CCA/03136/2014

IN THE HIGH COURT OF LESOTHO

In matter between:

DRYTEX (PTY) LTD LESOTHO	**APPLICANT**
AND	
PYRAMID LAUNDRY SERVICES	**1ST RESPONDENT**
MINISTRY OF HEALTH	**2ND RESPONDENT**
THE PRINCIPAL SECRETARY FOR MINISTRY OF HEALTH	**3RD RESPONDENT**
THE ATTORNEY GENERAL	**4TH RESPONDENT**

JUDGMENT

Coram	**:**	**L. Chaka - Makhooane J**
Date of hearing	**:**	**27th April, 2015**
Date of Judgment	**:**	**17th September, 2015**

SUMMARY

Urgent application – Applicant praying that the service contract between the 1st respondent and 2nd and 3rd respondents be declared void and to be cancelled – That the same contract be awarded to it – Alternatively that applicant be called for negotiations because it was the preferred bidder and the highest ranked tenderer – 3rd respondent awarding contract to 1st respondent on other considerations – The application dismissed with costs.

ANNOTATIONS

CITED CASES

1. Ash v Mannering and Another (34408/2012 [2012]ZAGJHC 256 (11 December 2012).
2. Chief Constable of the North Wales Police v Evans [1982] 3 ALL ER 141 (HL).
3. Collen v Rietfontein Engineering Works 1948 (1) SA (A) 420.
4. Hospital Association of South Africa (Pty) Ltd v Minister of Health 2010 (10) BCCR 1047 (GNP).
5. Law Society of Lesotho v The Chief Justice and Others CIV/APN/149/2010.
6. Lesotho v Molai & Another C of A (CIV) 01/2006.
7. Monahali Construction v Ministry of Education and Training and Others CIV/APN/239/11.
8. Nthati Mokitimi v Central Bank of Lesotho LC 23/13
9. Setlogelo v Setlogelo 1914 AD 221.
10. Teaching Service Commission and 3 Others v Judge of the Labour Appeal Court & 4 Others C of A (CIV) No. 21 of 2007.
11. Tsabane v Caba & Another CIV/APN/218/2000.
12. Van Zyl v Lesotho Highlands and Others 199

BOOKS

1. Baxter (1984) Administrative Law (Juta).
2. Cora Hoexter, Juta, Administrative Law in SA, 2nd Edition 2012.
3. De Smith, Lord Woolf Jowe LLC (1999) Principles of Judicial Review (London – Sweet and Maxwell)

STATUTES

1. Government Proceedings and Contracts Act No.4 of 1965

2. Public Procurement Regulations, 2007

[1] This is an application that came before me upon notice of motion, brought by the applicant as a matter of urgency. The applicant is seeking an order *inter alia*, an interdict against the 1st respondent, a declaratory order declaring the contract signed by and between the 1st respondent and the 3rd respondent void and was therefore to be cancelled, that the same contract be awarded to the applicant, or alternatively, the applicant be invited to contract negotiations in terms of clause 5.8 of the 3rd respondent's tender specifications.

[2] Initially all the respondents opposed the application however, the 2nd to the 4th respondents informed the court that they were no longer defending the matter and would abide by the final order of the court. When the parties first appeared before the court on the 29th September, 2014, the court referred the matter to mediation in line with **Rule 7** of the **High Court Mediation Rules**. However, on the 20th October, 2014 the parties informed the court that mediation had failed. The court having heard counsel for the parties, made an order that the matter was not urgent and that the respondent must their papers in accordance with the time frames as prescribed by the Rules of Court. The matter was postponed to be heard on the 27th April, 2015.

COMMON CAUSE FACTS

[3] It is common cause that around the 8th to the 14th December, 2013, the 2nd respondent advertised proposals inviting tenders from suitably qualified

firms for provision of laundry services at hospitals in Botha-Bothe, Leribe, Berea, Mafeteng and Mohale's Hoek. It is also common cause that amongst others, the applicant and the 1st respondent submitted their proposals accordingly.

