

**IN THE HIGH COURT OF LESOTHO**

**(Commercial Division)**

In the matter between:

**HIPPO TRANSPORT (PTY) LTD**

**APPLICANT**

AND

**AFRISAM LESOTHO (PTY) LTD**

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

**DAILY NEEDS ENTERPRISES (PTY) LTD**

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

**DANKIE TRANSPORT (PTY) LTD**

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

**SLITZ TRANSPORT (PTY) LTD**

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

**SP LOGISTICS (PTY) LTD**

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

**MEWS TRANSPORT (PTY) LTD**

**6<sup>TH</sup> RESPONDENT**

**MOTABO TRANSPORT (PTY) LTD**

**7<sup>TH</sup> RESPONDENT**

**RULING**

**Coram : L. Chaka-Makhooane J**

**Date of Hearing : 17<sup>th</sup> June, 2016 and 20<sup>th</sup> June, 2016**

**Date of Ruling : 28<sup>th</sup> June, 2016**

## **SUMMARY**

*Urgent Application – Applicant seeking to restore the status quo in a process contract by an interim interdict as temporary relief – Respondents opposing the application on grounds that the applicant had failed to meet the requisites for an interim interdict – Having found that the applicant failed to establish a prima facie right – Application dismissed with costs.*

## **ANNOTATIONS**

### **CITED CASES**

1. Boshoff Investments (Pty) Ltd v Cape Town Municipality 1969 (2) 256
2. Caledon Street Restaurants CC v D’Aviera [1998] JOL 1832 (SE).
3. Chopra v Avalon Cinemas SA (Pty) Ltd 1974 1 SA 469 (D).
4. Juta & Co. V Legal and Financial Publishing Co. (Pty) Ltd 1969 4 SA 443.
5. LF Boshoff Investments (Pty) Ltd v Cape Town Municipality 1969 2 SA 256.
6. Mahao v LEC C of A (CIV) No 8/09.
7. Mlondleni v Amathole District Municipality [2009] ZAECGHC 2.
8. Molaoli and Others v Lesotho Highlands Development Authority (LHDA) LAC/A/06/05.
9. Olympic Passenger Service v Ramalagan 1957 2 SA 382.
10. Schweizer Reneke VleisMkpy (Edms) Bpk v Minister Van Landbou en andere 1971 91) PH F11 (T).
11. Setlogelo v Setlogelo 1914 AD 221.
12. Webster v Mitchel 1948 1 SA 1186.

## BOOKS

Lexis Nexis, Christie's Law of Contract in South Africa, 6<sup>th</sup> edition.

[1] This matter came before me as an *ex parte* and urgent application, on the 15<sup>th</sup> June, 2016. The court ordered that all the parties be given notice and the matter was heard on the 17<sup>th</sup> June, 2016.

[2] The prayers sought by the applicant were couched in the following terms:

1. *Dispensing with the forms and service and time limits in terms of the Rules, and hearing the matter as one of urgency at such time and in such manner and in accordance with such procedure as to this Honourable Court seems meet.*
2. *For purposes of this order, the phrase "applicant's transport allocation" means 40% of the bagged volumes of Cementitious Products ordered by 1<sup>st</sup> Respondents' Lesotho Customers for delivery to them, and 100% of the Bulk volumes of such Cementitious Products.*
3. *A rule nisi is issued calling upon the Respondents to appear and show cause on a date as determined by this Honourable Court why an order in the following terms should not be made:*
  - 3.1 *The 1<sup>st</sup> Respondent is interdicted from*
    - 3.1.1 *Concluding any freight services contract with any of the 2<sup>nd</sup> to 7<sup>th</sup> Respondents of with any other company or person other than the applicant, for the transport of the applicant's transport allocation or any part thereof, whether pursuant to tender number CMD/LOG/LES/2016/01 or otherwise.*
    - 3.1.2 *Making use of a company or person other than the applicant for the transport of the applicant's transport allocation.*

