IN THE HIGH COURT OF LESOTHO
(Commercial Court Division)

HELD AT MASERU **CCA/0039/2022**

In the matter between:

LAXTON GROUP LIMITED	**APPLICANT**
And	
PROCUREMENT UNIT, INDEPENDENT ELECTORAL COMMISSION	**1ST RESPONDENT**
THE TENDER PANEL, INDEPENDENT ELECTORAL COMMISSION	**2ND RESPONDENT**
PROCUREMENT POLICY & ADVICE DIVISION	**3RD RESPONDENT**
INDEPENDENT ELECTORAL COMMISSION	**4TH RESPONDENT**
AXON AND CLOUD HUB	**5TH RESPONDENT**
FACE TECHNOLOGIES (PTY) LTD	**6TH RESPONDENT**
ZERO ONE GROUP	**7TH RESPONDENT**
ATTORNEY GENERAL	**8TH RESPONDENT**

Neutral citation: Laxton Group Limited v Procurement unit Independent Electoral Commission and 7 others [2022] LSHC 131 COM (23 May 2022)

CORAM: MATHABA J

HEARD ON: 13th May 2022

DELIVERED ON: 23rd May 2022

Summary

Tender – Fairness and audi alteram partem rule apply in resolving complaints regarding tender award – Affected party entitled to opportunity to make representations before adverse decision to re-evaluate a tender is made.

ANNOTATIONS:

Statutes

Public Procurement Regulations 2007

Cited Cases

Lesotho

Central Bank of Lesotho v Phoofolo LAC (1985 – 1989) 253

Hippo Transport (Pty) Ltd v African Lesotho (Pty) Ltd and Others (C of A (civ) No44/2016) [2017] LSCA (12 May 2017)

Drytex (Pty) Ltd Lesotho v Pyramid Laundry Services (Pty) Ltd C of A (civ) 53 of 2015 [2016] LSCA 10 (29 April 2016)

Laxton Group Ltd v Procurement Unit Independent Electoral Commission and 7 others (No1 [2022] LSHC 99) COM. (5th May 2022)

Lesotho Defence Force and Others v Mokoena and others LAC (2000 – 2004) 540

Matebesi v Director of Immigratin and others LAC (1995 – 1999) 616

South Africa

Boudwyn Homberg De Vries Smuts v Department of Ecnomic Development and Environmental Affairs case No 389/2008 [2010] ZAECBHC 8

CGEC Alsthom Equipment Et Enterprises (Elecrgues, Suth African Division v GKN Sankey (Pty) Ltd 1987 (1) SA 81 (A)

Jicama17 (Pty) Ltd v West Coast Municipality 2006 (1) SA 116

Lorgo Properties CC v SA Bedderson No and Others 2003 (2) SA 460

Mec for Health, Eastern Cape and Another v Kirland Investment (Pty) Ltd [2014] ZACC 6

INTRODUCTION:

[1] The will of the people is the basis of the authority of government. For nations that believe in the gospel of democracy like Lesotho, the will of the people is expressed by a secret ballot in periodic elections. Lesotho is soon going for general elections and Basotho pin their hopes on the third respondent *("the IEC")* to deliver a free, fair and transparent elections which is a stimulus for peace and prosperity. A

credible voters' roll is indispensable ingredient in the election process.

[2] The dispute in this case turns on whether the applicant *("Laxton")*, was given a hearing in line with regulation 54(2) of the Public Procurement Regulations of 2007 *("the regulations")* when the third respondent *("the PPAD")* ruled that the tender for the supply of Elector and Voter Management Information System *("IVMIS")* must be re-evaluated. The tender is intended to procure a service for purposes of cleaning the IEC's voters roll and putting in place a new systematised voters' roll to be used in the upcoming national general elections.

[3] Laxton contends that as a successful tenderer, it ought to have been given a hearing before the PPAD made a ruling that the tender must be re-evaluated. This never happened, so argues Laxton. As a result, Laxton brought a review application in this Court on the 11th April 2022 to set aside the decisions of the IEC and the PPAD to re-run the tender as well as for an order directing the first respondent *("the procurement unit")* and the second respondent *("the tender panel")* to invite Laxton to enter into a contract in accordance with the regulations. Both the applicant and the respondents have used the word re-run in relation to what the PPAD recommended should happen. The more accurate position is that the PPAD recommended that the tender be re-evaluated. Re-run

could mean re-tender.

[4] The review application was prefaced with application for prohibitory interdict to maintain *status quo* before the withdrawal of the award and to ensure that re-evaluation was not conducted until the application for review was heard. The interim relief in this regard was granted by my brother **Mokhesi J** on the 14th April 2022. However, the Court Order itself reflects the 16th August 2019 as the date on which Counsel appeared before Court to move the application. This is clearly an error considering the date on which the application was filed. Again, both the minute on the Court file and the Assistant Registrar's date stamp on the Court Order reflects the 14th April 2022.

