

**IN THE HIGH COURT OF LESOTHO**

**(COMMERCIAL DIVISION)**

**HELD AT MASERU**

**CCA/0089/2022**

In the matter between:

**MINET LESOTHO (PTY) LTD**

**APPLICANT**

**AND**

**THE TENDER PANEL – LESOTHO NATIONAL  
DEVELOPMENT CORPORATION**

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

**LESOTHO NATIONAL DEVELOPMENT  
CORPORATION**

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

**GUARDRISK INSURANCE**

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

**THABA BOSIU INSURANCE BROKERS**

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

**SIGNATURE INSURANCE BROKERS**

**5<sup>TH</sup> RESPONDENT**

**INSURECARE**

**6<sup>TH</sup> RESPONDENT**

**BMM INSURANCE**

**7<sup>TH</sup> RESPONDENT**

**RISK MANAGERS**

**8<sup>TH</sup> RESPONDENT**

**THARI MUTUAL**

**9<sup>TH</sup> RESPONDENT**

**Neutral Citation:** Minet Lesotho (Pty) Ltd v The Tender Panel Lesotho National Development corporation & 8 Others [2023] LSHC 135 Comm. (17<sup>TH</sup> AUGUST 2023)

**CORAM: MOKHESI J**

**HEARD: 04<sup>TH</sup> APRIL 2023**

**DELIVERED: 17<sup>TH</sup> AUGUST 2023**

## **SUMMARY**

**Administrative Law:** *The applicant challenging the decision to award the tender to the third respondent while the applicant's complaint remains unresolved in breach of the LNDC Procurement Policy and on other breaches of the same Procurement Policy- Held, the 1<sup>st</sup> respondent acted irregularly.*

## **ANNOTATIONS**

### **Legislation**

#### **High Court Rules 1980**

*Public Procurement Regulations 2007 (as amended)*

### **Cases**

*Administrator, Transvaal and others 1991 (1) SA 21 (A)*

*Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (CCT 48/13) [2013] ZACC 42; 2014 (1) SA 604 (CC)*

*Engidata (Pty) Ltd v Fischer Consulting Joint Venture and Others C of A (CIV) 7/2023*

*Matebesi v Director of Immigration and Others LAC (1995 – 1999) 616*

*Minet Lesotho (Pty) Ltd v Ministry of Defence & National Security (C of A (CIV) 15/20 [2020] LSCA 27 (30 October 2020)*

*Schierhout v Union Government 1919 AD 30*

*South African National Roads Agency Limited v City of Cape Town and Others: in Re: Protea Parkway Consortium v City of Cape Town and Others [2014] 4 ALL SA 497 (WCC)*

*Judicial Service Commission and Another v Cape Bar Council and Another 2013 (1) SA 170 (SCA)*

**JUDGMENT**

**[1] Introduction**

The applicant is a company involved in the insurance business. It is an unsuccessful bidder in the tender issued by the 2<sup>nd</sup> respondent (LNDC) for the provision of insurance broker services. The tender was issued on 08 June 2022. The 3<sup>rd</sup> respondent came out successful. On 18 August 2022 the LNDC issued an award letter to the 3<sup>rd</sup> respondent. The applicant lodged complaint against the award of tender to the 3<sup>rd</sup> respondent and requested LNDC to review its decision. This letter of complaint was written on the 26 August 2022 addressed the Chief Executive Officer of the LNDC. The letter (in relevant parts) complained that:

*“Minet Lesotho would like LNDC to review this decision on the grounds that eligibility requirement or scoring criterion was neither featured on the SELECTION CRITERIA nor on the INSTRUCTIONS TO BIDDER as contained on the Request for Proposal for Provision of Insurance Broke Services. We therefore believe it was unfair and improper that this scoring criteria was deployed at the detriment of our bid. The Debriefing team also informed Minet Lesotho that this criterion was deployed in complying with the LNDC’s Procurement Policy that was adopted in June 2022. This is around the same period the RFP was issued to the public; and one would have thought that this material requirement would have reasonably been captured on the RFP as introducing it at evaluation stage will be akin to moving the goalposts...” (sic)*

- [2] The above letter reached the offices of the CEO of LNDC on the same day (26 August 2022), but instead of the complaint being addressed the CEO signed the contract with the 3<sup>rd</sup> respondent on 30 August 2022. The applicant’s complaint in the main regarding the Procurement Policy related to the fact that the Request For Proposals (RFP) did not include the

percentage margin regarding Basotho shareholding. In the period between the lodging of the present application and its final hearing, the CEO of LNDC constituted an appeal panel to hear the applicant's complaint. What transpired in between, is not material for the determination of this case, suffice it to say that, after the Appeal Committee had considered the applicant's complaint it concluded that the applicant justifiably lost out to the 3<sup>rd</sup> respondent.

