

**IN THE COURT OF APPEAL OF LESOTHO**

**HELD AT MASERU**

**C OF A (CIV) 15 / 2020**

In the matter between

**MINET LESOTHO (PTY) LTD**

**1<sup>ST</sup> APPELLANT**

**LESOTHO NATIONAL GENERAL  
INSURANCE COMPANY LTD**

**2<sup>ND</sup> APPELLANT**

and

**MINISTER OF DEFENCE AND  
NATIONAL SECURITY**

**1<sup>ST</sup> RESPONDENT**

**PRINCIPAL SECRETARY, MINISTRY OF  
DEFENCE AND NATIONAL SECURITY**

**2<sup>ND</sup> RESPONDENT**

**PROCUREMENT POLICY AND ADVICE DEPARTMENT,  
MINISTRY OF FINANCE**

**3<sup>RD</sup> RESPONDENT**

**ALLIANCE INSURANCE COMPANY (PTY) LTD**

**4<sup>TH</sup> RESPONDENT**

**ATTORNEY GENERAL**

**5<sup>TH</sup> RESPONDENT**

**CORAM:** MUSONDA AJA  
VAN DER WESTHUIZEN AJA  
MTSHIYA AJA

**HEARD:** 21 OCTOBER 2020

**DELIVERED:** 30 OCTOBER 2020

### ***Summary***

*Award of tender for aviation insurance by Ministry of Defence complained of to procurement oversight body in Ministry of Finance; contract signed while tender process suspended; signing found to be irregular and unlawful; tender process set aside.*

## **JUDGMENT**

### **VAN DER WESTHUIZEN AJA**

#### **Introduction**

[1] *“The procurement process in this country ... is anchored on the principles of legality, accountability, efficiency, transparency and value for money.”* These wise words were uttered by Mokhesi J in paragraph 49 of his judgment in the High Court in this matter.

[2] Tender irregularities, fraud and the perception thereof have become poisonous in democratic societies with open economic systems. Therefore this matter is of high significance.

[3] The appellant, Minet Lesotho (Pty) Ltd (Minet), is an insurance broker. It appeals against the above-mentioned judgment in review proceedings, following on the award of a tender for the insurance of aircraft of the Lesotho Air Force, to the fourth respondent, Alliance Insurance Company (PTY) LTD (Alliance), a provider of insurance. The second appellant, the Lesotho National General Insurance Company LTD (Lesotho National) is an insurance company on whose behalf Minet tendered. The first to third and fifth respondents are actors within the Lesotho government. They do not oppose the appeal.

### **Condonation**

[4] Both parties applied for condonation for the late filing of documentation. They did not oppose each other's applications. In view of the relatively minor degree of lateness and the importance of this matter, condonation is granted.

### **Factual background**

[5] The intricate factual background of this matter is set out in the judgment of the High Court; and is evident in a record of more than 500 pages. I summarise.

[6] The insurance contract of the aircraft expired. The Ministry of Defence (MOD) Procurement Unit published one or more invitations to tender in January 2020. There is a dispute as to whether only insurance brokers were invited to attend, or insurance companies as well. This is dealt with below.

[7] Minet tendered. So did Alliance. Minet's quoted price was (according to Minet) 1.4% higher than that of Alliance. The Tender Evaluation Team recommended Minet, inter alia for a range of reasons. It awarded it a 100% score, as opposed to Alliance's 90%. The Team stated that Alliance was not recommended "*due to inadequate scope of work provided, did not provide regional and global partnership proof of companies*" and "*Its experience is insufficient to carry out aviation insurance due to information provided even though its bidding price is lower.*"

[8] The MOD Tender Panel (Panel) invited Minet and Alliance to make oral presentations. During these Alliance (according to the minutes of the event) submitted that, since they had submitted their tender, the "*tender price had risen from M53,361,389 to M68,257,050 due to dollar fluctuations caused by the corona virus. It was explained to them that they should not submit price different from their original tender price. It was a core item of tender process which was not subject to changes*".

[9] The Panel awarded the tender to Alliance. The MOD justified the decision on the basis that it was trite that the key factor to the

award of the tender was the tender price. According to Minet, Alliance openly indicated that they could not render the service for the price they quoted.

[10] On 25 March 2020 the MoD's decision to award the tender to Alliance was communicated to Minet. It was invited to object within a 15-day cooling-off period up to 9 April 2020. On 26 March Minet objected in writing. It forwarded its objections to the third respondent, the Ministry of Finance's Procurement Policy and Advice Department (PPAD), a body established by Regulation 5(1) of the Public Procurement Regulations of 2007 (the Regulations), with the responsibility to develop the public procurement system in Lesotho, as well as dealing with complaints and appeals against procurement decisions.