- 3.2 *It is declared that the process followed by the 1<sup>st</sup> Respondent in connection with tender number CMD/LOG/LES/2016/01 was materially irregular and unfair toward the applicant;*
- 3.3 *Tender number CMD/LOG/LES/2016/01 as issued by the 1<sup>st</sup> Respondent is declared to be invalid and is hereby set aside for irregular process;*
- 3.4 *The 1<sup>st</sup> Respondent is ordered to pay the Applicant's costs of this application on the attorney and own client scale including the costs of three counsel if employed;*
- 3.5 *Any other party or person that may oppose this application is ordered to pay applicant's costs, on such scale and on such basis as the Honourable Court may direct.*
- 3.6 *Further or alternative relief.*
4. *Paragraph 3.1 above operates as an interim interdict with immediate affect and shall remain in force until it may be discharged or set aside by this Court on the return date or thereafter.*
5. *The Applicant may supplement its papers by way of a supplementary affidavit to be delivered by no later than....*
6. *Any respondent that wishes to show cause as contemplated in 3 above must file an answering affidavit by no later than ....and the applicant may file a reply within two weeks thereafter.*
7. *The rights of the Respondents to anticipate the return day are not restricted in any way.*
8. *This order and the application papers are to be served on the respondents by the sheriff.*
9. *Further or alternative relief.*

[3] The applicant and the 2<sup>nd</sup> – 7<sup>th</sup> respondents are in the transportation (carriage) business of large cargo. The 1<sup>st</sup> respondent is said to be the producer and distributor of cement throughout Lesotho. The applicant and 2<sup>nd</sup> – 6<sup>th</sup> respondents have existing contracts with the applicant, to transport

cement. The contracts ran from May, 2015 to April, 2016. However, the applicant extended the contracts from April, 2015 to the end of June, 2016.

- [4] The applicant was awarded the contract for forty percent (40%) of the bagged volumes of the cement product, while the respondents were awarded to share the remaining sixty percent (60%). The applicant was also awarded a tender to transport hundred percent (100%) of the bulk volumes of cement through its specialised containers.
  
- [5] Sometime in February, 2016 the 1<sup>st</sup> respondent invited the applicant and the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> respondents to submit tenders for transport services for the period after April, 2016. The respondents submitted their tenders under tender number CMD/LOG/LES/2016/01.
  
- [6] The applicant was later advised around the 10<sup>th</sup> May, 2016, that its tender had been unsuccessful. The applicant also found out that when the 1<sup>st</sup> respondent advised that the existing contracts would be extended to terminate at the end of June, it had also advised the other tenderers, to the exclusion of the applicant, that it was not satisfied with the tender offers it had received and had requested the tenderers to revise their tender prices down wards.<sup>1</sup> This letter that was given to the tenderers was not given to the applicant.
  
- [7] It appears also that when the applicant was disqualified, so was the 3<sup>rd</sup> respondent. However, it is alleged that thereafter, the 3<sup>rd</sup> respondent was “secretly” given an opportunity by the applicant to revise its prices, thus

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<sup>1</sup> See Annexure “IM 05” at page 33 of the founding affidavit.

providing the 3<sup>rd</sup> respondent with secret information on the other tenderers' prices.

- [8] According to the applicant, by giving the other tenderers and not the applicant the opportunity to reduce their tender prices, the 1<sup>st</sup> respondent was acting in bad faith, it was unfair, unreasonable and it also acted improperly by discriminating against the applicant.
- [9] The applicant in his founding affidavit averred further that the tender process is regulated by various rights and obligations, even where the tender is invited by a private entity or body. According to the applicant, those rights and obligations arising out of the tender process, collectively constitute a process contract. Applicant contends therefore, that a process contract had come into existence, to regulate the rights and obligations in relation to the tender numbered CMD/LOG/LES/2016/01. The said rights and the 1<sup>st</sup> respondent's corresponding obligations, included *inter alia* that;
- (a) the tender process must be fair and reasonable and must be governed by absolute good faith at all times;
  - (b) those invited to tender must be treated fairly and equally.
- [10] The 1<sup>st</sup> respondent is said to have breached the process contract when it gave the other tenderers the opportunity to reduce their prices and the same opportunity was not afforded to the applicant. By its conduct the 1<sup>st</sup> respondent acted in bad faith as already shown elsewhere in the Ruling. As a result, a material term of the process contract namely, that all tenderers are entitled to equal treatment had been breached.
- [11] The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 7<sup>th</sup> respondents oppose this application and they filed their answering affidavits. Generally the respondents are of the view

that the matter is not urgent and that the applicant has not met the requisites for an interdict.