[3] The applicant is seeking a review of the decision to award the tender to the 3<sup>rd</sup> respondent on the basis that it was invalid and irregular for the following reasons:

- “(i) The CEO of LNDC acted ultra vires LNDC Procurement Policy by awarding the tender when such authority vests in the Tender Committee.*
- (ii) The CEO of LNDC invoked public interest in awarding the tender when such power vests in the Minister in terms of Regulation 8(g) of Public Procurement Regulations, which is in conflict with clause 17.1.6 of Procurement Policy which gives him such power.*
- (iii) Propriety of the verdict of the Appeals Committee when the matter is sub judice.*
- (iv) The retrospective application of a policy that the margin for locals constitutes more than 50% of the shareholding even though it did not form part of the conditions in the invitation to tender.*

- (v) *The act of awarding the tender before the adjudication of the provisions of Regulation 54(5) of Public Procurement Regulations read with clause 17.1.5 of the LNDC Procurement Policy.*
- (vi) *The irregular Constitution of the Tender Evaluation Committee in violation of Regulation 49 of the Public Procurement Regulations read with clause 9.9 of LNDC Procurement Policy.”*

[4] The application is opposed by the 1<sup>st</sup> to 3<sup>rd</sup> respondents. I wish to deal with the issues raised not in the order in which they are outlined above. Each party’s argument will be addressed when dealing with an issue raised. I turn to deal with the issues raised.

[5] As a starting point, it is important to reiterate the all too often but important refrain when dealing with matter concerning tenders: Procurement processes in our open economy is anchored on the principles of fairness, legality, accountability, transparency and value for money (see: **Minet Lesotho (Pty) Ltd v Ministry of Defence & National Security (C of A (CIV) 15/20 [2020] LSCA 27 (30 October 2020))**). The importance of strict adherence to the procurement prescripts was highlighted in the matter of **Engidata (Pty) Ltd v Fischer Consulting Joint Venture and Others C of A (CIV) 7/2023**, at para. 1:

*“Strict adherence to legally prescribed tender procedures is extremely important. In the southern part of Africa, not unlike elsewhere in the world, the allocation of tenders has been a fertile ground for corruption – to the extent that the word “tenderpreneurs” has been invented for the many who have profited from either hard work, or dishonesty.”*

[6] I turn to deal with the issues raised by the applicant against the awarding the contract to the 3<sup>rd</sup> respondent.

**(i) Procurement Regulations and LNDC Procurement Policy breaches:**

It is the applicant's contention that the CEO of LNDC committed procurement breaches by signing the contract in the face of the complaint lodged by the applicant. Before I deal with the arguments in this regard it is important that I set out the legislative framework applicable to the scenario. In terms of the now-repealed Public Procurement Regulations 2007 (as amended) (Procurement Regulations) they are applicable to the State-owned entities such as the 2<sup>nd</sup> respondent.

[7] Regarding dispute settlement which arises from the procurement complaints, Regulation 54 of the Procurement Regulations states that the Unit shall not enter into a contract in the face of a complaint being lodged. It provides as follows:

*“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 of 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.”*

[8] Providing in a similar fashion is the LNDC Procurement Policy. Clause 17.1.5 provides that:

*“The Unit shall not enter into a contract in respect of the tender in question after receiving a complaint and until 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 Committee.”*

[9] The applicant contends that the letter of complaint reached the office of the CEO of LNDC on 26 August 2022. On the other hand, the CEO disputes this version. The CEO’s version is that at paragraph 9.1 of the First and Second Respondents’ Supplementary answering affidavit in the application for amendment in terms of Rule 50(4) of the High Court Rules, avers that he only became aware of the applicant’s letter of complaint on the 30 August 2022, which he says it was a day after signing the Service level Agreement. Assuming in favour of the CEO that the letter reached his office on 30 August 2022, it is incorrect to say that it was a day after signing the contracts. The contract was signed on the 30 August 2022, not on the 29 August 2022 as borne out by the dates which appear on it. When the contract was signed the CEO was fully aware that the complaint had been lodged against awarding the contract to the 3<sup>rd</sup> respondent. He nevertheless proceeded to sign the contract. However, the CEO seems to advance a defence that it was in the public interest to sign the contract despite the complaint being unresolved. He avers as follows:

*“10.3 Moreover, and in any event, I was empowered by the Procurement Policy to confirm the Corporation’s insurance cover*



*notwithstanding the objection in terms of clause 17.1.6. This is more so because the insurance cover with the LNIG would effectively lapse on 31 August 2022. The absence of cover beyond this date would have been contrary to public interest since the corporation was barred in terms of its policy from continuing with LNIG beyond the 3-year cover period without a cooling-off period. If not, I would have contravened a statutory duty to insure, and public interest and policy demanded that the risk of being uninsured not be perpetuated.”*

[10] Clauses 17.1.6 to 17.1.7 of the LNDC Procurement Policy provide that:

*“17.1.6 Except where suspension of the tender would be against the public interest, the Chief Executive Officer shall be the arbiter of whether the tender process is in the public interest.*

*17.1.7 Where it is decided to continue the tender process, the justification and the decision to continue to place the contract shall be provided at least 5 working days before the time the decision comes into force.”*

[11] It is common ground that the LNDC Procurement Policy does not provide for criteria for determining “public interest”. However, implicit in this phrase is that it must be in the interest of the public not a few (70) individuals who are the employees of the LNDC and its property portfolio even though it may be worth a lot of money. While it is important that the LNDC property portfolio and its employees be insured, surely it is not in the public interest that it be so. In my considered view public interest connotes something much more than the narrow interests of the LNDC and its staff complement. In any event, the CEO did not invoke public interest as the

reason for concluding a contract despite the complaint being lodged. Had he formed an opinion that it would have been in the public interest to sign the contract he would have had to comply with the prescript of Clause 17.1.7 by providing a written justification for his decision to continue with the tender process, at least 5 working days before such decision comes into operation. In the present matter he did not do so.

- [12] The 1<sup>st</sup> and 2<sup>nd</sup> respondents argue further that they did not contravene the provisions of Clause 17.1.5 and that the applicant is not prejudiced as the Appeals Committee which was constituted after the lodging of complaint found that the 3<sup>rd</sup> respondent was rightly awarded the contract. As I see it, these respondents are in a guise raising the so-called “no difference” contention, by arguing that because the applicant’s objection was found by the Appeals Panel to have lacked merit, its complaint however merited about the procedure taken in making the decision, should make no difference to the outcome of the review. This is how the CEO puts it (para. 9.2 of the 1<sup>st</sup> and 2<sup>nd</sup> respondents’ opposing affidavit):

*“In the premises, for all intents and purposes, there was no wilful violation of clause 17.1.5 and certainly no prejudice suffered by Applicant since in any event, it would never have been successful as Third Respondent was in the overall consideration by the panel, and as it turns out now, also the appeal panel and my further attention, the most favourable candidate for the reasons set out.”*

- [13] This type of reasoning has been emphatically jettisoned by the courts in the context of the right to a hearing, and I would venture to say it is applicable with equal force in the circumstances of this case where procedural objection

is raised to the effect that a contract was signed when procedurally it should not have been until the applicant's objection would have been determined. The respondents' contention conflates the merits and procedure, when that should not be the case. In **Administrator, Transvaal and others 1991 (1) SA 21 (A)** at 37 C – F (quoted with approval in **Matebesi v Director of Immigration and Others LAC (1995 – 1999) 616** at 624 B – G), the court said:

*“It is trite... that the fact that an errant employee may have little or nothing to urge in his own defence is a factor alien to the inquiry whether he is entitled to a prior hearing. Wade, Administrative Law (6ed) puts the matter thus at 533 – 4:*

*‘Procedural objections are often raised by unmeritorious parties. Judges may then be tempted to refuse relief on the ground that a fair hearing could have made no difference to the result. But in principle it is vital that the procedure and the merits should be kept strictly apart, since otherwise the merits may be prejudiced unfairly.’...*”

