

IN THE HIGH COURT OF LESOTHO
(COMMERCIAL DIVISION)

In the matter between

QING JIAN GROUP CO. LTD

APPLICANT

AND

PROCUREMENT UNIT

1ST RESPONDENT

PPAD

2ND RESPONDENT

MINISTRY OF PUBLIC WORKS AND TRANSPORT

3RD RESPONDENT

PS MINISTRY OF PUBLIC WORKS AND TRANSPORT

4TH RESPONDENT

ATTORNEY GENERAL

5TH RESPONDENT

YAN JIAN CONSTRUCTION PTY LTD

6TH RESPONDENT

JUDGMENT

Coram : **Moleté J**
Date of hearing : **19th July, 2019**
Date of judgment: **31st October, 2019**

Summary

Government tender for construction of Senate building – applicant and others disqualified – subsequent call for re-tender by Principal Secretary found to be irregular – applicant remained disqualified – communication with P.S. and Procurement Unit of no effect to initiate contract – Court order interpreted to nullify – re-tender applicant relied upon – application dismissed with costs.

ANNOTATIONS

CITED CASES

Flash Construction (Pty) Ltd v The Principal Secretary, Minister of Public Works and Transport, CCA/0093/2014

STATUTES

The Public Procurement Regulations 2007, Legal Notice No.1

- [1] The applicant obtained an order granted on the **17th December 2018** interdicting 1st to 3rd respondents from signing a written contract with 6th respondent relating to the tender of construction of the new Senate building.
- [2] In the founding affidavit of **Jimbo Zhang**, who describes himself as the Assistant Manager of the Applicant, **Qing Jian Group (Pty) Ltd**; reliance is mainly upon correspondence and undertakings between the applicant company and some of the respondents, in particular the Procurement Manager and the Principal Secretary. In the communication the government officials made an offer to applicant for the award of a tender for the proposed construction of the new Senate building, and then the acceptance by applicant of the offer, which resulted in the formation of a contract which respondents seem to be refusing to comply with. Subsequently they revoked the offer, and actually repudiated the contract.
- [3] It is true that the immediate impression created is one of respondents who are unreasonably refusing to comply with an agreement therefore causing an inconvenience and substantial loss to applicant; of a tender worth hundreds of millions and profits that would accrue therefrom. On closer evaluation however, the scenario changes and it is clear that the whole

matter revolves around whether or not applicant had even qualified in the first place to be considered for the tender.

- [4] The respondents opposed the matter and raised some *points in limine* that (a) requirements for interdict were not met, (b) that local remedies were not exhausted, and (c) that the court was approached prematurely because the contract had not yet been signed. It is however on the merits that the deponent, **Mr Mothabathe Hlalele** who is the Principal Secretary and 4th respondent herein explains how the misunderstanding arose. At paragraph 8 he states as follows;

“Ad Para 7

Before answering the subparas in specifics, I wish to lay a brief background which led to the issuance of **QJ7**.

- 8.1 It is common cause that at the very inception of the tender, the applicant and others were disqualified for non-conformance with specifications of the Tender Document. This was in 2013. They were disqualified because their attachments were not authenticated and translated as required by the tender Document. I annex herewith such a Tender Document which was an addendum and mark “**MP1**”.
- 8.2 The Company by the name of Yan Jian Construction (6th Respondent) was recommended the preferred bidder, however, it was never awarded the contract. This tender process was cancelled at some stage. Flash Construction, another tenderer, successfully challenged the tender cancellation. Everything remained at halt until 2017 when I assumed office.
- 8.3 In 2017, I commenced with the project process. I learned that some firms including the applicant had been disqualified for failure to comply with the tender document annexure “**MP1**”. I made a decision that such companies be given an opportunity to comply. I then ordered the re-evaluation of the tender process thereafter. The re-evaluation was done and the applicant was recommended. When all this was happening, this court had reviewed the decision to cancel the tender. In my **bona fide** understanding of the judgment, I thought I was complying until when the court clarified its judgment that what was envisaged in the judgment was that the tender process should proceed from where they were before cancellation. This means that in view of the decision in

CCA/0093/14, we had no alternative but to revoke our offer to the applicant. I annex herewith such a judgement and mark “MP2”.

[5] He goes on at paragraph 9 to 14 as follows;

“9

AD SUB-PARA 7.1

It is by operation of law that the offer was revoked because the offer come as a result of the re-evaluation, the process which this court denounced.

10

AD SUB-PARA 7.2

During the debriefing process, the applicant and others were specifically informed of the court decision.

11

AD SUB-PARA 7.3

This reason was a reminder of the basis for their earlier disqualification.

12

AD SUB-PARA 7.4

Contents are denied. The decision in CCA/0093/14 reviewed and set aside the decision to cancel the tender, that meant that the status quo prevailed. Meaning that the applicant remained disqualified when the tender process was continued. This means it was wrong that the applicant was included in the re-evaluation. So following the decision in CCA/0093/13, the re-evaluation was a nullity.