[5] The application is fiercely opposed by the PPAD which is represented by Mr. *Thakalekoala* from the eighth respondent's chambers. The procurement unit, the tender panel and the IEC are ready to abide the decision of this Court. These respondents filed the answering affidavit to provide this Court with information as they are central to the dispute as well as to oppose the prayer for costs sought against them. It is convenient to indicate at this stage that during argument, Mr. *Phafane* for Laxton, indicated that his client was abandoning the prayer for costs against the procurement unit, the tender panel and the IEC.

[6] All the parties confirm that the matter is not only of public importance, but that it is urgent.

BACKGROUND FACTS:

[7] In November 2021, the IEC called for tenders for procurement of EVMIS. Following submission of tenders and evaluation thereof by the procurement unit, the tender panel decided that the tender must be awarded to the applicant. On the 21st December 2021, the secretary of the tender panel wrote a letter to Laxton informing it that its tender was successful and that the IEC was prepared to award it a tender. The net effect of the letter was to invite Laxton to enter into a contract considering the scheme of the regulations and the heading of the letter itself. This was subject to Laxton confirming that it wished to enter into a contract with the IEC.

[8] Laxton had been requested to respond within ten days from the 21st December 2021. It was further advised of ten working days cooling off period within which other tenderers were free to object to the award of the tender. Laxton respondent to the letter on the same day indicating its willingness to enter into a contract with the IEC.

[9] Silence on the side of the IEC following the letter from Laxton prompted the latter to write another letter on the 27th January 2022. Laxton expressed the view in the letter that the parties were in contract since no objection was lodged during the cooling off period. If ever there was such an objection lodged, it should have been informed, so argued Laxton.

[10] On the 1st February 2022, the secretary of the tender panel wrote a letter informing Laxton that three tenderers for EVMIS have lodged a complaint with the PPAD regarding the award of the tender and that the IEC has been instructed to stop all the process regarding the tender. Further communication between the parties followed with the applicant wanting the parties to sign a contract on the one hand, and the IEC sticking to the directive of the PPAD to suspend the process, on the other hand.

[11] On the 28th March 2022, the secretary of the tender panel informed the applicant of the verdict of the PPAD to have the tender re-evaluated by different evaluation team and tender panel. The director of IEC issued another letter dated the 1st April 2022 to all the companies that had tendered for IVMIS to re-submit valid bid certificates following the

verdict of the PPAD to have the tender re-evaluated.

PRELIMINARY ISSUES:

Exclusion of the answering affidavit

[12] On the 3rd May 2022, I was on duty attending to the motion roll when the matter came before me. Mr. *Phafane* moved the Court to confirm the rule and grant the application. His position was actuated by the fact that there was no answering affidavit filed of record. This was despite the Court Order of the 28th April 2022 that the answering affidavit be filed by the 29th April 2022.

[13] The move culminated into a hotly contested argument as it will appear elsewhere in this judgment. The answering affidavit was served just around lunch time when Mr. *Phafane* had finished arguing and before Mr. *Thakalekoala* could respond. Nonetheless Mr. *Phafane* did not pull his punches. He argued that the affidavit, which was not even accompanied by application for condonation, be disregarded.

[14] Because an affidavit constitutes evidence and this case was then not allocated to me, I considered that it would be premature to disregard the affidavit and grant the application. It was for the Court that

was going to hear the matter to exercise its discretion to exclude the answering affidavit or not. That captures the essence of the ruling I made on the issue on the 5th May 2022.

[15] That was not the end of the matter though. The applicant filed its replying affidavit to the PPAD answering affidavit without prejudice to the argument that the answering affidavit be excluded. However, this argument was not pursued on the date of hearing. When I reminded Mr. *Phafane* about it, his reaction was that since the merits were already being argued and considering the importance of the matter, the applicant was no longer pursuing the argument. That was a commendable approach from Counsel. I needed to record what happened to the argument so as not to leave it hanging.

A letter of complaint by face technologies to PPAD

[16] Just before the matter was called on the 13th May 2022, my Judge's Clerk brought to my chambers a letter which upon its perusal, I realised it related to this matter. She had received the letter that morning from Mr. *Thakalekoala*. It was a complaint lodged by one of the tenderers, Face Technologies (Pty) Ltd, *("Face Technologies")*, with the PPAD on the 3rd January 2022 following the debriefing meeting it had

with the IEC why it was not awarded the tender.

[17] Mr. *Thakalekoala* explained that the letter was inadvertently omitted at the time the record was prepared and that he wanted to file it of record so that it may be considered. Mr. *Phafane* vehemently opposed the admission of this letter. He reminded the Court that the parties had agreed on the 9th May 2022 that they were going to use the record filed by Mr. *Thakalekoala* because it was a complete record of the proceedings of the IEC and the PPAD. He argued that the letter may have been concocted to address the deficiency in the PPAD's case.

[18] I ruled that the letter was not going to form part of the record. Firstly because of the way it was introduced. If the letter was part of the record of the proceedings of the IEC and the PPAD, it was clearly filed late and should have been accompanied by an affidavit explaining the delay and why it should be admitted. Secondly, there is a prescribed period within which a record and the reasons underlying the impugned decision has to be filed in order to afford the applicant an opportunity to supplement its notice of motion or file further affidavits before the respondents file their answering affidavit. Filing part of the record when pleadings are closed undermines the review procedure and prejudices the applicant.

LAXTON'S CASE:

[19] The kernel of Laxton's case from the founding papers is that contrary to regulation 54(2), it was not heard when the PPAD and the IEC took the decision to re-evaluate the tender which it had been awarded. It contends that it was not informed of the nature of the complaint or invited to complaint proceedings that resulted in the decision to re-evaluate the tender. This according to Laxton, is in direct collision with the principles of natural justice, *audi alteram partem rule*, in particular.

[20] Mr. *Setlojoane,* who appeared with Mr. Phafane for Laxton, also strenuously argued that there is a legally binding process contract between the IEC and Laxton. The contract came into existence when Laxton accepted the invitation to enter into a contract from the IEC, so asserted Mr. *Setlojoane.*

PPAD'S CASE:

[21] The PPAD contends that "if there was a problem with notification concerning objections, it lied with the Procurement Unit and not with the PPAD". Mr. *Thakalekoala* conceded during argument that

Laxton does not appear to have been informed of the nature of a complaint nor invited to the complaint proceedings relevant to the tender in issue. He however argued that PPAD is appellate body and that if ever there is any one to blame for not giving Laxton a hearing, that is the IEC.

[22] The high-water mark of the PPAD's case is that the evaluation team had correctly performed its mandate as required by the law and recommended Face Technologies for the job. It argues that Laxton was awarded the tender by the tender panel when it had been disqualified by the evaluation team.

[23] Contrary to the principles of segregation of duties, the tender panel re-evaluated the tender in the process of which it considered an irrelevant factor that Face Technologies had been doing the same job with the IEC for the past 20 years, so argues the PPAD. In so doing, the PPAD contends, the tender panel included a tender specification or a term which was not included in the tender document, thus rendering its decision procedurally unfair.

[24] The PPAD argues that in view of the irregularities that had been committed by the IEC as the procurement unit, its decision that the tender be re-evaluated can be sustained and rationally explained from the

legality principle. It contends that the award could not sustain the legality scrutiny in light of objections from the disgruntled bidders.

[25] The PPAD accepts that the invitation to contract created a legitimate expectation in favour of Laxton that a contract would be signed, but it disputes that the invitation created or conferred contractual obligations between the IEC and Laxton in light of complaints submitted to the IEC and a further appeal to it. It argues further that regulation 30(3) validity period had not expired. The significance of this argument is difficult to comprehend in light of the facts in *casu*. The regulation provides that –

> "(3) The Unit and the tenderer with the most favourable tender shall sign the contract within 15 working days following the notification of the invitation to contract and within the tender validity period, operation of the contract shall not come into force until 15 working days after the notice of contract award has been made".

WAS LAXTON GIVEN A HEARING WHEN THE DECISION TO RE-EVALUATE WAS TAKEN?

[26] The starting point must be that the tender process in issue relates to procurement of a service by a public institution. Consequently, the process is governed by the regulations. The IEC as a procurement unit

in line with regulation 3(2) and the PPAD are therefore undoubtedly burdened with a public duty of fairness.

[27] It is manifestly clear from its verdict that, when it entertained the complaint from the three companies, the PPAD proceeded on the assumption that the three tenderers had first invoked regulation 54 and that dissatisfied with the decision of the IEC, they were then exercising their right of appeal to PPAD in terms of regulation 55. This is borne out by the following passage from the verdict –

> "The complainants first lodged their complaints with the IEC Procurement Unit pursuant to Regulation 54 of the Public Procurement Regulations of 2007. Dissatisfied with the Unit's determination, they then filed their grievance with the Procurement, Policy and Advisory Division (PPAD) pursuant to Regulation 55".

[28] Therefore, the exercise that I am embarking upon will not be complete without having a look at regulations 54 and 55 of the regulations. I reproduce the relevant parts of the regulations below.

"PART XI - SETTLEMENT OF DISPUTES

Submitting complaints to the unit

54. (1) A tenderer, a trade association, an auditor of the Government or any group with a legitimate interest in the object of the contract may submit a written complaint to the Unit not beyond 3 calendar months

following the date of contract award, any supporting evidence shall be enclosed with the complaint.

(2) The Unit shall notify all tenderers about the nature of the complaint and invite tenderers whose interest might be affected by a respective decision, to the complaint proceedings.

(3) Failure of the notified tenderers to participate in the complaint proceedings will prevent the tenderers from bringing further complaints concerning the same subject matter.

(4) The Unit shall review and make a decision on the complaint in 10 working days after the submission of the complaint, where the complaint is not accepted as valid, the decision shall state the justification for non-acceptance, but, where the complaint is accepted as valid, the decision shall state how the complaint will be rectified.

(5) The Unit shall not enter into a contract in respect of the tender in question after receiving a complaint and until such time as the complaint is resolved, either through a decision by the Unit or where such a decision is unacceptable to the complainant through a decision by the Appeals Panel, except where suspension of the tender process would be against the public interest, the Minister shall be the arbiter of whether the tender process is in the public interest.

(6) Where it is decided to continue the tender process, the justification and the decision to continue to place the contract shall be provided in writing to the complainant at least 5 working days prior to the time the decision comes into force, the decision shall be made available publicly through the mass media and on the procurement web-page.

(7) Any further redress shall be pursued through the Appeals Panel or through the Courts of Law.

Complaints regarding the Units' decision

55. (1) The complainant may appeal to the PPAD within 5 working days where-

(a) the complainant does not agree with the decision of the Unit,

(b) the Unit did not issue a decision within the specified time, or

(c) the Unit entered into a contract before its decision on the complainant, unless not entering into the contract is against the public interest.

(2) PPAD shall consider a complaint and issue the following decisions where it considers that the Unit breached these Regulations:

(a) nullify or modify illicit actions or decisions of the Unit wholly or partially;

(b) declare which provision of these Regulations should apply in a given case; or

(c) instruct the Unit to carry out the tender process after the breaches are rectified".

[29] Obviously, in arriving at the decision that the tender must be re-evaluated the PPAD was exercising its powers under the regulations. In line with regulation 55(2), the verdict had the effect of nullifying the decision of the IEC to award the contract to Laxton. It is beyond

disputation that the decision was prejudicial to Laxton.

[30] Due to its centrality and status within the public procurement process, the decisions and recommendations of the PPAD have a binding effect on the procurement units. *See*: **Drytex (Pty) Ltd Lesotho v Pyramid Laundry Services (Pty) Ltd** (C of A (CIV) 53 of 2015) [2016] LSCA 10 (29 April 2016) para 17. There is therefore a heightened need for the PPAD to observe the rules of natural justice in its dealings. Indeed, **Cameron J** observed in **MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd** [2014] ZACC 6 at para 82 that –

> "… there is a higher duty on the state to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights. Government is not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty, to whom the courts must extend a procedure-circumventing lifeline. It is the Constitution's primary agent. It must do right, and it must do it properly." (Footnote excluded)

[31] There is no question that regulation 54(2) entitled Laxton to a lawful and procedurally fair process and an outcome in dealing with the complaints arising out of the tender. Laxton had been invited to enter into contract in respect of the tender. It was therefore likely to be adversely affected by the decision that was going to result from the complaint

proceedings. The decision to re-evaluate the tender has indeed adversely affected it. Laxton was therefore entitled to be informed of the nature of the complaint, as well as being invited to complaint proceedings.

[32] The statement in the verdict of the PPAD that there was a complaint lodged with the IEC in terms of regulation 54, is not borne out by the record that has been placed before this Court. There is absolutely nothing of record to show that there was a complaint lodged in terms of regulation 54(1). Had there been such a complaint lodged with the IEC, it would have triggered complaint proceedings where all the tenderers would have been invited to attend having been advised of the nature of the complaint in terms of regulation 54(2).

[33] Again, a record of the complaint proceedings would have been furnished to this Court as well as the decision of the IEC on the complaint. Evidently, there is no such a record, because no such proceedings took place. In fact, there is hardly any suggestion, let alone semblance of proof that the IEC or any of its structures conducted such complaint proceedings as envisaged by regulation 54(2).

[34] The director of elections at the IEC, Mr. *Mpaiphele Maqutu*, confirms in his answering affidavit that the procurement unit, the tender

panel as well as the IEC were only in possession of the record of proceedings that founded the decision to award the tender to the applicant and that "the appeal to the 3rd respondent [PPAD] and the grounds thereof were filed directly to the 3rd respondent and the 4th respondent [IEC] was informed about the existence of the applicant's complaint and suspension of the tender award by the Ministry of Finance – Director PPAD on the 1 February 2022 and on the same day 4th respondent [IEC] informed the applicant about that complaint".

[35] It is pellucidly clear that Laxton was first informed of the complaint regarding the tender by the secretary of the tender panel through the letter dated the 1st February 2022. It is axiomatic that the complaint was lodged with the PPAD. In fact, according to the minutes of the debriefing meeting between one of the tenderers and the IEC, Cloud Hub/Axon Information Systems, *("Axon")* the latter was advised that "if the company is not happy with the outcome of debriefing, the next step is to forward the grief to the Ministry of Finance PPAD".

[36] It is therefore clear that dissatisfied tenderers and the IEC conflated the provisions governing debriefing and complaint procedure at the expense of Laxton. As a result, Laxton was not afforded the right to be heard before a prejudicial decision was reached against it.

[37] It is necessary to deal with Mr. *Thakalekoala* ‘s argument that the PPAD is appellate body and therefore cannot be blamed that Laxton was not afforded a hearing. PPAD argues that it was the IEC’s duty to afford Laxton a hearing. Counsel did not invoke any judicial authority in support of the proposition that PPAD is exonerated. I deal with his argument not because it has substance, but because it is the only argument that was advanced regarding this issue. One of the PPAD’s non-discretionary function in terms of regulation 6(2)(c) is to “monitor compliance with the Procurement Policies and these Regulations”. It is therefore utterly absurd for the PPAD to demonstrate a carefree attitude where a tenderer complains that, contrary to the regulations, it was not invited to participate in the complaint proceedings and where the PPAD is complicit.

[38] More tellingly, it was the PPAD’s responsibility to confirm that jurisdictional facts exist in terms of regulation 55 for it to entertain the appeal. Had it done so, it would have easily discovered that the complainants bypassed the IEC with the result that contrary to the regulations, no complaint proceedings were held at the IEC. Properly discharging its functions, the PPAD would have then remedied the situation and ensured that all the tenderers, including Laxton, were heard

before it delivered its verdict. The argument by Mr. *Thakalekoala* is disingenuous. Neither does it detract from the fact that Laxton was entitled to a hearing but that it was not heard when the decision adverse to its interests was taken. That it is the IEC that should have afforded Laxton a hearing is of no moment. It is even worse that Laxton was not heard both by the IEC and the PPAD.

[39] It is high time that government institutions and those entrusted with public power accept that *audi alteram paterm* is entrenched in this jurisdiction and then conform. This Court, as well as the Appeal Court have repeatedly cautioned that whenever a public official or a public body considers taking a decision prejudicially affecting an individual in his or her liberty or property or existing rights, that person must be given a hearing unless where the statute expressly or by necessary implication excludes a hearing. *See*: **Central Bank of Lesotho v Phoofolo** LAC (1985 – 1989) 253 at 257 – 258 C; **Matebesi v Director of Immigration and Others LAC** (1995 – 1999) 616 at 621 – 626 C; **Lesotho Defence Force and Others v Mokoena and Others LAC** (2000 – 2004) 540 para 10 -16.

[40] In **Logro Properties CC v SA Bedderson, NO and Others** 2003(2) SA 460 (SAC), having preferred the appellant as the successful

tenderer, the tender committee decided to call fresh tenders considering factors that had arisen from the time bids were called and when the appellant emerged as a successful tenderer. The appellant challenged the decision to call fresh tenders. Having found that the committee could not be faulted for taking into account the factors, **Cameron JA** said the following in setting aside the decision to call for fresh tenders:

> "[24] While, as Mr Marcus pointed out, it is no answer to a claim to be heard that the subject might have had little or nothing to say if such an opportunity had existed, it is certainly worth pointing out that, if afforded, the opportunity might have been extremely valuable. The fact of an increase in property values between 1995 and 1997 was undisputed before us. But its extent is unknown. The appellant's 1995 tender exceeded the property's then market value by more than 50%. Did the increase over the next two years surpass that margin? We do not know. Whether it did or not, the appellant was entitled to try to persuade the committee that accepting its 1995 offer would be more advantageous, taking all factors into consideration, than a call for fresh tenders; and in any event that, given its investment in time and money and its employment of skill, fairness pointed notwithstanding any increase to acceptance of its tender.
>
> [25] Procedural fairness in my view demanded that the committee in reconsidering the tenders would afford the compliant tenderers an opportunity to make representations, at least in writing, on any factor

> that might lead the committee not to award the tender at all. That opportunity not having been afforded, the committee's 1997 decision must be set aside, and the matter remitted to the appropriate authority to afford the appellant and the other compliant tenderers the opportunity to make representations, at least in writing, on any supervening consideration relevant to the committee's exercise of its powers in relation to the award or non-award of the tender." (Footnote excluded)

[41] On the evidence before me, the unquestioned fact is that contrary to the regulations, Laxton did not participate in the complaint proceedings before the IEC nor was it heard before the PPAD took a decision that the tender in issue must be re-evaluated. Therefore, the unavoidable conclusion is that the decision to re- evaluate the tender is impeachable. In view of innumerable authorities on *audi alteram partem* and taking into account the dictates of regulation 54, it would be a travesty of justice not to review and set aside the decision to re – evaluate the tender in circumstances of this case. I have gathered from savingram from the director of PPAD directed to the tender panel that the hearing before the PPAD took place on the 27th January 2022. This is confirmed by the letter from Axon to PPAD dated the 4th April 2022. This means that when Laxton was first advised of the objection to the award on the 1st February 2022, horses had already bolted.

SHOULD THE COURT DIRECT THE 1ST AND 2ND RESPONDENTS TO INVITE LAXTON TO ENTER INTO CONTRACT?

[42] In support of prayer 6 in the notice of motion, Mr. *Setlojoane* argued that the letter inviting Laxton to enter into contract constituted an offer that was accepted by Laxton with the result that a legally enforceable contract came into existence. Counsel relied on the case of **Hippo Transport (Pty) Ltd v Afrisam Lesotho (Pty) Ltd & Others** (C of A (CIV) NO.44/2016) [2017] LSCA (12 May 2017).

[43] Conversely, Mr. *Thakalekoala* argued that this Court cannot ignore the patent irregularities committed by the procurement unit, the tender panel and the IEC concerning the tender. The invitation to Laxton to enter into contract was in direct violation of the regulations, Mr. *Thakalekoala* asserted. He submitted further that the tendered price was above the budget allocations. He urged the Court to find in line with **Drytex (Pty) Lesotho v Pyramid Laundry Services & Others**, *supra*, that the contract was bound to be invalid or voidable.

[44] In addition to authorities referred to in **Hippo Transport (Pty) Ltd v Afrisam Lesotho (Pty) Ltd & Others,** *supra***,** on process contract, there is jurisprudence to the effect that acceptance of a tender by

an organ of state results in an agreement. *See*: **Boudwyn Homberg De Vries Smuts v Department of Economic Development & Environmental Affairs** Case No. 389/2008); **CGEE Alsthom Equipment Et Enterprises (Elecrigues, South African Division v GKN Sankey (Pty) Ltd 1987 (1) SA 81 (A) at 92 A-E; Jicama 17 (Pty) Ltd v West Coast Municipality 2006 (1) SA 116 (C) page 121.** The agreement may initially be lacking in detail, but once details are finalised, they constitute a new agreement which supersedes the original agreement. I respectfully agree with the principle enunciated in these cases; it accords with the generally accepted principles of how a contract comes into being.

[45] This jurisprudence must be considered in the context of the regulations. In terms of the regulations, a successful tenderer must be invited to enter into a contract and such a contract cannot be entered into when there is a pending complaint. Again, the contract must be approved by chief accounting officer, otherwise it will be rendered void or voidable in terms of regulation 39(1)(b). I am constrained to arrive at a conclusion that under the regulations, a valid contract only comes into existence when the regulations have been followed and the chief accounting officer has provided his approval for the procurement unit to enter into such a contract.

[46] Back to prayer 6 in the notice motion. This prayer is legally untenable. The Court is being asked to direct the procurement unit and the tender panel to invite Laxton to enter into contract in accordance with the regulations. This is notwithstanding Laxton's own allegations in the founding affidavit that it was invited to enter into contract. To support this assertion, Laxton has annexed to the affidavit the letter dated the 21st December 2021 titled **"INVITATION TO ENTER INTO A CONTRACT"**. The PPAD argues that the invitation was issued contrary to the regulations.

[47] Instead of embarking on a proper process to have the letter of invitation to enter into contract set aside, the respondents failed to observe the requirements of procedural fairness as a result of which Laxton was not afforded an opportunity to be heard before the letter was withdrawn. Again, the respondents failed to counter – apply in these proceedings, neither did the IEC bring application for self-review if it was convinced that the process leading to the issuance of the letter was irregular. Irritated by the IEC, the PPAD engaged in a botched process that is tantamount to self-help which this Court cannot countenance.

[48] Inasmuch as I am not prepared to direct the procurement unit

and the tender panel to invite Laxton to enter into contract in that such invitation had already been made, a decision not to set aside the PPAD 's verdict to have the tender re-evaluated would not be compatible with the proper exercise of judicial discretion considering the process that the PPAD followed in arriving at its impugned decision. If violating *audi alteram partem* was a sin, the PPAD would have to pray hard to have its name reinstated in the Book of Life. If it was an offence, it would surely attract a hefty penalty. I say this to highlight how sacrosanct *audi alteram partem* is. Unless there are valid reasons, which do not exist in this case, condemning a person without a hearing has no place in civilized society.

[49] I am not sure how the parties will proceed with the matter once the impugned decisions are reviewed and set aside. But should the matter somehow find its way back to the PPAD, it will not be proper for the director of the PPAD to be involved in its adjudication to guard against perception of bias. If permissible, he has to recuse himself. It is clear from his verdict, as well as his answering affidavit, that he is convinced that the evaluation team did a proper job in recommending Face Technologies. I must caution that I do not have full facts as a result of which whatever I am saying in this regard should not be construed as definitive.

