CIV/APN/200/2013

IN THE HIGH COURT OF LESOTHO
(Commercial Division)

In the matter between:

INDEPENDENT ELECTORAL COMMISSION **1ST APPLICANT**

MINISTER OF FINANCE AND DEVELOPMENT PLANNING **2ND APPLICANT**

ATTORNEY GENERAL **3RD APPLICANT**

AND

SAVE GUARD SECURITY CASH MANAGEMENT SERVICE (PTY) LTD **RESPONDENT**

JUDGMENT

Coram : L.A. Molete J
Date of Hearing : 17th February 2015
Date of Judgment: 25th February 2015

Application for rescission of Judgement – Judgment obtained by consent of the parties – When such a judgment may be set aside or rescinded – Principles to be applied – Applicant failing to allege or prove fraud, mistake or any factor to invalidate the agreement – Application dismissed.

ANNOTATIONS

CITED CASES

Hlobo v Multilateral Motor Vehicle Accidents Fund 2001(2) SA 59 (SCA)
Rossow v Hauman 1949(4) SA 796
Hundderfield Banking Co Ltd v Henry Lister & Son Ltd (1985, 2 ch 273)

STATUTES
Public Procurement Regulation, Legal Notice NO:1 of 2007

BOOKS

Introduction

[1] The Applicant seeks rescission of an order granted by the brother **Peete J.** confirming the rule nisi issued on 10th May 2013. The effect of the order was that;

(a) It restrained the 1st Respondent from inviting and evaluating new tenders for the provision of security at its premises countrywide.

(b) It directed first respondent to sign a contract for the provision of security services with the Applicant within 30 days.

The facts

[2] Briefly the facts are that 1st Respondent, the IEC called for tenders for the supply of security at its premises throughout the country. The applicant company which provided the services submitted a tender in compliance with the requirements.

[3] On 3rd April, the company received an invitation to enter into a contract with the IEC. It was stated in the letter that the company has been selected as the most favourable tender. It was therefore invited in terms of the **Public Procurement Regulations, Legal Notice No.1 of 2007**[1]

In terms of subsection (3) the unit had to sign a contract with the tenderer within 15 working days of the notification of the invitation to contract.

[4] On the 26th April, the I.E.C. informed the company that it wanted to withdraw the invitation to contract for the reason that the company had failed to give full information about the status of directors in not providing the police security clearance of its other director.

[5] The directors were **Mr Sephula** and **his wife**. He had provided the policy clearance for himself, but did not provide one for his wife who passed away in 2009. He therefore was the only director of the company.

[6] The rule nisi was granted and was confirmed on the 27th May 2013 by agreement of the parties.

The Consent Order

[7] Agreement of the Parties came about in that **Advocate Mda** who was duly briefed to represent Respondents 1 and 2 phoned **Advocate Laubser** for the Applicant and said that the matter would not be opposed.

[1] Regulation 30 (1)

[8] On the return date, both Counsel met in Court and again discussed the matter. Advocate Mda requested that the fifteen day period be extend to one month and that the prayer for costs be abandoned. They agreed, and proceeded to both meet the Judge in Chambers to make the agreed arrangement an order of court. It was done by consent.

This is now the order that the IEC as applicant today would like to have rescinded and set aside. That is the Application before me.

[9] The events leading up to the granting of the order are common cause. The IEC however contends that;

(a) It never consented nor did it gave instructions to Mr Mda to consent to the order.

(b) That in any event it was not able to agree to what amounted to a violation of the statute.

(c) It was also submitted that a mistake of law and fact common to both parties was that the company failed to supply the police clearance and the IEC did not realise this omission until it had addressed the invitation to the company.

[10] It is the law that an order made by consent between the parties cannot be rescinded unless it was obtained through fraud or where there had been a mistake common to both parties.

Hlobo V Multilateral Motor Vehicle Accidents Fund[2]

Rossow V Hauman[3]

[2] 2001(2) SA 59 (SCA)

[11] The IEC relying on the judgment of the English Court of Appeal, per Lindley LJ in

Huddersfield Banking Co Ltd V Henry Lister & Son Ltd where he said;

> "The appellants contend that there is no jurisdiction to set aside the consent order upon such materials as we have to deal with; and they go so far as to say that a consent order can only be set aside on the ground of fraud…….and so long as it stands it must be treated as such, and so long as it stands I think it is as good as estopped as any other order. I have not the slightest doubt on that; nor have 1 the slightest doubt that a consent order can be impeached, not only on the ground of fraud, but on any grounds which invalidate the agreement it expresses in a more formal way than usual."[4]

[12] In the same case, **Kay LJ** also said;

> "Now what is this consent order? After all, it is only the order of court carrying out an agreement between the parties. Supposing the order out of the way and the agreement only to exist, there can be no sort of doubt that the agreement could be set aside, not merely for fraud; but in case it was based upon a mistake of material fact which was common to all the parties to it. Then, if it

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[3] 1949(4) SA 796

[4] (1895, 2 ch 273)

could be set aside on that ground, why should the court be unable to set it aside simply because an order has been founded upon it? It seems to me that both on principle and on authority when once the court finds that an agreement has been come to between parties who were under a common mistake of a material fact, the court may set it aside, and the court has ample jurisdiction to set aside the order founded upon that agreement."[5]

[13] The immediate inquiry is therefore whether any of the grounds can be found in this case to rescind or impeach the order.

[14] There is no suggestion that there was any fraud and this Court can safely assume that it is not applicant's case.

[15] It is submitted that Advocate Mda had no instructions to consent to the order. That would be inconceivable. He is known to be an experienced and capable Counsel, one cannot imagine him making such a mistake. It is indeed the first instruction that must be given by client to an attorney or counsel whether the matter is to be defended or settled by agreement. Adv. Mda cannot make such a mistake as to fail to defend a matter when so instructed; or consent to an order without clients instruction. I reject the argument that he had no authority to consent to the order.

[16] On the alleged mistake, it is clear that it is not a mistake of fact common to both parties, nor could but it be said to have been induced by the Respondent.

[5] (1895, 2 ch 273)

[17] The Applicant apparently invited the Respondent to enter into the contract without checking that the Respondent had supplied all the necessary information, alternatively it was considered insignificant at the time and was only acted upon as an afterthought to terminate the already established and confirmed fact that the Respondent had been selected as a most favourable tender.

[18] It was submitted on behalf of the Respondent that the mistake relied on by the Applicant and the consequent cancellation make no sense at all because the IEC contends that the company supplied false information or omitted relevant information. There is no mistake that can be shown to have been committed because the Respondent did supply the police clearance for the only director of the company.

[19] In the founding affidavit to the order initially granted by **Peete J.** which Applicant seeks to have rescinded; the paragraph 2 thereof clearly states that the other director being the wife passed away. This is repeated in paragraph 15 of the same affidavit and in paragraph 11.6 of the answering affidavit to this application.

[20] There is nowhere in the papers where the Applicant denies any of the facts alleged. Neither the fact that the other director passed away, nor the allegation that the Applicant was informed about this was denied or placed in issue. The Court therefore has to accept the undisputed facts as they appear in the affidavits of the parties.

[21] In the circumstances there is no reason to justify the rescission of the order made. I therefore conclude that the Application for rescission cannot succeed;

(a) The application for rescission is dismissed with costs.

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L.A. MOLETE

JUDGE

For the Applicant : Adv. N. Pheko

For Respondents : Adv. P.J. Laubser