13

AD SUB-PARA 7.5

Contents are denied. The court will readily observe per the Evaluation Report herein annexed and marked “MP3” that the Evaluation Team convened on the 15th August 2012 when it disqualified the applicant. But, for example, the certification and authentication were done after the disqualification on the 13th September 2013 per annexure “QJ12” to founding affidavit.

AD SUB-PARA 7.6

Contents are denied. In view of the decision of the court in CCA/0093/14, it is clear that the offer and acceptance whatever the form were unlawful and therefore legally a nullity”.

- [6] It seems that only a correct and proper understanding or interpretation of what her Ladyship **Chaka-Makhooane J** held in **CCA/0093/14** will be the key to resolve this matter. The Principal Secretary owns up to a *bona fide* mistake, and if he corrects it by compliance with the court order, that is commendable. Even this Court in the present application will not be seen to depart from the judgment of her Ladyship **Chaka-Makhooane J**.
- [7] Invitation for tenders for the building of the Senate of the Government of Lesotho were published on the **4th – 9th July 2012** in the newspapers, and a number of companies bid including the respondent. It is convenient to mention them all for the record; they were:

BIDDER/CONTRACTOR	TENDER AMOUNT
Qing Jian Constructing Group	M75,589,613.49
Shanxi Construction Engineering Group	M75,966,666.66
Flash Construction	M85,232,637.00
Yan Jian Construction	M85,997,448.80
N.M. Khojane Construction	M88,645,533.21
Sigma Construction	M95,748,294.48
LSP Construction	M97,038,935.88
Brix/Devinfra Joint Venture	M114,869,818.87

- [8] The tenders were opened and subjected to scrutiny as required by the Procurement Regulations and a detailed evaluation was made. In this evaluation, both applicant and **Shanxi Construction Engineering Group** were rejected together with **Sigma Construction**. A full explanation was given as to why they were rejected. They failed to qualify from the first stage by not meeting certain requirements of the tender invitation notice.
- [9] It was after this stage that for some reason the tenders which had already been opened and evaluated; saw the Principal Secretary calling for re-tender. This decision was successfully challenged by **Flash Construction (Pty) Ltd** in **CCA 0093/14**, before her Ladyship **Chaka-Makhooane J**. The Judge specifically had this to say about the whole dispute; at paragraphs 34 and 35 of the judgment;

34;

“The respondents are criticised for failing to follow fair and proper procedures. It is apparent that the 1st respondent was the one who made the decision to re-tender as opposed to the Procurement Unit as provided by the Regulations. It has not been justified by the respondents why there was a delay between the first tenders being opened in August, 2012, its cancellation in November 2013 and the re-tendering in May, 2014. This inordinate delay during the process of tendering has not been accounted for by the respondent.

and 35;

“Construction tenders should observe high standards of professional ethics, efficient economic and effective use of resources. It must provide services impartially, fairly, equally and without bias. It must also be accountable and foster

transparency by providing the public with timely, accessible and accurate information.”

- [10] In this case what the applicant (**Flash Construction (Pty) Ltd**) sought to be reviewed was the calling for re-tender and it succeeded, which meant that the process of re-tender was held to be irregular and was nullified. It was during this process of re-tender that the applicant in this matter managed to sneak in and be re-evaluated, resulting in the award to it and formation of the contract which it insists is being breached and seeks an order of specific performance.
- [11] A proper understanding of the ruling in my view is that once the review had succeeded, both the second invitation for tenders and the second evaluation report resulting in the award, to applicant must all fall away and be disregarded. They are all part and a result of a process which has been nullified by the court.
- [12] It is very surprising how the Principal Secretary and deponent to the answering affidavit arrived at the decision to call for re-tender and start the whole process from the beginning when the prayers that were granted in the application directly prohibited him. The learned Judge found that for the reasons outlined, the application must succeed with costs.
- [13] In **Flash Construction (Pty) Ltd v The Principal Secretary, Minister of Public Works and Transport**¹ the applicant sought amongst others an order to interdict and restrain the respondents from;

¹ CCA/0093/2014

“Reviewing and setting aside the decision to cancel the tender process which was in response to the tender invitation published in the Informative Newspaper, dated 4th to 9th July 2012”

“Declaring the decision to re-tender, issuance and publication of annexure “A” as irregular and unlawful”

[14] This application succeeded. It was as a result of the decision to re-tender that the applicant ended up with the award of the contract from which it had initially been disqualified. The re-tender was declared unlawful and therefore the applicant is left with nothing.

[15] Consequently, the application cannot succeed and it is dismissed with costs.

L.A. MOLETE
JUDGE

For Applicants : Adv T. Kuoane (Ms)

For Respondents : Adv M. Sekati (1st to 5th)
: Adv P.J. Cronjé (6th respondent)