

IN THE HIGH COURT OF LESOTHO
(Commercial Court Division)

HELD AT MASERU

CCA/0113/2022

In the matter between:

JAPPIE CATERING

APPLICANT

And

MINISTRY OF HEALTH

1ST RESPONDENT

**THE PRINCIPAL SECRETARY-
MINISTRY OF HEALTH**

2ND RESPONDENT

SAMSONS CATERING

3RD RESPONDENT

Neutral citation: Jappie Catering v Ministry of Health & 2 others Ruling
(No.1 [2023] LSHC 346 COM (15th November, 2022))

CORAM: MATHABA J
Heard On: 9th November 2022
Delivered On: 15th November 2022

SUMMARY

Application in terms of rule 8(22) - A matter should not be given preferential treatment simply because it has financial consequences – Applicant failing to meet threshold for urgency - Interim interdict - Applicant failed to prove requirements thereof - Interim interdict not granted.

ANNOTATIONS:

Statutes

High Court Rules 1980

Cited Cases

Lesotho

Attorney General & Another v. Swissbrough Diamonds Mines (Pty) Ltd and Others LLR & LB 1995 – 1996

Leloli Trading (Pty) Ltd v. Mafeteng District Council and 5 others CCA/0074/2021 [2022] LSHC 11 COM

Selemela Construction (Pty) Ltd v. Road Fund and 2 Others CCA/0084/2021 [2021] LSHC 136 COM

Smally Trading Company v. Lekhotla Mats'aba & 10 Others (C of A (CIV) 17 of 2016 [2016] LSCA 22

TM2 Consultancy (Pty) Ltd v. AHF Lesotho Proprietary and 2 Others No.1 2SHC 306 COM

South Africa

Eriksens Motors (Welkom) Pty Ltd v. Protea Motors (Warrenton) 1973 (3) SA 685

I L & B Marco Caterers v. Greatermans SA Ltd and Another; Aroma Inn (Pty) v. Hypermarkets (Pty) Ltd and Another 1981 (4) SA 108

Introduction:

[1] The applicant approached this Court on an urgent basis on 2nd November 2022 for the following reliefs:

- “1. Condoning Applicant’s non-compliance with the rules relating to time periods, service and forms and that this application be disposed of as urgent in terms of Rule 8 (22) of the Rules of Court;
2. A rule Nisi is issued calling upon the Respondents to appear and show cause why an order in the following terms should not be made:
3. The 1st and 2nd Respondents are interdicted, prohibited and restrained from:
 - 3.1.1 Proceeding with the decision of allowing 3rd Respondent access to the Mafeteng hospital pending finalization of this matter.
 - 3.1.2 Taking any steps in relation to the performance of any obligations relating to use of state funds for payment of 3rd Respondent pending finalization of this matter.
 - 3.1.3 Interfering with, disrupting or restricting in any manner whatsoever access of Applicants’ peaceful, undisturbed and beneficial use of the workplaces, occupation and enjoyment of the kitchens and any facilities by the Applicants and, without restriction, any of its staff, workmen, and/or representatives pending finalization of this matter;
 - 3.1.4 An order directing 1st and 2nd Respondents to dispatch the record of the deliberations of all the meetings at which the decision to award the tender to 3rd Respondent and incidental decision on selective tendering were made to this Honourable Court within seven days after service of this order;
4. An order reviewing and setting aside the decision of the 2nd Respondent to appoint 3rd Respondent without open tender process as irregular for failure to comply with eligibility requirements as specified in the Public Procurement Regulations 2007.
5. An order reviewing the decision of the 2nd Respondent to cancel the tender as unlawful and violating the sub-judice principle.

6. An order declaring that the decision of 2nd Respondent to isolate Applicant when it extended the contracts of similarly placed companies as inconsistent with section 18 of the constitution.
7. An order that Applicant is entitled to extension of the contract and or adjustment with respect to the estimated period of five months engagement set forth in the engagement contracts of the Applicants in the main case.
8. The costs of this application are to be paid by Respondents on the scale of attorney and own client.
9. Granting further or alternative relief.
10. Prayers 1 & 2, Paragraphs 3.1.1 to 3.1.4 operate as interim orders with immediate effect and will remain in full force and effect until the final determination of this application and, if the rule nisi should be confirmed, also thereafter.”

[2] On 9th November 2022, the parties appeared before me to argue the interim reliefs. The applicant moved for amendment of prayer 10 in the notice of motion to include prayer 3 amongst the prayers that were sought in the interim. It is crystal clear that prayer 3 is purely a preamble to prayers 3.1.1 to 3.1.4. Understandably, there was no objection to the amendment. There being no prejudice to the respondent I granted the amendment.

[3] I gave short oral reasons on 15th November 2022 refusing all the interim reliefs and removing the matter from the roll of urgent matters. I said that I would provide my reasons later. These are the reasons.

Background:

[4] This application is a sequel to a matter that is pending before this Court in CCA/0105/2022, (*“the main matter”*) where the applicant is the 7th

applicant. Under scrutiny in the main matter is procurement process for provision of catering services at hospitals.

