

**IN THE HIGH COURT OF LESOTHO**  
**(Commercial Court Division)**

**HELD AT MASERU**

**CCA/0044/2019**

In the matter between:

**PHAKOE BUILDING CONSTRUCTION**

**APPLICANT**

And

**TS'ILO STAR CONSTRUCTION (PTY) LTD**

**1<sup>ST</sup> RESPONDENT**

**PROCUREMENT UNIT-MINISTRY OF PUBLIC  
WORKS AND TRANSPORT**

**2<sup>ND</sup> RESPONDENT**

**MINISTER OF PUBLIC WORKS AND INDUSTRY**

**3<sup>RD</sup> RESPONDENT**

**THE ATTORNEY GENERAL**

**4<sup>TH</sup> RESPONDENT**

**Neutral citation:** Phakoe Building Construction v. Ts'ilo Star Construction (Pty) Ltd & 3 others [2019] LSHC 49 COM (13<sup>th</sup> March 2023)

**CORAM:** MATHABA J  
**Heard On:** 10<sup>th</sup> November 2022  
**Delivered On:** 13<sup>th</sup> March 2023

## **SUMMARY:**

*Tender Panel making award to a tenderer not recommended by Evaluation Team – Tender Panel properly exercising its powers in declining the recommended tenderer whose tendered price was irregular – Public Procurement Advice Division does not have jurisdiction to entertain an appeal from a dissatisfied tenderer without recourse, in the first place, to the Procurement Unit – The decision of the Tender Panel stands.*

## **ANNOTATIONS:**

### **Statutes**

Public Procurement Regulations 2007 as amended (2018)

### **Cited Cases**

#### **Lesotho**

Drytex Lesotho (Pty) v. Pyramid Laundry Services (Pty) Ltd and Others LAC (2015 – 2016) 387

Minet Lesotho (Pty) Ltd and Others v. Minister of Defence and National Security C of A (CIV) 15/2020 (30 October)

Procurement Policy and Advice Division and One v. Laxton Group Limited C of A (CIV) No. 26/2022 (28 October 2016)

Shale v. The Judicial Service Commission (CIV/APN/49/18) [2020] LSHC 39 (26 June 2020)

Smally Trading (Pty) Ltd T/A Smally Uniform and Protective Clothing v. Lekhotla Matsaba and 10 Others (C of A (CIV/17/2016)

## **South Africa**

Normandien Farms v. South African Agency for Promotion of Petroleum Exportation and Exploitation [2020] ZACC 5; 2020 (6) BCLR 748 (CC); 2020 (4) SA 409 (CC) (24 March 2020)

### **JUDGMENT**

#### **INTRODUCTION:**

[1] The genesis of the dispute is the tender process undertaken by the Ministry of Public Works (“*MoPW*”), for renovations of Mohale’s Hoek Correctional Services for the Ministry of Justice and Correctional Services.

[2] The applicant, Phakoe Building Construction, (“*Phakoe*”), is challenging the award of the tender to Ts’ilo Star Construction (Pty) Ltd, (“*Ts’ilo*”), the 1<sup>st</sup> respondent. On the date of argument Mr. Ndebele for Phakoe indicated that renovations relevant to the tender were completed during the pendency of this matter as a result of which Phakoe was only pursuing the following prayers:

- “3. The decision of the **2<sup>nd</sup> Respondent** to award a contract to **1<sup>st</sup> Respondent** in respect of the **Proposed Renovations to Mohale’s Hoek Correctional Services for the Ministry of Justice and Correctional Services-phase 1 (Builder’s Work)** be reviewed and set aside.
4. The contract between **1<sup>st</sup> Respondent** and **2<sup>nd</sup> Respondent** in respect

of the **Proposed Renovations to Mohale's Hoek Correctional Services for the Ministry of Justice and Correctional services – Phase 1 (Builder's Work) of Mohale's Hoek** be declared unlawful.