[4] On the 16th June, 2014, the 3rd respondent notified the applicant that having carefully evaluated all the tenders received, the contract had been awarded to the 1st respondent. The 3rd respondent further advised the applicant and the other bidders to lodge an objection regarding the award of the contract. The applicant was the only company that lodged the objection.[1] The objection was eventually entertained even though it was through the Procurement Policy and Advice Department's ("PPAD") intervention. It is important to note that in its intervention among other things, the PPAD also directed the 3rd respondent to see to it that the contract between the 1st respondent should not be signed until the matter had been finalised.[2]

[5] It is further common cause that even though the 3rd respondent entertained the objection, the Unit maintained its earlier decision of awarding the tender to the applicant. The applicant was not satisfied with the decision of the Unit and it appealed the decision to the PPAD. The PPAD ruled in the applicant's favour and recommended that the contract be awarded to the applicant, as it was the highest ranked tenderer.

[6] The 1st respondent raised so a called point *in limines.* I was not sure what to make of some of them because many of them had either been dealt with

[1] Annexure "DT8" to the Founding Affidavit. Pg 81 of the record.
[2] Annex "DT 11" at pg 92 of the record.

already or had been overtaken by events. The 1st respondent lamented *inter alia* that the applicant abused court processes by bringing the matter to court *ex parte* and on an urgent basis. The court ruled on this issue very early in the matter. Above all, that point *in limine* was certainly not material. As a result the point of abuse of court process falls by the way side.

[7] The other point is that the decision by the 3rd respondent to award the contract to the 1st respondent is an administrative action and it ought to have been challenged by way of review. According to 1st respondent's counsel **Mr Molapo**, the applicant ought to have been disqualified at the determination of eligibility stage and should not have been allowed to tender. It is alleged that the applicant's tax certificate was fraudulent and that the company also owed tax arrears. According to **Mr Molapo** this was the reason why they were disqualified even though they were the highest bidder. As a result therefore, the Unit decided not to award the tender to the applicant because of these other considerations, as opposed to the overall score. **Mr Molapo** argued that the 2nd and 3rd respondents took an administrative decision not to award the applicant the tender and instead awarded it to the 1st respondent. It was argued further that since this was an administrative decision, the applicant should have approached the court by way of review.

[8] **Mr Molapo** has shown on behalf of the 1st respondent that, the applicant wants the court to exercise the duties and functions of the unit (of awarding the tender to the applicant) which would be tantamount to usurping the powers of the unit. The court was referred to several cases such as the **Law**

Society of Lesotho v The CJ and Others[3] and **Hospital Association of South Africa (Pty) Ltd v Minster of Health.**[4]

[9] The applicant on this point argued that, the matter is not a purely administrative action. This is because the matter also involves the engagement of third parties by way of a contract, invited by the 3rd respondent, to tender for the provision of laundry services to certain districts. **Ms Khesuoe**, counsel for the applicant, showed that the engagement of the third parties is regulated by the **Public Procurement Regulations**, ("Regulations").[5]

[10] It was **Ms Khesuoe's** submission that what actually constitutes an administrative action is the PPAD's decision that was in favour of the applicant. That being the case, the applicant would not have a decision in its favour reviewed, it could ask the court instead, to confirm and enforce it. According to **Ms Khesoue** this is what brought the applicant to court. The applicant is seeking an order that would effectively enforce the PPAD's decision. As a result the applicant prays that the preliminary point be dismissed with costs on the attorney and client scale.

[11] So far we have established as part of common cause facts that the applicant appealed the decision of the Unit (3rd respondent in particular) to the PPAD. That decision was to the effect that the 1st respondent was the preferred tenderer and that the contract was awarded to it. This was despite the

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[3] CIV/APN/149/2010.

[4] 2010 (10) BCCR 1047 (GNP) [68]- [71].