[11] In an attempt to resolve Minet's complaint, PPAD convened a meeting at the Finance Ministry on 9 April 2020. Because of the conduct of some of those present, this meeting was adjourned. On the same day PPAD addressed a letter to the MoD's Tender Panel. It advised the Panel's chairperson to rectify their administrative issue relating to the tender; requested a response within seven days so that another hearing date could be set; and suspended the award of the tender pending finalization of the matter. Also on 9 April PPAD informed Minet in writing that it had suspended the award of the tender based on what had transpired at the meeting.

[12] Despite PPAD's suspension of the tender, the MoD and Alliance signed an aviation insurance contract on 17 April 2020.

[13] On 20 April 2020 Minet drew this to the attention of PPAD. On 22 April PPAD wrote to Minet that it had expressed its dismay to the MoD and would support Minet in litigation. Indeed, earlier that day PPAD sent a savingram to the MoD, saying that "*contrary to our directive, you went ahead and signed the contract before Minet's appeal could be finalized ... we take exception to that and have since advised Minet to lodge their grievance before the courts of law*". Minet and Lesotho National Insurance unsuccessfully sought an undertaking from the MoD not to implement the contract. Thus they approached the High Court with a review application.

### **High Court**

[14] In the High Court a rule nisi was urgently sought to interdict, restrain and prevent the implementation of the tender and the contract. The applicants asked for the award of the tender to Alliance, as well as the subsequent entering into a contract, to be reviewed and set aside.

[15] The High Court dealt with a range of issues. Not all are relevant for present purposes. Amongst others, it held that Lesotho National lacked standing because it was "a bystander" that did not even tender. The appellants' case is that it did not tender because the invitation was only open to insurance brokers and not

insurance companies, as a result of which Minet tendered for Lesotho National.

[16] The High Court found that the invitation to tender was clearly open to insurance brokers as well as insurance providers, in spite of the protestations of Minet and Lesotho National.

[17] The High Court furthermore found nothing untoward in the Panel's award of the tender to Alliance, in spite of the Evaluation Team's recommendation of Minet. For the High Court the tender price was crucial. Mokhesi J indeed stated that the government could save M 795,156.00 by awarding the tender to Alliance.

[18] It also found no merit in Minet's allegations of bias on the part of the MoD.

[19] On one important point the High Court found in favour of Minet. Relying on the Regulations, as well as on the principles mentioned in the quotation in paragraph [1] of this judgment, the court found that the decision to sign the contract in defiance of PPAD's directions, was "*grossly irregular and unlawful*".

[20] Yet, the High Court stated that "*the above conclusion that the decision was grossly irregular and unlawful does not spell an end to this matter*". Mokhesi J pointed out that before him was a review application, in which he had a discretion. Relying on case law and academic opinions, he decided not to set aside, but to uphold the

irregular and unlawful decision and to keep the invalid contract alive.

## **Issues**

[21] Minet raised several grounds of appeal, but during the presentation of oral argument its counsel focused on two aspects, namely the lack of clarity or indeed misleading nature of the invitation to tender; and the signing of the contract. To other aspects, like reasons to suspect bad faith and bias on the part of the MoD, he alluded.

[22] This judgment deals with the signing of the contract first. Thereafter other aspects are considered to the extent of their remaining relevance.

## **The signing of the contract**

[23] From the above it is clear that Minet approached PPAD with its concerns; that PPAD arranged a meeting or hearing to address the issues raised; that the meeting adjourned prematurely; that PPAD directed, advised, or requested the MoD to suspend the implementation of the award; but that MoD disregarded PPAD and went ahead to have the contract signed by itself and Alliance.

[24] Alliance's main argument is that PPAD merely "advised", but did not "decide", or "rule", inter alia because it did not furnish reasons for its decision. The High Court ruled that the question



whether PPAD directed or merely “advised” but left it in the hands of MoD to exercise its discretion whether to suspend or proceed to sign the contract was a storm in a tea cup.

[25] The Regulations make it abundantly clear that MoD had no right or discretion to proceed with the contract after the communication from PPAD. Regulation 55(3) states that when PPAD is seized with an appeal, it “*may issue a decision to temporarily suspend the implementation of the Unit’s 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*”. The High Court interpreted Regulation 55(3), in spite of its inelegant drafting. PPAD did issue a ruling to suspend.

[26] Regulation 54(5) provides: “*The (Procurement) 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 ...*”. The Regulation provides for the possibility that suspension of the tender process would be “*against the public interest*” but states that the Minister is the arbiter as to whether the tender process is in the public interest. The Minister gave no such indication in this case.