[12] I must at this juncture make it clear that even though at the time the applicant appeared before me, no arguments had been advanced in relation to the issue of urgency, by allowing the matter to be heard within two (2) days, I effectively allowed this matter to be heard on urgent basis.

[13] Apart from the question of urgency the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> respondents had raised other points *in limine*. These were in relation to the interim interdict. According to the said respondents the applicant had failed to prove a *prima facie* right. **Mr Loubser** counsel for the 1<sup>st</sup> respondent argued that the applicant was relying on a contract which in his own words expires at the end of June. Nothing in that contract entitled it to the relief it now seeks, because it has no rights post the end of June. According to counsel, the applicant was simply trying to hijack a new contract, against the principles of contract law.

[14] **Mr Loubser** further argued that a call for tenders is normally no more than a request to submit offers, and each tender is an offer which the employer calling for tenders, may accept or reject at will.<sup>2</sup>

[15] **Mr Nthontho** counsel for the 2<sup>nd</sup>, 4<sup>th</sup> and 7<sup>th</sup> respondents argued that the applicant had not shown that he has a *prima facie* right to sustain its claim for an interim interdict, when clearly it did not tender for the 40% that they are now trying to claim as theirs. Like all others tenderers the applicant had tendered for a 100% of the tender.

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<sup>2</sup> Annexure "C" to the 1<sup>st</sup> respondent's answering affidavit.

- [16] It was further argued on behalf of the respondents that the applicant had failed to show in his papers how he would suffer irreparable harm. Instead he is said to have referred to 3<sup>rd</sup> parties as a basis of his approach. Furthermore, it was argued that the applicant does have an alternative remedy by way of an action for damages against the 1<sup>st</sup> respondent, if it is found that the tender should have been awarded to the applicant.
- [17] On the point of the balance of convenience, **Mr Loubser** argued that what the applicant was asking the court to do was to interdict the 1<sup>st</sup> respondent to conclude any new contracts even though the existing ones are to lapse by the end of June, 2016. That means the applicant is asking the court to direct the 1<sup>st</sup> respondent to deal only with it, to the prejudice of the other respondents. According to **Mr Loubser**, the applicant had not addressed the prejudice they will suffer and the balance of convenience to them.
- [18] On the other hand, **Mr Nthontho** argued that the court cannot be asked to maintain the *status quo* if the current contract is to lapse by the end of June. Counsel further argued that on the basis of the applicant's averments, the balance of convenience does not favour the granting of this application more so when the applicant has failed to show what kind of prejudice it is likely to suffer, if the interim interdict is not granted. The court was asked to weigh the prejudice the applicant will suffer if the interim interdict is not granted, against the prejudice the respondents will suffer if it is. The court was referred to the cases of **Boshoff Investments (Pty) LTd v Cape Town Municipality**<sup>3</sup> and **Olympic Passenger Service v Ramalangan**.<sup>4</sup>

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<sup>3</sup> 1969 (2) SA 256

<sup>4</sup> 1957 (2) SA 382



[19] I am not convinced that the applicant has met the requisites for an interim interdict *in casu*. It is trite that these requisites are:

- (a) a *prima facie* right;
- (b) a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted;
- (c) that the balance of convenience favours the granting of an interim interdict; and
- (d) that the applicant has no other satisfactory remedy.<sup>5</sup>

## **PRIMA FACIE RIGHT**

[20] I am unable to find anywhere in the founding affidavit proof of the facts that establish the existence of a right (s), enough to entitle the applicant the relief sought. *In casu* the applicant relies on the rights that it says have accrued under the process contract. The applicant contends that the 1<sup>st</sup> respondent violated those rights in relation to the tender, in tender number CMD/LOG/LES/2016/01. According to him he was discriminated against and that the tender process was not fair and it was not governed by absolute good faith.