[14] In order to determine whether the irregularity has occurred, a legal enquiry must be undertaken to establish whether it amounts to a ground of review. The materiality of deviance from the legal prescripts should be assessed by linking the question of compliance with the purpose of the provision before a conclusion can be reached that there has been an irregularity (**Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (CCT 48/13) [2013] ZACC 42; 2014 (1) SA 604 (CC)**)

at para.28). The purpose of the requirement that when a complaint has been lodged procurement process should be suspended is aimed at ensuring a fair determination of the grievance and to curb a situation where a complainant is foreclosed from raising complaints and to ensure that the procurement process is efficient and that its outcome is optimal. This is an important purpose sought to be served by this requirement. Equally important is the rationale for requiring that if the CEO considers to be in the public interest not to suspend the procurement process despite the complaint being lodged, he should provide reasons for doing so, because were the CEO given a leeway to act without reason, that will amount to giving him freedom to act capriciously. This clause is geared at ensuring accountability on the part of the CEO by requiring him to give reasons for classifying his decision as being in the public interest. The requirement that there be justification for the decision is critical. Deviation from compliance with these requirements is, therefore, in my view, material.

[15] I have considered the arguments of the 3<sup>rd</sup> respondent. The fact that I have not specifically singled them out for treatment does not mean that I did not consider them. In any event, even during argument, it was clear that the 3<sup>rd</sup> respondent made common cause with the arguments of the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

[16] (ii) **Irregular Constitution of the Tender Evaluation Committee**

In terms of Clause 9.9.1 of the LNDC Procurement Policy, the Tender Evaluation Committee “shall be a non-standing committee of six (6) members recommended by the Procurement Manager to the Tender

Committee.” It is common cause that the Evaluation Committee was only constituted by three (3) members. The question is whether that was a reviewable irregularity. This contention must be dealt with on the basis of the general principle which was espoused in **Schierhout v Union Government 1919 AD 30** at 44 where it was put thus:

*“[W]henever a number of individuals, were empowered by statute to deal with any matter as one body; the action taken would have to be the joint action of all of them ... for otherwise they would not be acting in accordance with the provisions of the statute.”*

[17] This general principle is, however, not cast in stone, as the court has to determine whether the legislature intended to invalidate the actions of the members which were taken outside of the joint body decreed by the legislation (**Judicial Service Commission and Another v Cape Bar Council and Another 2013 (1) SA 170 (SCA)** at para. 29). I have looked at Clauses 9.9.1.1 and 9.9.1.2 of the LNDC Procurement Policy and I have not deciphered from the language of these clauses that the LNDC Procurement Policy intends to invalidate the actions of any members even when they formed a quorum when taking such actions.

[18] The argument that I find persuasive is one that pertains to the absence of evidence that the Tender Committee was ever convened to consider the evaluation report of the Evaluation Committee. In terms of Clause 9.3.1 of the LNDC Procurement Policy, the Tender Committee is the body which is responsible for reviewing and awarding tenders after considering the evaluation report and recommendations of the Tender Evaluation Committee, and it acts as the regulatory body in charge of the procurement

policy. This committee is comprised of three (3) members: the General Manager, Corporate Services as the Chairperson, the General Manager, Legal and Administration as the Deputy Chairperson, the Head of the Procurement Unit who is the Secretary of the Committee,

[19] Crucially in terms of Clause 9.5.5 of the LNDC Procurement Policy, the Secretary of the Committee is enjoined to make an attendance register and a full account of the proceedings of the Committee through minute-taking, which should depict the following elements:

- (i) Date of the meeting.
- (ii) List of all matters considered.
- (iii) The decision made on each matter.
- (iv) The reasons for any rejection or clarifications
- (v) A note on the basis of any evaluation made.
- (vi) Declaration of conflict of interest made by any member.
- (vii) Any matter which is necessary to record

[20] The decision of the Committee should be communicated to the CEO of LNDC, and importantly, in terms of clause 9.6.2:

*“The Procurement Department will prepare a cover letter; attach Tender Committee minutes, and evaluation reports and submit them to the LNDC CEO for approval or Board where relevant.”*

Other than the CEO’s mere *ipse dixit* that the “Tender Committee determined the rightful candidate for the tender,” there is no

evidence that ever did. Had it done so there would be minutes and its decision on the evaluation report. There is no evidence that the Tender Committee was ever triggered. What appears more glaring is that the CEO of LNDC simply concluded the contract on the basis of the Tender Evaluation committee's report. This irregularity is fatal to the 1<sup>st</sup> and 2<sup>nd</sup> respondent's case.