[5] Legal Notice No.1 of 2007 at Regulations 39 (c) and 56 (2).

complaint already lodged by the applicant. It is not disputed that the PPAD sat and considered the appeal and the ruling was made in the applicant's favour, in that the PPAD recommended that the applicant be the preferred bidder to be awarded the contract as the highest ranked tenderers.[6]

[12] The 1st respondent shows that the applicant's action of coming to court, amounts to seeking the court to exercise the duties and functions of the Unit, in awarding the applicant the tender, whereas there is a body specifically for that role. According to **Mr Molapo** should the court find for the applicant, then it would be usurping the powers of the Unit. This is especially so in the case where the applicant alludes to certain irregularities that eventually led to the award of the tender.

[13] Judicial review has traditionally been said to be;

> *"... concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power.*"[7]

[14] Judicial review as opposed to appeal is not concerned with the merits of the decision but whether the decision was arrived at in an acceptable fashion. *In casu* I am inclined to disagree with the 1st respondent that this matter ought to have come to court by way of judicial review. It would seem that

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[6] See Annex "DT15" to the founding affidavit sivingram from the Director, PPAD, dated 26th August, 2014.

[7] Chief Constable of the North Wales Police v Evans [1982} 3 ALL ER 141 (HL) at 154 d, quoted in Administrative Law in SA, Cora Hoexter, Juta, 2nd Edition, 2012 at page 109.

the 1st respondent has over looked the journey that the applicant says brought it thus far. It has not been disputed up to this point that the applicant went through the process, first complaining over the 3rd respondent's decision to the Unit. When that decision was not to its satisfaction, it appealed to the PPAD which found in her favour. When the 3rd respondent did not comply with the PPAD's recommendation, the applicant approached the court. In essence both the Unit and the PPAD were let to do their administrative functions as they did, that being the case, there is no need for the court to intervene in that process. Even if there were any irregularities in the process, those ought to have being dealt with by the PPAD in the light of its functions as stipulated in **Regulation 6 (2)** especially **(c)**. I am convinced that this point *in limine* must fail.

[15] On the merits it is the applicant's case that the 2nd and 3rd respondent wrongfully granted a contract to the 1st respondent when infact it should have been granted to it as the most favourable bidder. The awarding of the contract to the 1st respondent is in contravention of Clause 5.8 of RFP NO GOL/C002/2013. The applicant seeks an order declaring the contract null and void and that it must therefore, be cancelled. Furthermore, the applicant pray for an order that it should be awarded the same contract. Alternatively, the applicant prays that it should be invited by the 2nd respondent to the contract negotiations as per clause 5.8 of the RFP No GOL/C 002/2013.

[16] The 1st respondent's case is that it was awarded the contract lawfully. It is the 1st respondent's case further that, even though the applicant was ranked as the highest bidder, it was disqualified because the applicant's tax certificate was fraudulent and it was also in tax arrears. Furthermore the 1st

respondent's case was that the prayers sought by the applicant had been superceded by events, in that the negotiation meetings had already been held and as such it was expected to perform. The 1st respondent had already incurred certain expenses in the effort to meet its contract obligations.

[17] The issues to be determined by this court are;

(a) whether the contract is void and must therefore be cancelled;

(b) whether the applicant ought to be awarded the same contract;

(c) whether the applicant should be invited to the contract negotiations as per clause 5.8 of the contract specifications.

[18] The applicant contends that to determine the validity of the contract, the court has to examine the provisions of Regulation 39,[8] which provides as follows;

> *39. "…the procurement process shall be regarded in valid and the subsequent contract void or voidable in the following cases:*
>
> *(a) The contract shall have been entered into breaching the elements of the law of contracts;*
>
> *(b) The Unit entered into the contract without the approval of the chief accounting officer: or*
>
> *(c) the Unit entered into the contract breaching the procedures set out under these regulations*."