COSTS DE BONIS PROPRIIS IN RESPECT OF THE POSTPONMENT OF THE 4TH MAY 2022

[50] I have already alluded to the ruling that I made on the 5th May 2022 in this matter. Amongst others I directed the third and the eighth respondents to pay the applicant costs of the day for the 4th May 2022 at attorney and client scale. I further directed Mr. *Thakalekoala* to make written submissions in a form of heads of argument or an affidavit on or before the 10th May 2022 explaining why he may not contribute to the costs in issue. On the 9th May 2022 when the matter was set down to proceed on the 13th May 2022, I had directed that I will hear the main matter as well as Mr. *Thakalekoala* submissions on costs *de bonis propriis.*

[51] For convenience, but only to the extent necessary, I regurgitate the facts leading to consideration of costs *de bonis propriis* against Mr. *Thakalekoala*. These facts can be gleaned from the ruling I made referenced **Laxton Group Limited v Procurement Unit IEC & 7 others** (No.1 [2022] LSHC 99 COM. (5th May 2022).

[52] I already dealt with the argument that ensued when the parties appeared before me on the 3rd May 2022. Contrary to my brother **Mokhesi J** 's order of the 28th March 2022, the third and the eighth

respondents had not filed their answering affidavit on the 29th April 2022. The nub of Mr. *Thakalekoala*'s explanation before me why the Order was not complied with was that he was busy with another urgent application of public importance at the main division of this Court which delayed the drafting of the affidavit in this matter.

[53] In view of the arguments that were advanced by the parties even after the answering affidavit was filed, I had postponed the matter to the 4th May 2022 at 14h00 to give my ruling on the issue. I had invited Counsel who were minded providing me with authorities to do so latest by 07h00 on the 4th May 2022. I needed time to consider the authorities in order to deliver my ruling at 14h30. As I have already stated, the argument was that I should disregard the answering affidavit and grant the application. This is the issue I had to apply my mind on.

[54] My Judge's Clerk availed me the heads of argument for the applicant at around 08h00 on the 4th May 2022. I was told that Mr. *Thakalekoala* had sought indulgence to submit his at 09h00. However, I had still not received Mr. *Thakalekola*'s heads of argument when the matter was called at 15h00 as a result of which I had not considered them. Once again Mr. *Thakalekoala*'s explanation was that his hands were full. He had to submit heads of argument in the urgent matter he was handling

at the main division of this Court.

[55] Mr. *Thakalekoala* urged me to consider his heads of argument which he explained were emailed to my Judge's Clerk at around 14h00. Unfortunately, he had not made the Judge's Clerk aware of the email. As a result, the Judge's Clerk only confirmed after I had already postponed the matter to the 5th May 2022 to consider Mr. *Thakalekoala*'s heads of argument that indeed they were emailed around 14h00.

[56] At the time that the matter was postponed Mr. *Thakalekoala* did not have a concern with his client being ordered to pay costs of the day at a punitive scale for persistent non – compliance with Orders of this Court. The non – compliance was not only objectionable, but it was delaying finalization of the matter which all the parties were agreeable was of public importance and required to be urgently disposed of.

[57] Inasmuch as I had already made up my mind that the third and the eighth respondents were conducting themselves in an objectionable manner, I did not consider costs *de bonis propriis* against Mr. *Thakalekoala* until when I had to prepare my ruling and carefully looked at the history of this case. I then discovered that when the parties

appeared before my brother **Mokhesi J** on the 28th April 2022, Mr. *Thakalekoala* had indicated that the answering affidavit was prepared a long time ago.

[58] In my view, Mr. *Thakalekoala* had clearly changed tune when he appeared before me. His excuse was that the affidavit was not filed as ordered because it was not timeously prepared due to his engagement in another urgent matter. Based on the information at my disposal then, there were now two mutually destructive versions regarding the filing of the answering affidavit before this Court. This implicated Mr. *Thakalekoala*'s integrity as an officer of this Court, hence he needed to explain himself.

[59] Consistent with how Mr. *Thakalekoala* has been conducting himself in this matter, his submissions on the issue of costs *de bonis propriis* were still not filed by the 10th May 2022. This was contrary to my Order of the 5th May 2022. He had still not filed them when this matter was heard on the 13th May 2022. His explanation was that he was not able to prepare and file his submissions due to his academic commitments. He nonetheless told me that he had his notes on the issue readily available to be shared with the Court. A document titled "authorities – costs attorney and client" was emailed to my Judge's Clerk

just after 17h00 on the 13th May 2022.

[60] Before I turn to Mr. *Thakalekoala*'s explanation for the mutually destructive versions, I reproduce below the record on my brother **Mokhesi J** of the 28th May 2022 on the issue:

> "Adv. Thakalekoala: We have prepared the answering affidavit a long time ago. We could not log into the meeting on the day the matter was heard, we were prepared even to argue the Interim reliefs. We have part of the record which court had ordered it to be dispatched. Two days from today we will be able to file and serve the record on my Learned friend".