[21] **The Remedy**

The applicant has raised a number of complaints but in my considered view, what I have considered so far in the judgment constitutes reviewable irregularities. It is, therefore, unnecessary to traverse all of them, the ones that I have dealt with suffice for the present exercise. It is trite that the court that deals with review applications retains a discretion whether to grant or withhold the remedy. Adv. Roux SC for the 1<sup>st</sup> and 2<sup>nd</sup> respondents argued that there are compelling circumstances that impel this court to exercise its discretion in favour of the LNDC. The compelling circumstances, according to him, are:

- (i) The inadequacies of Minet's tender,
- (ii) The prejudice the other tenderers will suffer if the tender process is set aside in view of the disclosure of their bids,
- (iii) The LNDC cannot request the LNIG as its erstwhile insurer to insure its assets pending the finalisation of the tender process *de novo*.

[22] The above considerations do not constitute compelling circumstances. As it is well known when tender awards are challenged on review there is almost invariably a comparison of tenders which should be made to determine whether the supposedly successful bidder complied with the requirement of the applicable legal framework and whether it scored favourably as suggested. This much was made clear in the persuasive case of **South African National Roads Agency Limited v City of Cape Town and Others: in Re: Protea Parkway Consortium v City of Cape Town and Others** [2014] 4 ALL SA 497 (WCC) at para. 71, where the court said:

*“As recognized in Transnet supra loc at, any person who participates in a tender process... must appreciate that much of the information that they disclose in the process may be susceptible subsequently to public scrutiny, certainly much of it that is relevant to an assessment of compliance by the organ of state concerned with the competitive and cost-effective character of the procurement process concerned. Any such public assessment will entail consideration not only of the bid of the successful tenderer, but also of the unsuccessful bids, because a comparative assessment is necessary to determine whether there has been compliance with the applicable ... statutory requirements...”*

[23] Adv. Roux SC did not refer me to an authority that says once disclosures have been made during review, that constitutes a compelling circumstance warranting exercising the discretion in favour of the tenderer who has been adjudged successful. The point regarding the inadequacy of the applicant’s tender is equally unsound.



[24] Regarding the third consideration which talks to the LNDC's assets being exposed if the process is to start *de novo*, that question was answered emphatically in **Minet** case referred to in paragraph 5 of this judgment where the Court of Appeal made it clear that while it is desirable that expensive government property be insured, that cannot constitute a basis on which the court should exercise its discretion not to review an irregularity in the tendering process. At para. 30, the court said:

*“...[T]he High Court states an obvious truth, namely that when tenders are awarded, implementation with financial and cost implications often promptly follow. Sometimes the setting aside of an invalid contract could have devastating consequences, for example for social grants and the lives of millions of people. This case deals with the insurance of aircraft though. Of course, it might be important that expensive government property is insured. We are not dealing with life and death, though.”*

[25] In the present matter we are not concerned with matters of life and death but rather with the insurance of LNDC property portfolio and its employees. These are not matters of life and death which would necessitate keeping an invalid contract alive.

[26] In the result the following orders are made:

- (i) The decision of the First and Second Respondents of awarding a tender for the procurement of insurance broker to the Third Respondent and subsequently entering into a contract with it, is reviewed, corrected and set aside as irregular and unlawful.

- (ii) The Award Letter written by the Interim Chief Executive Officer. of Second Respondent in favour of Third Respondent and dated 18<sup>th</sup> August 2022 is declared unlawful and irregular.
- (iii) The Second and Third Respondents' Service Level Agreement signed and dated 30<sup>th</sup> August 2022 when an objection by Applicant to the tender in issue was pending is cancelled and set aside.
- (iv) The First, Second and Third Respondents should pay costs of this application.

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**MOKHESI J**

**For the Applicant:        Mr M. Rasekoai assisted by Adv. R. Setlojoane  
   instructed by Mei & Mei Attorneys**

**For the 1<sup>st</sup> and 2<sup>nd</sup> Respondents:        Adv. Jaco Roux SC instructed by Webber  
   Newdigate Attorneys**

**For the 3<sup>rd</sup> Respondent:                    Adv. C.J Lephuthing instructed by  
   MESSRS T. Maieane & Co. Attorneys**

**4<sup>TH</sup> to 9<sup>th</sup> Respondents:                    No Appearance**

