

**IN THE HIGH COURT OF LESOTHO  
(Commercial Division)**

In the matter between:

**PANDAGRAM CONSTRUCTION (PTY) LTD                      APPLICANT**

**AND**

<b>MINISTRY OF GENDER, YOUTH, SPORTS &amp; RECREATION</b>	<b>1<sup>ST</sup> RESPONDENT</b>
<b>UNIK CONSTRUCTION</b>	<b>2<sup>ND</sup> RESPONDENT</b>
<b>ATTORNEY GENERAL</b>	<b>3<sup>RD</sup> RESPONDENT</b>

**JUDGMENT**

Coram	:	Hon. Chaka-Makhooane J
Date of hearing	:	15 <sup>th</sup> February, 2016
Date of Judgment	:	28 <sup>th</sup> April, 2016

**SUMMARY**

*Urgent application – Applicant having raised point in limine – Violation of Oaths and Declarations Regulations, 1964 – 2<sup>nd</sup> Respondent also raising a point in limine – Court opting to decide the matter on the merits and not on technicalities – Points in limine dismissed with costs.*

## ANNOTATIONS

### **CITED CASES**

1. Afrisure Finance and Eesy Management Services v Maneo Lechaka and 36 Others.
2. Central Bank of Lesotho v Phoofolo 1985 0 1989 LAC 253.
3. Chobokoane v Solicitor General Maseru LAC 1985 – 1989.
4. Lesotho Renew Authority and 2 Others v Olympic Off Sales C of A (CIV) 13/2006.
5. Matime v Moruthoane C of A (CIV) No.4 of 1986.
6. Tatersall and Another Nedcor Bank Ltd 1995 3 SA 222 ( A) 228.
7. Valentino Globe v Phillips 1998 (3) SA 775 SCA.

### **BOOKS**

The Civil Practice of The High Court of South Africa 5<sup>th</sup> Ed. Vol 1, Herbstein &Van Winsen.

### **STATUTES**

1. Oaths and Declarations Regulations of 1964.
2. Public Procurement Regulations of 2007

[1] The applicant approached this court on an urgent basis. The application was couched in the following terms:

- 1. The rules pertaining to modes and periods of service of process herein be dispensed with on account of urgency hereof.*
- 2. (a) A rules nisi be issued calling upon the Respondents save to show cause if any, on the date to be determined by this Honourable Court why*

- (b) *The 1<sup>st</sup> respondent and or his subordinate be directed to furnish to applicant tender evaluation report of MGYSR/INFURSTRUCTURE/01/2015/2016.*
  - (c) *That the 1<sup>st</sup> respondent be interdicted from entering into a contract with 2<sup>nd</sup> respondent pending finalization of this matter.*
  - (d) *That the 1<sup>st</sup> respondent be ordered to extent the Cooling Off Period to a period of (14) fourteen days after his matter has been finalised.*
3. *That prayers 1, 2(a), (b), (c) and (d) operate with immediate effect as Interim relief pending finalization hereof.*
  4. *Costs of suit at attorney and client's scale.*
  5. *Further and/or alternative relief.*

[2] The matter was opposed, however, the court granted the applicant only prayers 1, 2 (a) and (b), as interim relief.

[3] The facts in brief are that the applicant and the 2<sup>nd</sup> respondent were among many tenderers who had submitted a tender for the construction of a Bakery and Potato Workshop-Thabana Li 'Mele Youth Center. The tender was eventually awarded to the 2<sup>nd</sup> respondent on the 13<sup>th</sup> November, 2015. The applicant received a letter informing him that it had not succeeded in its bid for the tender.

[4] The applicant then wrote a letter noting its objection to the Procurement Policy and Advice Division ("PPAD") on the 19<sup>th</sup> November, 2015. The applicant's objection was that it suspected that the tender had not been

awarded transparently and fairly and that the only way it could prove it would be if it could be provided with the tender evaluation report.<sup>1</sup>

[5] The applicant approached the court because his letter had not been responded to and his fear was that the 1<sup>st</sup> and the 2<sup>nd</sup> respondents would sign the contract on the 3<sup>rd</sup> December, 2015, to his prejudice. In his prayers before the court he has also asked that the cooling off period be extended to allow it to study the evaluation report.

[6] The respondents have opposed the application in its entirety.

[7] The applicant in its heads of argument raised a point *in limine*, which was that of non-compliance with the **Oaths and Declarations Regulations**.<sup>2</sup> **Mr Falatsi** counsel for the applicant, argued that contrary to the provisions of the Regulations, the respective respondents had not commissioned their affidavits before a Commissioner of Oaths and as it were, the so called oaths had not even been dated. **Mr Falatsi** prayed that the depositions should not be considered as evidence.

