

IN THE HIGH COURT OF LESOTHO
(COMMERCIAL DIVISION)

HELD AT MASERU

CCA/0115/2021

In the matter between:

ENGIDATA (PTY) LTD

APPLICANT

And

FISCHER CONSULTING JOINT VENTURE

1ST RESPONDENT

MINISTRY OF PUBLIC WORKS

2ND RESPONDENT

ATTORNEY GENERAL

3RD RESPONDENT

Neutral Citation: Engidata (Pty) Ltd v Fischer Consulting Joint Venture and Others [2022] LSHC 107 Com. (09 JUNE 2022)

CORAM: **MOKHESI J**

DATE OF HEARING: **23rd March 2022**

DATE OF JUDGMENT: **9th June 2022**

SUMMARY

CIVIL PRACTICE: *Approach to points in limine re-stated and applied- Matter dismissed on the bases of untenability of a declarator and lack of locus standi in judicio.*

ANNOTATIONS

BOOKS:

Herbstein & Van Winsen The Civil Practice of the High Courts of South Africa (2009) 5 ed vol. 1

CASE LAW:

Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd (237/2004)
[2005] ZASCA 50 (30 May 2005): [2006] 1 ALL SA 103

Makoala v Makoala LAC (2009 – 2010) 40

Mars Incorporated v Candy World (Pty) Ltd [1990] ZASCA 149; 1991 (1) SA 567
(A)

Moiloa v City of Tshwane Metropolitan Municipality (249/2016) [2017] ZASCA
15 (22 March 2017)

National Executive Committee and Others v Morolong (C of A (C(V) No.26/2001)
(NULL) [2002] LSHC 10 (12 April 2002)

JUDGMENT

[1] **Introduction**

This is an interlocutory application by the applicant company which is one of the respondents in the main application wherein the 1st respondent in the current matter is the applicant.

[2] **Factual Background**

In the main case, the 1st respondent, Fisher Consulting Joint Venture (hereinafter “JV”) had launched an urgent application before this court in terms of which it sought to interdict the Ministry of Public Works and Transport (Ministry) from awarding the contract for the supply, installation and Support of Lesotho Integrated Transport Information System (LITIS) to the applicant in the instant matter (hereinafter “Engidata”). The main application was lodged after a formal application to the Ministry by JV to avail to it information which led to it being rejected as a bidder. This court was approached after it was clear that the Ministry was intend on awarding the said contract to Engidata despite JV’s apparent discontent and queries.

[3] It is apposite to set the context in terms of which the bidding was conducted. With the aim of developing and harmonising road transport policies, laws, regulations, and standards for efficiency in cross-border transport and transit networks, transport and logistics, systems, and procedure in the Common Market for Eastern Southern Africa (COMESA), the East African Community (EAC), and the Southern African Development Community (SADC), the European Union funded a project which is known as TTTFP (Tripartite Transport and Transit Facilitation Programme). The strategic

objective of this project was to facilitate the development of a more competitive, integrated, and liberalised regional road transport market in the three economic zones alluded to above. Fisher Consulting which is part of the JV, was the lead partner of the consortium of companies in developing the three economic zones (EA-SA) vehicle load management (VLM) strategy, vehicle regulation and standards for harmonised EA-SA, preconditions for an operational EA-SA Transport Registers and Information Platform System (TRIPS).

[4] After the completion of the TTTFP project, Lesotho as the member country of the economic zone mentioned above, invited bids for supply, installation and support of LITIS with the aim of achieving the above-stated objectives of TTTFP. JV and Engidata were participants in the bidding process, with the latter coming out as a successful bidder, and the former having been disqualified in the initial stages. As already said, when the Ministry intimated its intention to award the contract to Engidata, and after unsuccessful requests by JV for Evaluation documents/reports, the latter lodged the main application in terms of which it sought certain reliefs, chief among which, was an interdict against the Ministry from awarding the contract to Engidata, and the review of the decision to so award the contract and other reliefs. One of the reliefs against which Engidata was vehemently opposed was the disclosure of certain information it regarded as confidential. On the eve of the ruling on the issue whether confidentiality attaches to certain documents sought to be released, Engidata lodged the current application.

[5] This application is anchored on three pillars, namely;

- (i) The JV omitted to make a full disclosure of Fischer Consulting in terms of its involvement as a lead member of the consulting firms in the TTTFP project, and that JV's eligibility would not have been fully interrogated and decided in the absence of full disclosure.
- (ii) By virtue of Fisher Consulting's participation in the TTTFP project , and as one of the partners in the JV bidding for LITIS, the JV was thus placed in unfair competitive advantage over other bidders and was thus acting contrary to World Bank Regulations which govern the bidding process.
- (iii) That the JV was not eligible to bid for LITIS for having contravened Regulations 3.15a of the World Bank Regulations, for having a conflict of interest.