[61] Mr. *Thakalekoa* made a brief oral explanation before me why this Court should not issue an order of costs *de bonis propriis* against him. His explanation is that the record above is inaccurate in that he never said the answering affidavit was prepared a long time ago. He urged me to listen to electronic record of the proceedings before my brother **Mokhesi J**. He therefore moved the Court not to impose costs *de bonis propriis* arguing that he never adopted delaying tactics as he tried all he could to assist the Court and ensure the matter was expeditiously heard. I am still baffled that Mr. *Thakalekoala* could not provide this brief explanation in advance as he had been ordered but was able to find

time to prepare more than 20 pages heads of argument in this matter.

[62] In response, Mr. *Phafane* for the applicant indicated that he and all Counsel that were in attendance on the 28th April 2022 were appalled that instead of taking responsibility for his actions and owning up, Mr. *Thakalekoala* was shifting the blame to my brother **Mokhesi J.** He submitted that the minute of my brother **Mokhesi J** of the 28th April 2022 constituted a court record as a result of which there was no need for this Court to listen to the audio as the record was correct.

[63] While I accept that this is a Court of record and that the minute constitutes a court record, I also know that to err is human. Therefore, where an officer of Court insists that the minute on the court file does not accurately reflect what he said, the interests of justice dictate that electronic record be resorted to where such exists, particularly when an officer is suspected of an egregious conduct thus facing costs *de bonis propriis.* Resort to electronic record is not unusual – it happens even in trial actions when there is a dispute over a witness testimony.

[64] It bears mentioning that section 15 (4) of Superior Courts Practice Direction No. 2 of 2021 for Management of Case in Superior Courts During the COVID – 19 Pandemic Notice, 2021 provides that “All

video conference hearings shall be recorded and the record shall be lodged with the Registrar for record keeping purposes by the recorder". As he pleaded that the electronic record will bear him out and that I should listen to it, I obliged and asked for the electronic record for the 28th April 2022 to listen exactly what Mr. *Thakalekoala* told the Court. This I did also because I agree with **Le Grange J** in **Thunder Cats Investments 49 (Pty) Ltd & others v Fenton & others** 2009 (4) SA 138 (C) para 30 where he said that: 'An order to hold a litigant's legal practitioner liable to pay the costs of legal proceedings is unusual and far-reaching. Costs orders of this nature are not easily entertained and will only be considered in exceptional circumstances.' I was about to make a big decision and therefore needed all the information.

[65] I followed the discussions in the electronic record attentively. In summary, what Mr. *Thakalekoala* is heard confirming is that the intention to oppose was prepared and served a while ago such that he was ready to argue the interim reliefs at the time they were granted. This was after Mr. *Phafane* expressed his frustration that while the intention to oppose was filed way back on the 19th the respondents had still not filed their answering affidavits when they knew that the matter must be heard on the return day.

[66] Mr. *Thakalekoala* explained that he was yet to get a full record from the PPAD which, according to him, was critical in the preparation of the answering affidavit. The Court made an Order that the answering affidavit be filed on the 29th May 2022 after it became apparent during the discussions that the PPAD was dragging its feet. There was mention of both the intention to oppose and answering affidavit which must have surely let to the slip of the pen on the minute. There is therefore no need to issue costs *de bonis propriis* against Mr. *Thakalekoala* regarding this particular issue which had indeed perturbed this Court. Counsel involved in the matter are free to request the relevant electronic record from the Assistant Register.

DISPOSITION:

[67] In the result, the following order is made:

67.1 the decision of the 3rd respondent to re-evaluate the tender of Elector and Voter Management Information System Tender No: LES/IEC/TEN/PAN/2021-22/03 and thereby unlawfully aborting the process which had evaluated and found the applicant to be the preferred candidate who qualified to proceed to enter

into a contract is reviewed and set aside.

67.2 the decision of the 4th respondent to re-evaluate the tender of Elector and Voter Management Information System Tender No: LES/IEC/TEN/PAN/2021-22/03 and thereby unlawfully aborting the process which had evaluated and found the applicant to be the preferred candidate who qualified to proceed to enter into a contract is reviewed and set aside.

67.3 Processes that may have ensued as a consequence of the decision of the 4th respondent to re-evaluate the tender of Elector and Voter Management Information System Tender No: LES/IEC/TEN/PAN/2021-22/03 and thereby unlawfully aborting the process which had evaluated and found the applicant to be the preferred candidate who qualified to proceed to enter into a contract are hereby reviewed, set aside and nullified.

67.4 the third and the eighth respondents to pay costs of this application.

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A.R. MATHABA J
Judge of the High Court

For Applicant: Adv. S. Phafane KC with Adv. R. Setlojoane.

For First, Second and Fourth Respondents: Adv. K. Letuka

For Third and Eight Respondents: Adv. T. Thakalekoala