5. It be declared that the findings of the Procurement Policy and Advice Division in respect of the **Proposed Renovations to Mohale's Hoek Correctional Services for the Ministry of Justice and Correctional Services- Phase 1 (Builder's Work) of Mohale's Hoek**, are binding to the 2<sup>nd</sup> Respondent.
7. Costs of suit on attorney and client scale.
8. Further and/or alternative relief.”

### **PUBLIC PROCUREMENT:**

[3] At the time that the cause of action arose procurement of public goods and services in this jurisdiction was governed by Public Procurement Regulations 2007 as amended, (*“the regulations”*). I am aware that Public Procurement Act No. 3 of 2023 has since been promulgated. Back to the regulations. In terms of regulation 3(2) public bodies such as ministries, district councils, state-owned enterprises, etc, constitute a Procurement Unit, (*“the Unit”*), when carrying out public procurement.

[4] Public procurement in Lesotho is grounded on principles of legality, accountability, efficiency, transparency and overall value for money. Consequently, the regulations establish several bodies for checks and balances as well as to ensure segregation of duties. The most pivotal body is the

Procurement Unit (*“the Unit”*), which has to establish the Evaluation Team (*“ET”*) and the Tender Panel, (*“TP”*). There is also Public Policy and Advice Division (*“PPAD”*) which is a regulator in public procurement. I refer to the powers of these bodies to the extent of their relevance in this matter.

### ***Procurement Unit (“the Unit”)***

[5] The Unit is responsible for inviting tenders<sup>1</sup> and for preparation of tender documents<sup>2</sup> which amongst others must include a criteria and methods for selecting qualified tenders<sup>3</sup>. Once tenders have been submitted, it is the responsibility of the Unit to ensure that they are evaluated<sup>4</sup> and that the tenderer who has satisfied the requirements specified in the tender invitation and submitted the most favourable tender is invited to enter into a contract<sup>5</sup>. The tendered price is the key criterion in evaluation of apparently compliant tenderers<sup>6</sup>.

[6] Subject to the decision of the TP, the Unit is responsible for finalising and attending to the signing of a contract<sup>7</sup>. At the time that the Unit places a contract with a successful tenderer, it must offer unsuccessful tenderers

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<sup>1</sup> Regulation 22(1)

<sup>2</sup> Regulation 20(4)

<sup>3</sup> Regulation 20(5)

<sup>4</sup> Regulation 29(1)

<sup>5</sup> Regulation 30(1)

<sup>6</sup> Regulation 29(4)

<sup>7</sup> Regulation 48 (1)(d)

and the winning tender an opportunity for de-briefing<sup>8</sup>. This is intended to advise a successful tenderer of areas where its tender was not as strong as it should have been for purposes of improvement in future<sup>9</sup> and unsuccessful tenderers are advised of the reasons for their lack of success<sup>10</sup>.

[7] In the event of there being a complaint arising out of the award, such is lodged with the Unit<sup>11</sup> which must make a decision in 10 working days after the submission of the complaint<sup>12</sup>. The Unit must notify tenderers about the nature of the complaint and invite those whose interest might be affected by a respective decision to the complaint proceedings<sup>13</sup>. After receiving a complaint and until such time that the complaint is resolved, the Unit is barred from entering into contract in respect of the tender in question unless the Minister of Finance decides that suspension of the tender is not in the public interest<sup>14</sup>.

### ***Evaluation Team (“ET”)***

[8] One of the functions of the Unit is to set up ET<sup>15</sup>. A fundamental function of the ET is to “*examine and evaluate tenders, prepare an evaluation*

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<sup>8</sup> Regulation 32(1)

<sup>9</sup> Regulation 33(3)

<sup>10</sup> Regulation 33(4)

<sup>11</sup> Regulation 54(1)

<sup>12</sup> Regulation 54(4)

<sup>13</sup> Regulation 54(2)

<sup>14</sup> Regulation 54(5)

<sup>15</sup> Regulation 48(1)

*report and make recommendations to the Tender Panel on award of contract”<sup>16</sup>.*

Regulation 49(6) provides as follows regarding the form and content of evaluation report:

“(6) An evaluation report from the Evaluation Team to the Tender Panel shall be made in the form of the minutes of the evaluation meeting and include full details of the evaluation against the criteria published with the invitation to tender, reasons for rejecting any or all tenders, recommendations approved by the majority of the members of the Evaluation Team, their rationale and all relevant and supporting information.”

### ***Tender Panel (“TP”)***

[9] Amongst its functions the TP has to open the tenders received<sup>17</sup> and submit them to the ET for evaluation<sup>18</sup>. TP is the one that decides which tenderer shall be awarded the tender following consideration of the report and recommendations of the ET<sup>19</sup>. In terms of regulation 50 (13), the TP shall ensure that –

- “(a) the competitive process has been followed in accordance with these Regulations;
- (b) the award of the procurement contract is strictly in accordance with objective evaluation criteria as set out in the Invitation to Tender;
- (c) no subjective judgement or conflict of interest are brought to bear on the decision;
- (d) the decision is able to stand scrutiny by the audit authorities, the business community and the public in general;
- (e) the decision can withstand any challenge of anti-competitive behaviour or misuse of public funds; and

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<sup>16</sup> Regulation 49(2)

<sup>17</sup> Regulation 27(1)

<sup>18</sup> Regulation 50(3)(b)

<sup>19</sup> Regulation 50(c)

(f) the Government is achieving value for money.”

### ***Public Procurement Advice Division (“PPAD”)***

[10] This is the regulatory body responsible for public procurement policy in Lesotho. In terms of regulation 6(1) the PPAD is *“responsible for the development of the public procurement system legality, accountability, efficiency, transparency, and overall value for money in the implementation of public procurement and by stimulating a competitive environment with equality of treatment among bidders in the public procurement process.”*

[11] Amongst others PPAD is responsible for developing public procurement laws and for proposing best practise in procurement in addition to monitoring compliance with procurement policies and laws<sup>20</sup>. As far as dispute resolution in public procurement is concerned, the PPAD has to *“set up an appeals Panel to deal with complaints and appeals from suppliers and companies, and PPAD shall provide the Secretariat service to the Appeals Panel*<sup>21</sup>;

[12] In terms of regulation 55 the PPAD is empowered to handle appeals arising out of complaints lodged with the Unit in terms of regulation.

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<sup>20</sup> Regulation 6(2) (a) and (c)

<sup>21</sup> Regulation 6(2)(m)

The regulation provides as follows:

- “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 complaint, 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.
- ...
- (4) PPAD shall seek an opinion from the independent Appeals Panel for reviewing the complaint related to the tender process authorized for contracting, the decision of PPAD shall be based on the Appeals Panel Opinion.”

**FACTUAL BACKGROUND:**

[13] On 9<sup>th</sup> October 2018, MPW through its procurement unit initiated procurement process for renovations of Mohale’s Hoek Correctional Service. This was by way of selective tendering. Phakoe and Ts’ilo were amongst the invitees in the tender. They both submitted their bids. Besides compliance criteria which tenderers needed to meet, the evaluation criterion was the amount

closest to the quantity surveyor's/engineer's estimate, (*"the estimates"*). During the opening of the bids, the estimate was announced as M35,661,747.00.

[14] Following evaluation of bids, the ET made a recommendation to the TP that the tender be awarded to Phakoe. This was on the basis that its bid was closest to the estimate hence met the evaluation criterion. The TP did not approve ET 's recommendation on the ground that Phakoe's bid amount was irregular as it did not correlate with the figures underlying it – adding figures for different items in the bid resulted into a different bid amount from the one reflected in the bid. Consequently, the TP disqualified Phakoe's bid and awarded the tender to Ts'ilo as its bid amount was closest to the estimate following the disqualification of Phakoe.

