



**IN THE HIGH
COURT OF ESWATINI**

JUDGMENT

HELD AT MBABANE

Case No. 2149/2016

In the matter between:

THE ATTORNEY GENERAL

Applicant

And

SABELO MATSEBULA N.O

First Respondent

V.J PROGRESS PRINTING AND PUBLISHING
(PTY) LTD

Second Respondent

SWAZILAND PUBLIC PROCUREMENT
REGULATORY AGENCY

Third Respondent

Neutral citation:

**The Attorney General v Sabelo Matsebula N.O and
others (2149/2016) [2018] SZHC 269 (23 November
2018)**

CORAM

J.S MAGAGULA J

HEARD:

14 November 2018

DELIVERED: 23 November 2018

[1] This is an application in which the applicant seeks relief as follows:

“ (a) That the first Respondent’s decision of 28th June 2015 under the aegis of the Independent Review Committee be reviewed and set aside;

(b) That the costs occasioned by any opposition to this application for review be paid by the Respondent who opposes it.”

[2] This matter was argued before me on the 14th November 2018 and I issued an ex tempore judgment in which I granted the application as prayed. I now proceed to give reasons for my judgment.

BACKGROUND

[3] The founding affidavit gives a lucid background of the matter. The long and short of it is that in April 2015 the Ministry of Education invited tenders for the supply of stationery for public primary schools as part of execution of its constitutional mandate and obligation to provide free primary education to public primary schools.

[4] The 2nd Respondent also submitted a tender together with other tenderers. The tender evaluation process has three stages namely; Preliminary Examination, Technical Evaluation and Financial Evaluation. The tender for the second respondent was unsuccessful. The reason for failure of this tender as given by the Evaluation committee was that the tender materially deviated from

the forms and conditions of the tender document. It therefore failed at the preliminary evaluation stage.

- [5] Dissatisfied with the decision of the Tender Evaluation Committee the 2nd Respondent applied to the Principal Secretary Ministry of Education and Training for a review of the committee decision. This application was unsuccessful. The 2nd Respondent then instituted review proceedings with the 3rd respondent which constituted an Independent Review Committee to hear the review application (the first IRC).
- [6] The first IRC found in favour of the 2nd respondent. It then made an order the relevant provisions whereof are orders (b) to (f) which read as follows:

- “ (b) The decision of the Principal Secretary of Education as conveyed in his letter dated the 28th August 2015, dismissing the Applicant’s application for review instituted under section 47 of the Procurement Act, 7 of 2011 is hereby set aside;*
- (c) The evaluation and contract award decisions as well as the procedures and steps followed by the Ministry of Education and Training as procuring entity pertaining to the conduct and award of tender NO. 87 of 2015/2016 are hereby annulled and set aside only to the extent that these relate to the evaluation and award proceedings and processes; and*
- (d) Consequently the various contracts entered into, signed and executed by the procuring entity with various suppliers and third parties pursuant to the tender contract awards are also hereby annulled.*

- (e) *It is recommended that the Ministry of Education and Training reconstitute and appoint a technical evaluation committee in terms of the provisions of the Act and the applicable regulations as to the balance of required skills and competences and to conduct de novo the evaluation of the tenders received under Tender No. 87 of 2015/16; and in that regard,*
- (f) *The Ministry is hereby directed to communicate this decision of the committee to all affected tenderers and to request them to issue an extension of tender validity and tender security periods for a further 90 days henceforth to enable the conduct of re-evaluation of the tender process.”*

[7] Pursuant to this order of the first TRC the Ministry of Education and Training started the whole evaluation process *de novo* from the preliminary examination stage. The second respondent was again unsuccessful. It again failed at the preliminary evaluation stage and the process was conducted by a different committee from the one that conducted the first evaluation.

[8] The second respondent again applied to the Principal Secretary on the 10th December 2015 for review of the decision of the 2nd evaluation committee. The Principal Secretary dismissed the review application. Meanwhile the Principal Secretary had applied to the Government Tender Board in terms of section 54 (2) of the Procurement Act, 2011 for authorisation to award of tender to the successful tenderers. The Principal Secretary explains in his affidavit that he made the application because he realised that time was running out since

Government needed to meet its constitutional obligation by ensuring that a supplier of stationery had been engaged to supply such in January 2016. The Tender Board authorised the award of the tender and the process went ahead.

- [9] On the 5th January 2016 the 2nd respondent launched another review application with the 3rd respondent herein. The 3rd respondent constituted another Independent Review Committee to conduct the review proceedings (the second IRC).
- [10] It appears that the 2nd respondent's contention was now that the second tender evaluation committee and subsequently the Principal Secretary, had misinterpreted the direction or order of the first IRC. The 2nd respondent contended before the 2nd IRC, as it did in this court, that the first IRC did not direct the evaluation process to start from the preliminary stage. It directed that the process should start at the subsequent stage which is the technical stage and go on to the financial stage. Although there is no specific direction made by the first IRC to this effect the 2nd respondent seems to be contending that this is a necessary implication of the setting aside of the order made by the Principal Secretary on the 28th August 2015 when he dismissed the review application filed by the 2nd respondent.
- [11] The 2nd IRC upheld this contention in favour of the 2nd respondent. However since the tendering process had already been finalised and contracts awarded by the time (28th June 2016), the 2nd respondent elected to sue for damages. To this end the 2nd respondent filed a letter of demand with the Attorney General on the 28th September 2016 demanding payment of the sum E7 384 090.88 (Seven Million Three

Hundred and Eighty – Four Thousand and ninety Emalangeni Eighty Eight cents). On the 13th December 2016 the Applicant launched the present application.

IN LIMINE

[12] The 2nd respondent has filed an opposing affidavit in which it first raises two points of law in *limine*.

The first point raised is that the applicant has failed to institute the proceedings timeously. It is common cause that the applicant took five and a half months to institute the review proceedings. In his response to this point the Principal Secretary contends that this is not an unreasonably long period as review proceedings in this jurisdiction have been entertained even after longer periods than this. He further explains that due to the change of the legal basis for review coming with the advent of section 33 of the constitution, Applicant had to seek the opinion of counsel from South Africa on the nature of the powers exercised by the IRC.

I am satisfied that the delay in bringing the application is not so long as to justify a dismissal of the application, even more so in light of the explanation given.

[13] The second point raised in *limine* is that of abuse of court process. The 2nd respondent maintains that the applicant only brought these proceedings once he was served with the letter of demand referred to above. It therefore contends that the object of these proceedings is merely to frustrate the action proceedings it intends to bring against

Government. This court has not been given any factual basis for this contention and there is no basis for me to agree with it. In any event I do not see how the bringing of this application bars the 2nd respondent from pursuing its action proceedings.

In the premises I find no merit in the points in *limine* and I dismiss them forthwith.

THE MERITS

[14] On the merits the matter really turns on an interpretation of the order of the first IRC by the second IRC.

Beginning from paragraph 24 of the founding affidavit the applicant states his case as follows:

“ 24. The second IRC found that by setting aside my decision of 28 August 2015, the first IRC held the view that the VJ’s tender was complainant with the terms and conditions of the tender document. