

IN THE HIGH COURT OF LESOTHO
(COMMERCIAL DIVISION)

In the matter between

**MAMOIPONE PHAKISI T/A MAPU
CATERING SERVICES**

PLAINTIFF

AND

**MINISTER OF DEFENCE AND
NATIONAL SECURITY
NATIONAL SECURITY SERVICE
ATTORNEY GENERAL**

**1ST DEFENDENT
2ND DEFENDENT
3RD DEFENDANT**

JUDGMENT

**Coram : L.A. Molete J
Date of hearing : 22nd May 2017
Date of Judgment: 31st August, 2017**

SUMMARY

Claim for damages – Plaintiff claims tender awarded to her was cancelled – Court having set aside tender process – Is claim for damages sustainable in the circumstances.

ANNOTATIONS

CITED CASES

Jurgens Steenkamp NO v The Principal Tender Board - CCT71/2005
Olitzki Property Holdings v State Tender Board and Another - Case NO
698/98

STATUTES

- [1] This is a case in which Plaintiff claims from the Defendant an amount of **M2,970,273-60** in respect of damages for breach of contract. The Plaintiff in her declaration states that following the conclusion of an agreement after the tender was awarded to her the same tender was awarded to **MEM Catering Services**. Plaintiff had already incurred expenses of purchasing equipment, stock and hiring additional labour.
- [2] A substantial part of the claim consists in food costs at **M3000,000-00**, salaries at **M495,000-00** and lost income estimated at **M2, 087,197-00**.
- [3] Plaintiff's claim is based on the allegation that Defendants have frustrated the Plaintiff to perform the contract by awarding it to another entity and therefore breached the material terms of the agreement. That is how the damages arose.
- [4] On or about the **10th of October 2014** at **Maseru**, the Plaintiff and second Defendant entered into written contract in which it was agreed that;
 - (a) Plaintiff would provide catering services to Second Defendant during hours of **breakfast (0630 hrs)**, **lunch (1300 hrs)** and **supper (1900hrs)**.

- (b) Such catering services were inclusive of but not limited to providing proper preparation and service of fresh food items.
- (c) The number of people to be catered for was **90 (Ninety)**.
- (d) Second Defendant would compensate the Plaintiff for the services at the rate of **M39.58 (Thirty Maloti and Fifty Lisente)**, **M89.60 (Eighty Nine Maloti and Sixty Lisente)** and **M79.70 (Seventy Nine Maloti and Seventy Lisente)** per person for breakfast, lunch and supper respectively.
- (e) Defendant would pay Plaintiff the full amount agreed upon by the parties after the latter performed her obligation under the agreement.
- (f) Such payment would be effected at the end of every month.
- (g) The agreed contract was to subsist from **24th October 2014** to **31st March 2015** with an option to renew.

[5] It is Plaintiff's case that upon the conclusion of the contract there were some additional facts that were agreed upon by the parties. Such facts are to the effect that:

- (a) Plaintiff would not engage in any other catering service agreement with other parties during the subsistence of the contract.
- (b) Defendant would use the services of Plaintiff only, and that
- (c) Plaintiff's income would be derived from the revenue generated from the services rendered.

[6] Furthermore, Plaintiff alleges that second Defendant is in breach of the contract by committing the following acts;

- (a) Following the conclusion of their contract and despite having agreed not to; Second Defendant entered into a similar contract to

provide catering services with an entity by the name of **M.E.M. Catering Services**.

(b) The contract with **M.E.M. Catering Services** was entered into despite Plaintiff having been the successful bidder and awarded a binding contract.

[7] The Plaintiff in anticipation to execute its obligations under the contract entered into certain expenses which include, but are not limited to purchasing equipment, stock and hiring additional labour. As such Plaintiff was highly prejudiced by defendants breach and the contract entered into with **M.E.M. Catering services**.

As a result of the said breach Plaintiff claims to have suffered damages in the amount of **M2,970,273.60** (Two Million Nine Hundred and Seventy Thousand Two Hundred and Seventy Three Maloti and Sixty Lisente) which despite demand, Second Defendant refused to pay. A further claim is that Defendants should be ordered to pay the amount together with interest and costs.

[8] To prove her case the Plaintiff relies upon a written contract between it duly represented by **Mamoipone Phakisi** and second Defendant which was duly represented by **Mr Thato Mohasoa**. Such contract is attached to Plaintiff's declaration and marked Annexure "**MCS1**" and was in the trial labelled exhibit "**PW1**".

