MAKHOOANE J. I will quote extensively the reasoning in support of this submission because it is couched in language that is not altogether clear to me. It is this:

“In terms of the Public Procurement Regulations, eligibility to tender is pre-empted by a pre-qualification review prescribed by regulations 15 and 16.

What this means is that the appellant, subject to pre-qualification review stipulated above, was in essence eligible *for tendering*. It goes without saying then that appellant’s disqualification would fatally be founded by non-compliance hereto and such has not been the case here. The appellant remained eligible for tendering.

In the event that the bidder is not disqualified for want of eligibility to tender, and has conformed to deadline for submission, then such bidder qualifies for evaluation – a totally different process from tendering.

It is worth mention (sic) that after the submission of tenders, tenderers may, prior to the process of evaluation, submit additional information or clarifications of tender documents upon request by the unit. See regulation 23.

This then clarifies the submission of the appellant’s certification letter from the Embassy to comply with the Addendum. Even at this point having been allowed to modify the certification, appellant remained qualified, this therefore means the court a quo erred in holding that appellant was precluded from being evaluated.”

34. The appellant makes further submissions which I do not find necessary to deal with. What seems to have escaped the appellant and its counsel is the simple fact that what we are here concerned with is what to make of a process that was undertaken in disregard of a judgment of the High Court, against which no issue had been taken, directing that the July 2012 tender process be continued with. In this connection it does not matter what nature of process was conducted in 2017 after CHAKA-MAKHOOANE J’s judgment, whether it be referred to as a re-tendering or as a re-evaluation. The appellant fell at the first hurdle when he failed to comply with the tender specifications in Addendum

No.1. In *Head of Department, Mpumalanga Department of Education v Valozone 268 CC and Others* (837)[2017] ZASCA 30 (29 March 2017) at paragraph 7-

“... the first step in the adjudication of bids would be to determine which bidders submitted all the compulsory documents and thus qualified to be evaluated in terms of the tender....”.

35. It is common cause that the appellant failed to comply with the tender specification back in 2012 and was disqualified from the tender as a result. Whatever happened later, appellant was already out of the picture. That in a nutshell was the essence of Molete J’s decision. In its written submissions the 5th respondent referred appropriately to *Sanyathi Civil Engineering & Construction (Pty) Ltd & Another v e Thekwini Municipality & Others, Group Five Construction (Pty) Ltd v e Thekwini Municipality & Others* (KZ) [2011] ZAKZPHC 45, 2012(1) BCL 45(KZP) wherein it was stated that “procurement is prescriptive precisely because the award of public tenders is notoriously prone to influence and manipulation. Allowing discretion would weaken the law of its purpose of preferential procurement and curbing corruption.” There is an element of improper and preferential treatment, as observed by Molete J, in what transpired between the Ministry and the appellant in 2017 when an attempt was made to re-open the door to a tenderer that had failed to meet the bid specification some 5 years before.

36. The heads of argument submitted by counsel for the 1st to 4th respondents and the 6th respondent correctly point out from the outset that “ all these grounds of appeal relate to the proper understanding of the judgment of the Commercial Court in CCA/0093/14 per Chaka-Makhooane J”. That, as I said at the beginning of this judgement is the real issue on appeal. The appeal falls on the inability of the appellant to show that the judge *a quo* erred in any respect.
37. Accordingly the appeal fails and it is dismissed with costs.
38. Having dismissed the appeal with costs, and noting that this is the first judgment delivered by this Court immediately after the passing on of His Lordship Molete J, this judgment, with the endorsement of the President of this Court and all their Lordships, my Brothers on this Bench, be viewed as a tribute to the sterling work that the learned Judge did for the judiciary of this country and for the common good of all the citizens of this Kingdom. It is a testimony to his judicial skills, his abiding faith in the rule of law and his commitment to personal independence and impartiality in the administration of justice. MAY HIS SOUL REST IN ETERNAL PEACE.



MH CHINHENGO
ACTING JUSTICE OF APPEAL

I agree:



DR KE MOSITO
PRESIDENT OF THE COURT OF APPEAL

I agree



PT DAMASEB
ACTING JUSTICE OF APPEAL

For the Appellant: ADV T KUOANE

For the 1ST, 2ND, 3RD, 4TH AND 6TH Respondents:

ADV M SEKATI

For the 5th Respondent: P R CRONJè