[5] In November 2019 the 1st respondent engaged the applicant and the co-applicants in the main matter to provide catering services at different hospitals. This was per contracts that were due to expire on 31st October 2022. The applicant was allocated Mafeteng Hospital. In preparation for expiry of the contracts, the 1st respondent embarked on the impugned procurement process.

[6] What precipitated the instant matter is that while the main matter was still pending, the 1st respondent extended co-applicants' contracts by a period of five months to the exclusion of the applicant. The applicant was replaced with the 3rd respondent to serve Mafeteng Hospital.

[7] The nub of the applicant 's complaint is that when the contracts of its co-applicants in the main case were extended it had a legitimate expectation that its contract would also be extended. Accordingly, failure to extent its contract constituted discrimination as the 1st respondent ought to have afforded it the same treatment to its co-applicants. It queries the process through which 3rd respondent was "*hand-picked*" to replace it.

[8] As regards urgency, the applicant incorporates by reference the grounds that are canvassed in the certificate of urgency. They are that if the matter follows the ordinary route, the applicant will continue to suffer more business loss and that efforts to restore status *quo* will have been thwarted by the time the matter is heard.

[9] I proceed to consider if the applicant has met the requirements of urgency based on the applicable principles.

Urgency:

[10] Rule 8(22)(b)¹ requires applicant to ‘*set forth in detail the circumstances which he avers render the application urgent and also the reasons why he claims that he could not be afforded substantial relief in a hearing in due course if the periods presented by this Rule were followed*’. The rule is couched in peremptory terms. Its rigours are aimed at maintaining the equitable principle *prior in tempore est prior in jure*, namely, the first in time, is the first in law. A case should not jump the queue unless it is in the best interest of justice to do so.

[11] The applicant is more concerned with business loss; hence it wants the matter to be heard on an urgent basis. Therefore, it is apposite to quote

¹ High Court Rules 1980

Fagan J in **I L & B Marco Caterers v Greetermanns SA Ltd and Another**²

where he said the following:

“Other litigants waiting for their matters to be heard would be prejudiced if priority were afforded to these applications as they would have to wait longer. And what distinguishes these two applications from other matters? Applications for review such as these occur commonly and are not given priority. The prejudice that applicants are complaining about is the possibility that they may suffer losses of profits - the losses, if any, sound in money. Assuming that such losses are irrecoverable, that still does not distinguish these matters from many others awaiting their turn on the ordinary roll. Take for example all the cases wherein general damages are claimed in delict including actions instituted under the Compulsory Motor Vehicle Insurance Act 56 of 1972. Interest is not claimable on the amount awarded and litigants suffer financially by delay in the adjudication of their matters. Moreover, the fact that a litigant with a claim sounding in money may suffer serious financial consequences by having to wait his turn for the hearing of his claim does not entitle him to preferential treatment. On the other hand, where a person's personal safety or liberty is involved or where a young child is likely to suffer physical or psychological harm, the Court will be far more amenable to dispensing with the requirements of the Rules and disposing of the matter with such expedition as the situation warrants. The reason for this differential treatment is that the Courts are there to serve the public and this service is likely to be seriously disrupted if considerations such as those advanced by the applicants in these two matters were allowed to dictate the priority they should receive on the roll. It is, in the nature of things, impossible for all matters to be dealt with as soon as they are ripe for hearing. Considerations of fairness require litigants to wait their turn for the hearing of their matters. To interpose at the top of the queue a matter which does not warrant such treatment automatically results in an additional delay in the hearing of others awaiting their turn, which is both prejudicial and unfair to them. The loss that applicants might suffer by not being afforded an immediate hearing is not the kind of loss that justifies the disruption of the roll and the resultant prejudice to other members of the litigating public”.

[12] In my view, perceived business loss in circumstance where the applicant 's contract has expired and the decision has already been made not to extent it, does not warrant the case to be heard on an urgent basis. Importantly, financial loss is not invariably an imperative for the matter to be heard on an

² IL & B Marcow Caterers (Pty) Ltd Greetermanns SA Ltd And Another; Aroma Inn (Pty) v Hypermarkets (Pty) Ltd And Another 1981 (4) SA 108 (C) at 113 to 114 F/C.

urgent basis³. Most cases in this court have commercial implications. Therefore, it was incumbent upon the applicant to set forth in detail why its case must be given a priority. I cannot say the circumstances in this case are so peculiar as to allow the applicant to access justice first.

Interim Interdict:

[13] The following four requirements⁴ have to be satisfied in the application for interim interdict:

- (a) a prima facie right, though open to some doubt;
- (b) a well-grounded apprehension of irreparable harm if interim interdict is not granted and ultimate relief is eventually granted;
- (c) the balance of convenience favours the granting of the interim interdict; and
- (d) the absence of any other satisfactory remedy.