[6] On the 14 January 2022, this court ordered that the Evaluation Report and Procurement Plan be released but ordered that the Technical and Financial bids of Engidata be withheld until this application is determined as it might have a bearing on whether such documents should be released to the JV at all, that is, depending on whether the latter was eligible to participate in the bidding process.

[7] This application is opposed only by the 1st respondent (JV), and in its answering affidavit, had raised a number of the so-called points in *limine*, namely;

- (i) Lack of urgency. This point was however not argued as it was overtaken by events.
- (ii) That this application is vexatious and abuse of court processes, it being argued that it is meant as a stratagem to frustrate the main application.
- (iii) Declarator as a remedy is discretionary and should, in this case be refused for inordinate delay in bringing the application. The basis of this argument being that it took Engidata sixteen (16) months before lodging the application from the time when bids were opened.
- (iv) Declarator is not available to Engidata, the argument being that a person seeking this remedy must establish a right to which he seeks this court to declare.
- (v) Engidata's lack of *locus standi in judicio*, for the reason that it does not have a right that must be declared, it lacked the standing to seek the reliefs it is claiming.
- (vi) Disputes of fact.
- (vii) Estoppel and waiver. The argument is that Engidata is estopped from raising before this court matters it should have raised before the Ministry through "procurement-related procedures."
- (viii) Jurisdiction of the court delayed. The argument in this regard relates to the exhaustion of local remedies: That jurisdiction of this court is

delayed until the Ministry will have determined the JV's eligibility in terms of the procurement-related procedures provided by the World Bank Regulations.

- [8] On the merits, the JV disputes all the negative allegations made by the applicant against it, and further raised an issue that the applicant impermissibly raised a new matter in its replying affidavit. The new matter being referred to in this regard relates to the assertion that it did not make full disclosure when submitting its bid. It is JV's argument the applicant's case as pleaded in the founding affidavit is that the JV *"had unlawfully and intentionally omitted to disclose that they are at an unfair advantage and they have a conflict of interest and are therefore ineligible to participate in the LITIS in terms of the Procurement Regulations"* and not the one it is seeking to rely on in reply. In reply to the JV's averment in paragraph 4.1 of its Answering affidavit that in its covering letter of their Technical Bid they made *"full disclosure of their legacy since 1988, where Fischer Consulting has a proven track record to design and implement National Transport Information Systems, Driving licence and related traffic information systems in the Tripartite Region,"* Engidata at paragraph 14 of its reply, avers that:

"AD para 4.1

Contents herein noted. Save to deny that the legacy to design national transport information systems reveals the conflict of interest, or the true position of Fisher Consulting (Pty) Ltd in the TTTFP which cannot be said to be "full disclosure." The 1st Respondent should not seek to mislead the court that full of being a lead member of the TTTFP."

- [9] **Issues for determination:**

- (i) The points in *limine* raised by the JV
- (ii) Whether there has been non-disclosure by the JV, and therefore, fraudulent practice or conduct on its part.
- (iii) Whether the JV was disqualified and ineligible on account of conflict of interest and unfair competitive advantage.
- (iv) Whether a new matter has been raised in reply and the approach to it.
- (v) Costs

I turn to deal with the issues not in the sequence I have outlined them.

[10] **Approach to points in *limine*.**

The approach to points in *limine* is trite. This procedure is aimed at conveniently disposing of the matter at the instance of the point raised before the merits of the application are canvassed (see **fn1. Moiloa v City of Tshwane Metropolitan Municipality (249/2016) [2017] ZASCA 15 (22 March 2017)**). The task of the court before which the preliminary point is raised is to determine whether the applicant's founding affidavit makes out a *prima facie* case for the reliefs sought. In order to determine the validity of the point in *limine* raised, only the founding affidavits fall to be looked at and the factual averments contained therein must be taken as true (**Makoala v Makoala LAC (2009 – 2010) 40 at 42G – H**). In **Makoala (ibid)** the court decried the practice by counsel, of turning the defences to the merits of application into points in *limine*. Alive to these principles I turn to consider the points in *limine* raised.

[11] The argument by the 1st respondent that a declarator is untenable, has two facets to it; the first one being that the applicant has not shown any of its rights which it seeks to be declared in view of the fact that the World Bank Regulations on which its case is based do not create any rights as Regulation 2.1 of the same Regulations stipulates, and secondly, the declarator being a discretionary remedy, the delay by the applicant in bringing this application merits the dismissal by the court of this application. I do not think that the delay aspect of the declarator should be dealt with as a point in *limine* as the determination of its validity will not be dependent on consideration of the applicant's founding affidavits but on consideration of the 1st respondent's averments as well. This conclusion holds true for the points in *limine* that the application is vexatious and an abuse of court process, dispute of facts, estoppel, and waiver. In fact, as regards foreseeable dispute of fact, the court in **Makoala v Makoala (above) at 45C**, made it plain that this is "*not a proper point [] in limine_at all, should not have been raised as such by the respondent...*" I turn now to consider the other preliminary points which were raised, namely, rights-based aspect of the declarator, *locus standi in judicio* of the applicant, and delayed jurisdiction of this court (exhaustion of local remedies).