[21] In my view the applicant was informed since the 10<sup>th</sup> May, 2016 that he had been disqualified as a contender for the new tender. In that regard the applicant is already out of the race. Any dealings that the 1<sup>st</sup> respondent has with the other tenderers in clearly between the 1<sup>st</sup> respondent and those

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<sup>5</sup> Setlogelo v Setlogelo 1914 AD 221 at 227.

tenderers. That he wants the court to preserve the *status quo* in relation to the 40% that it says belongs to it, is stretching it a bit far.

[22] The process contract referred to, I am unconvinced that, this area of the law forms part of our law of contract, so far. Even if it was persuasive, *in casu* the 1<sup>st</sup> respondent had already short listed the companies that it wished to be contracted to.

[23] As far as the current contract is concerned, this expires in June, 2016. Nothing so far shows that the 1<sup>st</sup> applicant has any rights that could be interpreted as extending beyond the life of the existing contract, that is beyond June, 2016. So that any reference to legitimate expectation and the process contract where these were not mentioned in the contract between the parties cannot be enforced.<sup>6</sup>

### **APPREHENSION OF IRREPARABLE HARM**

[24] The requisites for an interim interdict and should not be viewed in isolation. The applicant in its founding affidavit was unable to show how it would suffer irreparable harm should the relief not be granted. There was mention that the applicant bought trucks for M18 Million at the instance of the 1<sup>st</sup> respondent. I was unable to find anywhere from the facts where the 1<sup>st</sup> respondent intimated this. The 1<sup>st</sup> respondent has denied this. The contract does not refer to this. Infact what was clear was that the same trucks also did work for a rival company to the 1<sup>st</sup> respondent. Irreparable harm has not been established as a result.

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<sup>6</sup> See Molaoli And Others V LHDA LAC/06/2005.

## **THE BALANCE OF CONVENIENCE**

[25] The balance of convenience must favour its granting. According to the applicant the balance of convenience means maintaining the *status quo*. In essence what the applicant is saying is that, the 1<sup>st</sup> respondent must be interdicted to conclude any new contracts even though at the end of June the existing contracts will lapse. Effectively this means the court is being asked to hold the 1<sup>st</sup> respondent's hands to contract with tenderers of its choice, and to deal with the applicant to the prejudice of the companies that are likely to win the new tender. It is my opinion that in exercising my discretion, the balance of convenience *in casu* favours the respondents. The respondents will suffer more prejudice should the interim interdict be granted.

## **NO ALTERNATIVE REMEDY**

[26] The applicant has other remedies except it chose not to explore them first. It has been suggested that the applicant has an option of an action for damages against the 1<sup>st</sup> respondent. However, the 1<sup>st</sup> respondent was very quick to dismiss it by saying that it would not be a suitable or a practical remedy. Be that as it may, the court is more inclined to exercise its discretion by refusing to grant the interim relief especially where the requisites have not been established.<sup>7</sup>

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<sup>7</sup> See *Setlogelo v Setlogelo* (supra). See also *Plettenberg Entertainment (Pty) Ltd v Minister Van Wet & Orde* 1993 (2) SA 396 (C)

[27] It is for these reasons that the interim interdict is not granted. The following order is made:

1. The application for the interim interdict is dismissed with costs on the ordinary scale.
2. Costs will be costs in the course.

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**L. CHAKA-MAKHOOANE**  
**JUDGE**

For the Applicant	:	Mr Edeling
Assisted by	:	Mr Ndebele and Mr Rasekoai
For the 1 <sup>st</sup> Respondent	:	Mr Loubser
Assisted by	:	Mr Frazier
For the 2 <sup>nd</sup> , 4 <sup>th</sup> and 7 <sup>th</sup> Respondents	:	Mr Nthontho
For the 3 <sup>rd</sup> Respondent	:	Mr Maieane
For the 5 <sup>th</sup> and 6 <sup>th</sup> Respondents	:	No Representation.