[14] All these requirements must be met for interim interdict to be granted. *See: Leloli Trading (Pty) Ltd v Mafeteng District Council and 5 others*⁵. In *Eriksens Motors (Welkom) Pty Ltd v. Protea Motors*

³ *Selemela Construction (Pty) Ltd v Road Fund and 2 Others* CCA/0084/2021 [2021] LSHC 136 COM (26th November, 2022)

⁴ *Attorney General & Another v Swissbournh Diamonds Mines (Pty) Ltd and Others* LLR & LB 1995 – 1996 173 at 182

⁵ CCA/0074/2021 [2022] LSHC 11 COM (9th February 2022)

(Warrenton)⁶ the court said the following on how these requirements have to be assessed:

“The foregoing considerations are not individually decisive, but are interrelated; for example, the stronger the applicant’s prospects of success the less his need to rely on prejudice to himself. Conversely, the more the element of ‘some doubt’, the greater the need for the other factors to favour him. The Court considers the affidavits as a whole, and the interrelation of the foregoing considerations, according to the facts and probabilities; see *Olympic Passenger Service (Pty.) Ltd. V Ramlagan*, 1957 (2) SA 382 (D) at p. 383D – G. Viewed in that light, the reference to a right which, ‘though *prima facie* established, is open to some doubt’ is apt, flexible and practical, and needs no further elaboration.”

[15] In **TM2 Consultancy (Pty) Ltd v. AHF Lesotho Proprietary and 2 Others**⁷ this Court quoted in approval the decision in *National Treasury v Opposition to Urban Tolling Alliance* 2012 (6) SA 223 (CC) 237 at 238 para 50 where the Constitutional Court of South Africa said the following in explaining the requirement of *prima facie* right:

“Under the Setlogelo test the *prima facie* right a claimant must establish is not merely the right to approach a court in order to review an administrative decision. It is a right to which, if not protected by an interdict, irreparable harm would ensue. An interdict is meant to prevent future conduct and not decision already made. Quite apart from the right to review and to set aside impugned decisions, the applicants should have demonstrated a *prima facie* right that is threatened by an impending or imminent irreparable harm. The right to review the impugned decisions did not require any preservation *pendente lite*.”

[16] In *casu* the applicant’s contract has expired by effluxion of time and the respondent has already decided to contract the 3rd respondent for Mafeteng Hospital. Therefore, the applicant has no right that is threatened and

⁶ 1973 (3) SA 685 (A) at 691 (F)

⁷ No.1 [2SHC 306 COM (28th November 2022) para 25

need protection by way of interdict. Besides the fact that the 1st respondent extended co-applicants' contract, the applicant does not provide any basis or factors for having entertained expectation that its contract was going to be extended.

[17] Again, the applicant is challenging the 1st respondent 's decision on grounds of discrimination under the Constitution. The applicant has absolutely no prospects of success as far as this ground is concerned. The fact that co-applicants' contracts were extended to the exclusion of the applicant may be considered unfair does not necessarily mean that the 1st respondent offended the Constitution. None of the prohibited grounds for discrimination under section 18(3) of the Constitution are alleged in the papers.

[18] It bears repeating that the applicant's contract had expired. I doubt in the first place that it has *locus standi* to challenge the decision of the 1st respondent to contract the 3rd respondent. Be that as it may, the right to challenge that decision on review would not mean that the applicant automatically has a right worthy of protection by interdict.

[19] As regards well-grounded apprehension of irreparable harm, the applicant has a fundamental challenge as well. I have already expressed serious doubt on whether the applicant has a *prima facie* right. Resultantly, the

applicant must demonstrate irreparable harm if interdict is not granted⁸. This the applicant has not done. Significantly, my finding that the applicant has failed to establish a *prima facie* right means that there is no *prima facie* right to be protected.

[20] I do not think the balance of convenience favours the granting of an interim interdict. There is no factual basis placed before this Court to arrive at a conclusion that the applicant stands to suffer more prejudice than the respondents if interdict were to be refused. The applicant 's contract has expired and the 1st respondent has taken a decision to contract the 3rd respondent. Inasmuch as that decision may not be immune from scrutiny, the consequences of interdict would be disruptive to provision of catering services to patients. This critical service must be allowed to proceed unhindered as the applicant pursues its remedies.

[21] There is absolutely nothing on papers to suggest that the applicant does not have other satisfactory remedy. It does not explain why contractual damages will not be sufficient should this Court eventually find that its contract ought to have been extended. As stated in **Smally Trading Company v Lekhotla Mats'aba & 10 Others (C of A (CIV) 17 of 2016 [2016] LSCA 22**

⁸ Setlhogelo supra page 227

(25 May 2016) this would *prima facie* be profit which the applicant would have made on the contract.

Conclusion:

[22] Despite my finding that the grounds advanced for urgency are not peculiar and sufficient to warrant the matter to be heard on an urgent basis, I proceeded to consider the prayers for other interim reliefs including interdict. The logically conclusion to which I have arrived is that the prayers are untenable.

[23] It was for the above reasons that I made the following order on the 15th November 2022 whose net effect is to remove the matter from the roll of urgent matters:

23.1 Interim reliefs sought in prayers 1 to 3.1.4 in the notice of motion are refused.

A.R. MATHABA J
Judge of the High Court

For the Applicant: Adv. C.J. Lephuthing

For the Respondents: Adv. M.E Tsoeunyane