[8] Public Procurement Regulations, 2007

The applicant showed further that it is common cause that the 1st respondent was only registered on the 21st January, 2014. As a result, it could not possibly meet the requirements stipulated under **Regulation 17 (1) (b)**. The applicant on the other hand was registered in May, 2009. According to the applicant the contract was awarded in violation of other regulations such as **Regulation 30 (1)** and **Regulation 39 (c).**

[19] The 1st respondent argues in turn that the 1st respondent's tender was accepted without variation as a result a binding contract exists between itself and the 2nd respondent and that it has already been signed. The 1st respondent further shows that it is inconceivable that the applicant would be awarded the same contract in that, clearly the 2nd and 3rd respondent had no intention of entering into an agreement with the applicant, in that there is no intention to create reciprocal duties. It was argued that the court cannot rightfully order that the contract be awarded to the applicant because in doing so, the court would essentially be negotiating on behalf of the applicant, whereas for a proper contract to exist, the parties must both be *ad idem* and willing to be bound by the contract.

[20] It is interesting to note that the applicant has come to court to seek among others an order, that the court should find that the contract between the 1st respondent and the 2nd and the 3rd respondents is void and that it should be cancelled. It is interesting in that having gone through the appeals panel (PPAD), the PPAD recommended that the preferred bidder be the applicant. Even as the appeal was concluded, the applicant was aware that the contract had already been signed between the 1st respondent and the 2nd and 3rd respondents. Clearly the 2nd and 3rd respondent had made up their minds

the party with whom they intended to contract. By the time the PPAD's recommendation was made, a contract already existed between the respondents.

[21] It is to be noted also that the PPAD did not rule that the contract was to be given to the applicant, rather it recommended the applicant as a preferred bidder, which recommendation the Unit could take or reject and it seems the Unit chose the latter. In other words the court *in casu* cannot find that a valid and binding contract between the respondents properly signed, is void and therefore, should be cancelled. Neither can the court order that the same contract be given to the applicant because it is not available to the applicant. The contract had already been accepted by the 1st respondent without variation.[9] The court cannot revoke the contract that had already been signed. The court is being asked to declare that contract as void and then place the applicant as the rightful contractors. The applicant is actually asking the court to make contract for them. That is not the business of the court.

[22] I am of the view that the applicant has somewhat misinterpreted Regulation 39. Regulation 39 does not stipulate the procedure to be followed in the case where the court is approached, instead it stipulates the process where the contract is to be regarded as void or voidable. Indeed the applicant approached the court in terms of **Regulation 56 (2)** following their appeal to the PPAD. It seems to me that the applicant should have come to court

[9] Collen V Rietfontein Engineering Works 1948 (1) SA 413 (A) at 420.

on appeal rather than to come to court to pray for an order of cancellation of a valid contract.

[23] I have already found that the prayers sought by the applicant are untenable and in that regard, the application must fail. I must make mention however, that this does not mean that the applicant does not have any redress. The applicant itself has conceded that there is another remedy, which is a claim for damages, but it chose not to persue it. The applicant's choice was influenced by an anticipation that the Government may not comply with the order thus making it difficult for it to execute a writ of execution, in terms of **Section 5** of the **Government Proceedings and Contracts Act**.[10]

[24] I find it hard to comprehend what **Ms Khesuoe's** argument was based on here. Does it mean that the Government will not be sued because of Section 5? The answer is clearly in the negative. This court takes judicial notice of the fact that as a matter of fact the Government is sued all the time and where it has not complied with court orders, there are other avenues to be persued. That has never been a hindrance to the ordinary man in the street who has sued the Government. I therefore, find that, that remedy is still available to the applicant.

[25] Having found that the application must fail in the main, I am certain that even the alternative prayer falls under the same hammer.

[10] No 4 of 1965.

[26] It is for these reasons that I make the following order, the application is dismissed in the main prayers and in the alternative with costs on the ordinary scale. I must lament that both parties had prayed for costs on client and attorney basis but none of the parties had justified the need for a costs order on this higher scale. The court is at pains to grant this scale where no justification has been made. My order is therefore, that costs will be on the ordinary scale.

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L. CHAKA-MAKHOOANE
JUDGE

For Applicant : **Adv. Khesuoe**

For 1st Respondent : **Adv Molapo**

For 2nd to 4th Respondents not appearance.