[12] **Declarator**

As regards a declarator, section 2 of the High Court Amendment Act of 1984 provides that:

"The High Court ... shall have, in its discretion, and at the instance of any interested person, power to inquire into and determine any existing, future,

or contingent right or obligation notwithstanding that such a person cannot claim any relief consequential upon the determination.”

- [13] It is trite that the applicant who seeks a declarator must show, in terms of the above section, that she/he is interested in “an existing, future or contingent right or obligation” without more. The correct approach to this section was articulated by the Supreme Court of South Africa when dealing with a similarly – worded section 19(1) (a)(iii) of the Supreme Court Act 29 of 1959, in the following manner in **Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd (237/2004) [2005] ZASCA 50 (30 May 2005): [2006] 1 ALL SA 103 at para. 16** as follows:

“[16] Although the existence of a dispute between the parties is not a prerequisite for the exercise of the power conferred upon the High Court by the subsection, at least there must be interested parties on whom the declaratory order would be binding. The applicant in a case such as the present must satisfy the court that he/she is a person interested in an existing, future, or contingent right or obligation and nothing more is required...”

- [14] It is the 1st respondent’s contention that the declarator has been sought on an “erroneous and incorrect factual basis,” its argument goes further to say that because a declarator is sought on the basis of the World Bank Regulations it is erroneous because the same Regulations provide that the rights and obligations of the Borrower and providers of goods are governed by requests for bids and contracts signed and not by the Regulations. There is merit in this argument. Regulation 2.1 of the World Bank Procurement Regulations provides that:

“The Legal Agreement governs the legal relationship between the Borrower [Government of Lesotho] and the Bank. The Procurement Regulations are applicable to the procurement of goods, works, non-consulting services, and consulting services in IPF operations, as provided for in the Legal Agreement. The rights and obligations of the Borrower and the providers of Goods, Works, non-Consulting Services, and Consulting Services for IPF operations are governed by the relevant request for bids/request for proposals document and by the contracts signed by the Borrower and the providers of Goods, Works, non-Consulting Services, and not by these Procurement Regulations or the Legal Procurement. No party other than the parties to the Legal Agreement shall derive any rights from, or have any claim to, financing proceeds.”

- [15] It is my considered view that the applicant had failed to satisfy this court that it is interested in ‘existing, future or contingent right or obligation’ as the 1st respondent’s counsel correctly submitted, the Regulations on which the applicant relies for a declarator state in no uncertain terms that the rights or obligations which the providers of goods or services may claim shall only stem from the relevant request for bids and contracts signed between providers and the Government of Lesotho, and not from the Regulations or the Legal Agreement between the Government of Lesotho and the Bank. In its pleadings, the applicant refers to the World Bank Regulations and Request for Bids in particular to a section titled ‘Instruction to Bidders’ (ITB) quite loosely. However, it will be observed that the reliefs it is seeking are based on the breaches of the World Bank Regulations and not ITB. These are the reliefs that are being sought specifically. I do not think I am at liberty to substitute the reference to Regulations with ITB, as breaches of the ITB are not the basis of the reliefs the applicant is seeking. If I were I

to do that, it will offend a salutary principle of our law that a litigant cannot be granted a relief which he/she has not sought (**National Executive Committee and Others v Morolong (C of A (C(V) No.26/2001) (NULL) [2002] LSHC 10 (12 April 2002) at p.12.**

[16] **Lack of *locus standi in judicio*.**

Locus Standi has two aspects to it, the first one being the capacity of the applicant to litigate, and secondly, the interest which the applicant has in the relief claimed (**Herbstein & Van Winsen the Civil Practice of the High Courts of South Africa (2009) 5 ed vol. 1 at 143**). It is incumbent on the applicant to allege and prove that it has *locus standi* to institute the proceedings (**Mars Incorporated v Candy World (Pty) Ltd [1990] ZASCA 149; 1991 (1) SA 567 (A) at 575 H – I**). The above conclusion that a declarator is untenable should also apply with equal measure to the issue of *locus standi*. The applicant does not have a standing to sue based on the Regulations which clearly state that they do not create a right for the suppliers of goods or services. This conclusion and the one on untenability of a declarator, disposes of this matter without the need to deal with the remaining points in *limine* and the merits.

[17] In the result:

(a) The application is dismissed with costs.

MOKHESI J

For the Applicant: Ms Mokebisa from Mokebisa Attorneys

**For the 1st Respondent: Adv. T. Maqakachane assisted by Adv. K. J Selimo
instructed by Sello Mafatle Attorneys**

For the 2nd and 3rd Respondents: No Appearance