[15] On 11<sup>th</sup> January 2019 Phakoe appealed the decision of the TP to award the tender to Ts'ilo to PPAD. This was allegedly pursuant to the advice of the representative of the Unit. However, appealing directly to PPAD was contrary to regulation 54(1) of the Regulations which requires a complaint to be lodged first with the Unit before an appeal to PPAD.

[16] On 19<sup>th</sup> March 2019, PPAD made a ruling in terms of which it advised the TP to uphold the recommendation of the ET and award the contractor that had been identified as the preferred bidder. Unbeknown to

Phakoe and the PPAD, Ts'ilo and MoPW had concluded the contract in respect of the tender on 5<sup>th</sup> February 2019 – when the dispute was still pending before the PPAD. It is the decision to award the tender to Ts'ilo that has actuated the instant proceedings.

**PHAKOE'S CASE:**

[17] Counsel for Phakoe placed considerable reliance on the fact that Phakoe had met the entire evaluation criterion as its bid was closest to the estimate thus should have been awarded the tender. He argued that the contract entered into between Ts'ilo and the Unit was unlawfully awarded contrary to regulation 54(5) as Phakoe's complaint had not yet been resolved when the contract was concluded. Resultantly, the contract was invalid regard being had to regulation 39(1)(c) as it was entered into in breach of the procedures set out in the regulations.

[18] Concerning the argument by the respondents that when the contract was concluded there was no appeal pending before the PPAD, Counsel argued that it is not the respondents' contention that they were not aware of the appeal, rather they are challenging the fashion the appeal was lodged, which they did not object to.

[19] He asserted that Phakoe could not lodge a complaint with the Unit in terms of regulation 54(1) because it had been advised by the representative of the Unit to lodge an appeal with the PPAD if it was not satisfied with the explanation provided during the de-briefing session why it was not awarded the tender.

[20] Regarding the contention that this Court does not have jurisdiction to entertain this matter on the ground that it is being asked to glorify the recommendations of the PPAD which did not have jurisdiction to hear the appeal lodged by the applicant, Counsel thwarted the attack by relying on the decision of **Smally Trading (Pty) Ltd T/A Smally Uniform and Protective Clothing v. Lekhotla Matsaba and 10 Others**<sup>22</sup>. He specifically quoted the following passage by *Farlam AP* who took cue from *Ogilvie Thompson JA* in *Welkom Village Management Board v Leteno 1958 (1) SA 490 (AD)*:

“[14] As **Ogilvie Thompson JA** said in the passage quoted above the fact that there is a domestic remedy is not in itself a sufficient reason for excluding or deferring the court’s jurisdiction: in every case all the circumstances must be considered”.

### **TSILO’S CASE:**

[21] Mr. Tsabeha commenced his brief argument by inviting this Court to look at the PPAD’s recommendation, annexure “PBC6” to the founding

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<sup>22</sup> (C of A (CIV/17/2016) para 14

affidavit, that the TP should uphold the recommendation of the ET and award the tender to Phakoe. He stated that *ex facie* the document, it is patently clear that the PPAD was offering advice to the TP. He placed reliance on the following passage:

“PPAD Recommendations:

Pursuant to Regulations 55 (2) (a) of the Public Procurement Regulations a decision is made the sub criterion that award should be based on the tendered price closest to the engineers estimate is valid and obey of the Public Procurement Regulations The Tender Panel is advised to Uphold the Recommendations of the Evaluation Team and award the Contractor that the Evaluation Team has identified as the preferred bidder.

I hope you find the above in order.”

[22] Counsel argued that regard being had to regulation 55(2) the PPAD acted beyond its jurisdiction as it does not have advisory powers, but decision-making powers. In addition, so goes the argument, the PPAD acted *ultra vires* by entertaining the appeal when there were no jurisdictional facts entitling it to do so. No complaint had been lodged with the Unit from whose decision or non-decision an appeal could arise, the argument proceeded.