[27] Besides the Regulations, common sense, as well as one’s sense of justice and morality, dictates that the contract should not have

been signed in circumstances like those at stake here. The purpose of the creation of PPAD is to deal with complaints in an area fraught with possibilities for fraud and irregularity. It should instill confidence in tenderers and the public that procurement procedures will be conducted fairly. PPAD has the power to suspend a tender under investigation. It would make no sense – other than to undermine PPAD and render it powerless and irrelevant - if a government department could simply ignore its rulings. The conduct of MoD may well create suspicion regarding its motivation.

[28] As found by the High Court and argued by Minet, the signing of the contract was grossly irregular and unlawful. So, what is to be done about it?

### **Remedy**

[29] The High Court referred to Regulation 39(1) that states that the procurement process shall be regarded invalid or voidable if the procedures set out in the Regulations are violated. It kept a contract that emerged from a grossly irregular and unlawful act alive, though.

[30] The authority referred to by the High Court states an obvious truth, namely that when tenders are awarded, implementation with financial and cost implications often promptly follow. Sometimes the setting aside of an invalid contract could have devastating consequences, for example for social grants and the

lives of millions of people. This case deals with the insurance of aircraft though. Of course it might be important that expensive government property is insured. We are not dealing with life and death, though.

[31] The High Court stated that the remedy was “*fact sensitive*”. However, it did not state the facts that in this case prompted it not to set the contract, or indeed the tender process, aside. With respect, it erred. The revered principle of the rule of law, at the heart of a democracy, dictates that illegality should not be condoned and allowed to prosper, especially by a court of law, unless very compelling circumstances are present.

[32] On behalf of Minet it was argued that this is a good case for substitution. Practically that would mean that this Court, as a court of appeal, decides to award the tender to Minet. Such a ruling would violate the need for transparency in government procurement procedures; and perhaps the separation of powers. It was also submitted that the process must be referred back to PPAD or the MoD to pick up the pieces of the process from a certain point.

[33] The irregular and unlawful signing of the contract did not occur in a vacuum. It followed on earlier problems or concerns. Under the circumstances of this case, the most just and fair order would be to set aside the entire tender process, so that it could start over and be conducted in a procedurally correct and fair way.

It is up to the first to third respondents, as organs within the executive, to deal with the consequences of this judgment, which is a consequence of their conduct. The respondents could consider whether it is legally and otherwise viable to revive the expired contact temporarily. Perhaps PPAD could play a role. This Court is not required to design a solution for the government's dilemma, should there be one.

### **The invitation(s) and other concerns**

[33] In view of the above, it is not necessary to unravel and reach firm conclusions on the dispute as to whether the invitation to tender was extended to insurance brokers only, or also open to all players in the insurance field. According to the allegations made in this matter, a second invitation even emerged. The picture is not clear. In paragraph [2] of its judgment the High Court cites a document titled "Invitation to tender; 5/2020 – 2021". Under the number 1 it states that the Ministry of Defence and National Security "*invites suitably qualified and experience Insurance Brokers to submit sealed tenders for provision of comprehensive aviation insurance ...*" Under 2 it is stated that the tender "*is open to all aviation insurance providers ...*" This kind of confusion is unfortunate, at best, if not irregular. It is to be hoped that greater clarity and certainty will be central if tenders are again invited.

[34] Similarly worrying are aspects of the alleged conduct of MoD officials, as well as the award of the tender in contradiction of the Evaluation Team's recommendation and the reasons therefor, that

could well give rise to perceptions of bias and bad faith. The standards mentioned in the first paragraph of this judgment have to be kept in mind by all involved. This Court has not reached a conclusion on these and related aspects.

### **Costs**

[35] The High Court ordered each party to order its own costs. However, its dismissal of Minet's application is overturned. Costs must follow the result that should have been reached.

[36] Costs in this Court must follow the result.

### **Order**

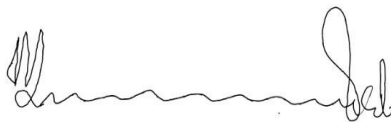
- (1) The appeal is upheld, with costs.
- (2) The order of the High Court is set aside and replaced by the following:
  - (a) The tender process, including the award of the tender to the fourth respondent and the entering into a contract by between the first and fourth respondents, is declared invalid and set aside.
  - (b) The fourth respondent must pay costs.



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**J VAN DER WESTHUIZEN**  
**ACTING JUSTICE OF APPEAL**

I agree



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**P MUSONDA**  
**ACTING JUSTICE OF APPEAL**

I agree



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**N MTSHIYA**  
**ACTING JUSTICE OF APPEAL**

**For Appellants:** Adv P Farlam

**For 4<sup>th</sup> Respondent:** Adv K K Mohau SC