

IN THE HIGH COURT OF LESOTHO
(COMMERCIAL DIVISION)

In the matter between

JUST IN TIME CATERING SERVICES

APPLICANT

AND

**MINISTER OF HEALTH AND SOCIAL WELFARE
& E OTHERS**

RESPONDENT

JUDGMENT

Coram : **L.A. Molete J**
Date of hearing : **2nd April, 2015**
Date of Judgment: **14th February, 2019**

SUMMARY

Tender for catering services – Matter enrolled in Court after final execution of contract – Whether Court would interfere and review such award of tender – Matter reduced to academic exercise – Application fails - No costs order.

ANNOTATIONS

CITED CASES

Millennium Waste Management (Pty) Ltd Vs Chairperson; Tender Board : Limpopo Province And Others 2008 (2) SA 481

Lambda Test Equipment CC V Broadband Infraco (Pty) ltd, and Another (2011) ZAGPJHC 38

Sebenza Kahle Trade CC v Emalahleni Local Municipal Council and Another (2003)2 All SA 340

STATUTES

- [1] This matter first came before her **Ladyship Justice K. Guni**. It was sought to interdict the execution of the decision of 3rd Respondent to award a contract for catering services at **Motebang Hospital** to 4th Respondent.
- [2] The initial interdict was never granted, and **Justice Guni** took an appointment at the **Africa Court of Human Rights**, whereupon the matter was ignored for a long time.
- [3] It was then allocated to the **Commercial Court** before me. Meantime, it should be mentioned that the tender that was sought to be interdicted proceeded and was finalised in the interim period even before the matter came to Court. The 4th Respondent then lost interest and the matter and filed a withdrawal.
- [4] It may have been because of this that the file was subsequently put away and thought to be finalised, until recently when the litigants wanted a judgment and upon retrieval of the file it was found to have been dealt with even though never argued to finality.

- [5] I undertook to write a judgment relying on the heads of argument filed. This is not my preferred manner of approach to applications, but due to the time lapse I considered it an exception.
- [6] The parties were in agreement that what was left to be considered by the Court was whether the decision of 3rd Respondent should be set aside as unlawful, irregular and irrational, and the costs of the matter. That is all that was brought before me because the rest of the matters had become academic, because the contract execution had been completed. i.e. what remained was prayer 3(b) and costs.
- [7] The matter on the merits was contested by the Respondents who denied any irregularity or unlawful award of the tender and disputed most of the Applicant's essential averments.
- [8] As already mentioned by the time the matter came to Court the contract had been concluded and executed to finality and therefore Respondents' main argument was that the review application had become academic and meaningless in that it serves no purpose to review and set aside a completed transaction.
- [9] The Respondents relied on a number of cases to the effect that there is difficulty presented by cases of review of invalid administrative acts that have already been acted upon by the time they are brought under review.

Millennium Waste Management (Pty) Ltd Vs Chairperson; Tender Board : Limpopo Province And Others¹

¹ 2008 (2) SA 481

- [10] The Judge in that matter said that to set aside the decision to accept the tender, with the effect that the contract is rendered void from the outset, could have catastrophic consequences for an innocent tenderer, and adverse consequences for the public at large.
- [11] In a case like this, where the tender involved catering and provision of meals for a hospital it is obvious that the public at large would be negatively affected. In such cases the authorities say those interests must be carefully weighed against those of the disappointed tenderer if an order is to be made that is just and equitable.
- [12] In the case of **Lambda Test Equipment CC V Broadband Infracore (Pty) Ltd, and Another**²

It was said that

“Tendering has become a risky business and that Courts are often placed in an invidious position in exercising the administrative law discretion – a discretion that may be academic in a particular case, leaving a wronged tenderer without any effective remedy.”

- [13] In the case of **Sebenza Kahle Trade CC v Emalahleni Local Municipal Council and Another**³

Kirk-Cohen J held that;

² (2011) ZAGPJHC 38

³ (2003)2 All SA 340

“an order reviewing and setting aside the decision to accept the tender would be meaningless and has no practical effect, for the simple reason that the contract in question had not only been awarded but completed.”

[14] I agree with this proposition and I would consider it to be in the discretion of the Court to allow or refuse the order to set aside the administrative action, and to use that discretion to set aside a completed transaction would be meaningless and academic. It would not be judicious use of that discretion.

[15] This matter is further complicated by the fact that in any event respondents dispute the applicant’s allegations and no interim order was given to halt the transaction. The respondents submit that nobody but the applicant may be blamed that the contract was completed before the matter could be heard; therefore equally the court will not allow an administrative act to be set aside because of effluxion of time.

[16] In the result the court comes to the conclusion that this application ought to be dismissed and it is so ordered.

[17] There will be no order as to costs.

L.A. MOLETE

JUDGE

For Applicant : Adv. K. Mosito KC
For Respondents : Adv. L. Moshoeshe