[23] Mr. Tsabeha concluded his argument by stating that Phakoe ‘s contention that the contract was concluded when there was appeal pending before the PPAD was misconceived because an appeal lies before the Appeals Panel and not the PPAD. Consequently, there was no appeal as envisaged by the

regulations at the time the contract was concluded.

**Procurement Unit, MPW & AG'S CASE:**

[24] Mr. Molise aligned himself with Mr. Tsabeha's argument that there was no appeal before the PPAD at the time the contract was concluded. He argued further that in terms of regulation 29(4), "*the key criterion in evaluating apparently compliant tenders shall be the tendered price*". He asserted that Phakoe's bid amount was irregular because when the figures for different items in the bid were added together, they resulted into a different bid amount, not M35,502,373.35 that is reflected as the bid amount. As a result, Ts'ilo was found to be the most favourable tenderer with a tendered price closest to the estimates following the disqualification of Phakoe.

[25] He argued further that based on regulation 50(3), the TP is not bound by the recommendations of the ET, but that following interrogation of the report and recommendations of the ET, the TP exercises its discretion as to who should be awarded a tender.

**ISSUES TO BE DECIDED:**

[26] The outcome of this matter hinges on whether the TP was wrong in

declining the ET's recommendation and awarding the tender to Ts'ilo; whether there was a pending complaint justiciable before the PPAD at the time the contract was concluded – and if so whether that justifies the review and setting aside of the award as well as declaring the contract that has already been performed unlawful.

***TP's decision to award the tender to Ts'ilo and not Phakoe***

[27] It is pellucidly clear from the powers of the TP as they appear fully in regulation 50, in particular regulation 50(3)(c), that TP is not bound by the recommendations of the ET. It is the one that “*decides which tenderer shall be awarded the procurement contract*”. In so doing, the TP must consider the underlying principles on which public procurement is anchored. In addition, it has to ensure amongst others that a competitive process was followed in accordance with the regulations and that its decision will withstand scrutiny by the audit authorities, the business community and the public in general.

[28] Surely, Phakoe's bid was irregular. There are four items on the bid, two of which have a subtotal. These are preliminaries and buildings. The last two items are fixed contingency of M1.5 Million and Value Added Tax, (“VAT”), at the standard rate of 15% which has to be derived from the subtotal of preliminaries and buildings plus M1.5 Million for contingency.

[29] The figures on the tender are handwritten, thus making it easy to follow where there are cancelations or revisions. The tendered price is reflected as M35,502,373.35 and it reconciles with the initial figures for the four items. I am using the word initial figures advisedly because on the tender M2,650,000.00 for preliminaries is cancelled and replaced with M1,450,000.00. It takes simple arithmetic to appreciate the ripple effect that the revision had, in particular on the subtotal for preliminaries and buildings, VAT amount and the tendered price. Doubtlessly, revision of the amount for preliminaries necessitated revision of the affected amounts, including the tendered price. However, Phakoe did not revise the figures as it retained the tendered price of M35,502,373.35 which had clearly been derived before the revision.

[30] It does not take a rocket scientist to realise that it is mathematically impossible for the tendered price to remain M35,502,373.35 following downward revision of the figure for preliminaries from M2,650,000.00 to M1,450,000.00. TP arrived at the conclusion that when considering the figures following the revision, Phakoe's tendered price is below the estimates and that of Ts'ilo became the one closest to the estimates<sup>23</sup>.

[31] In view of patent irregularities on Phakoe's tender, I do not see

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<sup>23</sup> Pleadings page 42, para 15 and page 40 para 7, Mothabathe Hlalele's Answering Affidavit

how the decision to award it a tender was going to withstand audit and public scrutiny. I therefore cannot fault TP's decision to award the tender to Ts'ilo. I prefer respondents' version that Ts'ilo's tendered price was the one closest to the estimates. This version has not been disputed by Phakoe in its replying affidavit.