[9] The Defendants admit that a contract for catering services was entered into between 2nd Defendant and the Plaintiff. However, it is denied that any other further facts were agreed upon between the parties other than those agreed upon in writing in the contract.

Furthermore they specifically deny that they had agreed with Plaintiff that they would not enter into any other similar contract with any third party for the provision of catering services.

Defendants also admit that they entered into another contract with a third party. (MEM Catering) but deny that by doing so during the subsistence of their contract they were in breach of the contract with Plaintiff.

[10] It is pleaded that following the conclusion of its contract with Plaintiff; Defendants were sued by **MEM Catering Services** in which the latter challenged the decision to enter into a contract with Plaintiff. The challenge was made before the **High Court** in **CIV/APN/437/14** where MEM Catering Services sued the Plaintiff jointly with the Principal Secretary and the Tender Panel. In that case the result was that the contract of Plaintiff was reviewed and set aside. This was made an Order of Court and in their defence the Defendants rely upon the aforementioned Court Order duly marked “**Exhibit DW1**”.

The order is to the effect that:

- (a) The decision or resolution of the Principal Secretary (1st Defendant herein to prefer 1st Respondent (Plaintiff *in casu*) contrary to the competitive framework of the tendering systems is corrected, reviewed and set aside.
- (b) The unqualified resolution contemplated in a letter of the Principal Secretary dated **9th October 2014** is hereby declared unlawful.
- (c) The conduct of the Principal Secretary in withdrawing the award of the tender in issue is declared a breach of the contract.

(d) There is no order as to costs.

[11] It is therefore upon the basis of the aforementioned order that the Defendants said they are not in any way liable for breach of contract as the decision to enter into that contract was declared to be reviewed and set aside.

The Defendants deny liability for **M2,970,273.00** (Two Million Nine Hundred and Seventy Thousand Two Hundred and Seventy Maloti Sixty Lisente) or any amount arising out of that contract which has clearly been denounced by the Court. They therefore pray that this application be dismissed with costs.

[12] A court order is a direction issued by a Court or Judge requiring a person to do or not to do something. This decision is binding on and enforceable against all persons it is made to refer to. Failure to abide by a Court Order will result in a Respondent/Defendant/Accused being contemptuous and further action may be taken against such a party.

A contract is an agreement entered into by two or more parties for the performance or non-performance of a certain act. Such agreement is binding on the contractual parties immediately upon conclusion.

The order that was granted by Judge N. Majara (as she then was) is a directive which ought to be adhered to accordingly. Such order has as a result nullified the contract between Plaintiff and 2nd Defendant. It would therefore be impossible for Defendants to perform under a non-existent contract.

[13] Praying that this Honourable Court should interfere with the aforementioned is asking that it should review a decision made by its fellow Judge and this is not permissible. It cannot be done.

The Defendants are therefore not liable to the Plaintiff for any damages' for a contract that ought not to have existed (as per the Court Order).

[14] Further a question to ask is whether Plaintiff was an unsuccessful tenderer claiming for damages or a successful tenderer prejudiced by the negligence of the tender board. A successful tenderer is obliged to spend money in preparation for performing the tender. *In casu* it has been established and an order made to the effect that the decision of the PS to grant the tender to Plaintiff herein was reviewed and set aside, this simply means that Plaintiff was an unsuccessful tenderer and not entitled to any damages.

[15] The relevant South African cases quoted **Jurgens Steenkamp NO: vs The Principal Tender Board of the Eastern Cape**¹, which was confirmed on appeal by the Supreme Court of Appeal which was concerned with provisions of the Constitution of South Africa. It was held that breach does not confer a right to a claim of damages against the tender board. See also **Olitzki Property Holdings v State Tender Board and Premier of the Province of Gauteng**².

[16] The case before me goes further than that, because there was already a Court Order by the High Court setting aside the decision of the Principal Secretary to award the tender to Plaintiff, and even declaring the conduct of the Principal Secretary in withdrawing the tender award to the MEM

¹ CCT 71/2005

² Case No 698/98

Catering Services to be unlawful. This was a direct Order that the Tender Panel could not disregard.

The test to apply is whether there are alternative remedies such as interdict, review or appeal. In which case such remedy is open for the plaintiff to explore.

The matter should have gone on appeal. This Court has no jurisdiction to entertain this matter. It is not for this Court to review the decision of another Judge. The proper forum should have been to lodge an appeal with the Appeal Court which is a superior Court to the High Court.

In the premises the Plaintiffs claim is dismissed with costs.

L.A. MOLETE
JUDGE

For the Plaintiff - Mr Q. Letsika

For Defendants - Adv. Sekati