[8] **Mr Falatsi's** further contention was that the 1<sup>st</sup> respondent's representative had not deposed to facts he had personal knowledge of, as it should be in Motion Proceedings. The court was referred to the case of **Matime v Moruthoane**.<sup>3</sup>

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<sup>1</sup> See para 5 and 6 of the founding affidavit – See also Annexure “PC2” to the founding affidavit.

<sup>2</sup> Oath and Declarations Regulations of 1964.

<sup>3</sup> C of A (CIV) 4/1986.

[9] **Mrs Brown** on behalf of the 1<sup>st</sup> and 3<sup>rd</sup> respondents argued in response that non-compliance with the provisions of the Regulations<sup>4</sup> complained of, does not dismiss the whose application. Instead the Court has a discretion to condone such non- compliance. **Mrs Brown** also showed that even though the applicant was saying this was an irregular step, the applicant did not follow the Rules<sup>5</sup> in terms of Rule 30, so that respondents could rectify the irregular steps.

[10] **Mrs Brown** further argued that where the applicant says the respondents had no personal knowledge of the facts they had deposed to, the respondents in their affidavits have used the phrase, “to the best of my recollection” which essentially means the same thing.

[11] **Mr Semoko** for the 2<sup>nd</sup> respondent decided not to respond to the points *in limine* raised by the applicant and decided to align himself with the arguments advanced by **Mrs Brown**. Most interestingly even though he had also raised a point in *limine*, he decided not to motivate it any further than his heads of arguments. The 2<sup>nd</sup> respondent’s point *in limine* was based on the fact that the deponent in the founding affidavit, had no authority as he claimed since there was no resolution by the Board, appointing him as such. **Mr Semoko** also fleetingly mentioned the issue of non-joinder of the Ministry of Finance. This particular point was not motivated at all even in the heads of arguments.

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<sup>4</sup> Oaths and Declarations Regulations, 1964

<sup>5</sup> High Court Rules, 1980

[12] The applicant feels that the respondents' affidavits should be thrown out and disregarded as worthless for non-compliance with the regulations.<sup>6</sup> I am of the view that, even though **Mr Falatsi** argues that Regulation 5 is peremptory, I disagree with him that this matter should be decided by disregarding the evidence as worthless. Rather, I choose to condone the sloppy work done by the respondents' counsel in filing such kind of affidavits. In that regard, I am allowing the respondents to rectify their improper affidavits and insist that this matter proceed on the merits to finality. This point *in limine* is dismissed accordingly

[13] On the point of whether the respondents had no personal knowledge of the facts in the affidavits, the 2<sup>nd</sup> respondent has actually deposed to facts that he says at paragraph 1 of his answering affidavit:

*"... are to the best of my knowledge both true and correct and within my personal knowledge..."*

[14] The 3<sup>rd</sup> respondent at paragraph 2 of his answering affidavit says:

*"Facts deposed to herein are to the best of my recollection and belief true and correct..."*

[15] The two (2) phrases do mean the same thing and as such this point *in limine* cannot succeed.

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<sup>6</sup> Oaths and Declarations Regulations, 1964.

[16] I agree with **Mr Falatsi** in relation to the point *in limine* raised by **Mr Semoko** that, the deponent in the founding affidavit had authority to depose to the founding affidavit on behalf of the company. In terms of the **Lesotho Revenue Authority and 2 Others v Olympic Off Sales**,<sup>7</sup> it was not always a must to annex a copy of the resolution of a company, authorising a particular person to represent it in any legal proceedings, if the existence of such authority appears from other facts. See also **Tattersall and Another Nedcor Bank Ltd**.<sup>8</sup> This point must also fail.

[17] The points *in limine* raised by the applicant are therefore dismissed with costs. Similarly the point *in limine* raised by the 2<sup>nd</sup> respondent is dismissed with costs. The following order is therefore made;

- (a) The points *in limine* are dismissed with costs. The parties are ordered to see to it that the matter is set down for hearing in the main application.
- (b) Costs will be costs in the course.

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

For Applicant : **Mr Falatsi**  
For 1<sup>st</sup> and 3<sup>rd</sup> Respondents : **Mrs Brown**  
For 2<sup>nd</sup> Respondent : **Mr Semoko**

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<sup>7</sup> C of A (CIV) 13/2006.

<sup>8</sup> 1995 3 SA 22 (A) 228 G H. See also Central Bank of Lesotho v Phoofolo 1985 – 1989 LAC 253 at 258 – 259.