### ***The propriety of the appeal and the decision by the PPAD***

[32] The powers of the PPAD and the legal force of its recommendations have received undoubted recognition in this jurisdiction. In **Drytex Lesotho (Pty) v. Pyramid Laundry Services (Pty) Ltd and Others**<sup>24</sup>

*Cleaver* AJA stated as follows when speaking of the role of the PPAD:

“[17] In my view the failure to comply with the recommendation of the PPAD and the requirements of Regulation 30(1) is a breach of the procedure set out under the regulations and renders the process invalid and the subsequent contract with the first respondent void. Were this finding not to be made, the role of the PPAD as described in Reg. 6 (1) would be nullified. These reasons would also in my view satisfy the requirements for a successful review of the decision to award the contract to the first respondent.”

[33] Later in **Minet Lesotho (Pty) Ltd and Others v. Minister of Defence and National Security**<sup>25</sup> *Van Der Westhuizen* AJA emphasised the significance of the PPAD in public procurement as follows:

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<sup>24</sup> LAC (2015 – 2016) 387 at 394 para 17

<sup>25</sup> C of A (CIV) 15/2020, para 27

“[27] Besides the regulations common sense, as well as one’s sense of justice and morality, dictates that the contract should not have been signed in circumstances like those at stake here. The purpose of the creation of PPAD is to deal with complaints in an area fraught with possibilities for fraud and irregularity. It should instill confidence in tenderers and the public that procurement procedures will be conducted fairly. PPAD has the power to suspend a tender under investigation. It would make no sense – other than to undermine PPAD and render it powerless and irrelevant - if a government department could simply ignore its rulings. The conduct of MoD may well create suspicion regarding its motivation.”

[34] In both decisions of the Court of Appeal, the decision or recommendations of the PPAD had not been followed by the Units. In **Minet**, *supra*, the Unit had, fully aware of a pending dispute and contrary to the directive of the PPAD, concluded a contract. However, the Unit in *casu* claims that to its knowledge, there was no appeal made at the time the contract was signed, more so when it had not received a notice of complaint<sup>26</sup>.

[35] In a vain attempt to rebut the assertion that the Unit was not aware of the appeal when it concluded the contract, Phakoe relies on the information it received from the PPAD on the 29<sup>th</sup> January 2019 that the appeal could not proceed as scheduled because contrary to the usual telephone invitation, the Unit had asked for a letter of invitation to PPAD’s proceedings<sup>27</sup>. This is clearly hearsay and cannot be relied upon. There is no evidence that at the time the contract was concluded on 5<sup>th</sup> February 2019, the respondents were aware of the pending appeal.

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<sup>26</sup> Pleadings, page 42, para 12, Mothabathe Hlalele’s Answering Affidavit

<sup>27</sup> Ibid, page 60, para 14, Pokello Phakoe’s Replying Affidavit

[36] In addition, it is common cause that no complaint had been lodged with the Unit. Resultantly, there were no jurisdictional facts in terms of the regulations for the PPAD to hear the appeal or the complaint. *PT Damaseb AJA* said the following in **Procurement Policy and Advice Division and One v. Laxton Group Limited**<sup>28</sup> in circumstances similar to the one in *casu*:

“[56] It is clear from the dispute resolution framework that I set out above (in paragraphs 18-19) that it is only once the complaints procedure to the Procurement Unit is exhausted that an appeal lies to the PPAD. The Regulations make no provision for leapfrogging an appeal to PPAD without recourse, in the first instance, to the Procurement Unit. PPAD therefore acted beyond its power in assuming jurisdiction over the complaints by the unsuccessful bidders. But that is not the end of the irregularity on PPAD’s part apparent on the record.

[57] However it became seized of the complaints, PPAD had the duty to follow the procedure set out in the Regulations for the adjudication of appeals to it. I have set out that procedure fully and need not repeat it here. Suffice it to say that PPAD was required to apprise Laxton of the complaints and to afford it audi which it failed to do.”

[37] Besides the fact that the contract had already been concluded at the time the PPAD issued its decision, all that happened before the PPAD is a nullity as it did not have jurisdiction to entertain the matter. Again, the conclusion it reached is not supported by its own finding that the “*response given by the ministry on the issue of the Tender Panel responding to the complaint is satisfactory and valid*”<sup>29</sup>. The immediate question is why then reverse the decision of the TP if its response is satisfactory and valid?

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<sup>28</sup> C of A (CIV) No. 26/2022

<sup>29</sup> Pleadings, page 28, A recordal by Director of PPAD

[38] One other insurmountable hurdle for the applicant is that the contract has been fully performed. This renders the application moot. The Constitutional Court of South Africa underscored the principle of mootness as follows in **Normandien Farms v. South African Agency for Promotion of Petroleum Exportation and Exploitation**<sup>30</sup> when it pronounced that:

“[47] Mootness is when a matter ‘no longer presents an existing or live controversy’. The doctrine is based on the notion that judicial resources ought to be utilised efficiently and should not be dedicated to advisory opinions or abstract propositions of law, and that courts should avoid deciding matters that are “abstract, academic or hypothetical.” Footnote omitted.

[39] It must be borne in mind that the main relief sought by Phakoe is that the Unit must be directed to award it a contract relevant to the tender consequent upon this Court reviewing and setting aside the decision to award the contract to Ts’ilo and declaring that contract unlawful. The impugned contract was concluded before the proceedings were instituted and performed during the pendency of the proceedings. Even if I were to grant the application, the judgment is not going to have any practical effect. The remaining prayer for costs cannot be considered in isolation as a claim for costs cannot stand alone. I am in full agreement with *Mokhesi J*’s observation in **Shale v The Judicial Service Commission**<sup>31</sup> where he said the following:

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<sup>30</sup> *Normandien Farms (Pty) Limited v South African Agency for Promotion of Petroleum Exportation and Exploitation SOC Limited and Others* [2020] ZACC 5; 2020 (6) BCLR 748 (CC); 2020 (4) SA 409 (CC).

<sup>31</sup> (CIV/APN/49/18) [2020] LSHC 39 (26 June 2020) para 16

“The issue for determination in this case is one of costs only as the main case has been rendered academic by the turn of events alluded to above. As a general rule, a claim for costs does not stand alone as it is consequential upon determination of the merits (Cats v Cats 1959 (4) SA 375 (c) at 379 G-H; Simon NO v Air Operations of Europe AB and Others 1999 (1) SA 217 at 217 at 231 C-D). In the present matter the application has become moot. The question of costs does not, therefore, arise in the absence of a decision on the merits”.

## **CONCLUSION:**

[40] I conclude therefore that the TP properly discharged its powers in awarding the tender to Ts’ilo. Again, in the absence of admissible evidence that TP was aware of a pending appeal at the time it concluded a contract with Ts’ilo and absent any irregularity in the award of the tender, there was nothing untoward or unlawful concerning conclusion of the contract. More tellingly, there were no jurisdictional facts for the PPAD to entertain appeal from Phakoe without recourse, in the first instance, to the Unit. Resultantly, whatever happened before the PPAD is a nullity. It is not even necessary for this Court to contribute to the debate concerning the status of the ruling the PPAD made, whether it was just an advice or a decision, and to answer the question whether the PPAD must at all times involve Appeals Panel in handing appeals from the Unit.

[41] However, if I am wrong that the TP properly awarded the tender to Ts’ilo, I am satisfied that the application became moot the minute the contract

was performed and renovations completed. There is no reason why the applicant should not be ordered to pay the costs of this application.

**ORDER:**

[42] Therefore, I dismiss the application with costs.

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**A.R. MATHABA J**  
Judge of the High Court

For the Applicant: Mr. K. Ndebele  
For the 1<sup>st</sup> Respondent: Adv. S. S. Tsabeha  
For the 2<sup>nd</sup> Respondent: Adv. T. V. Molise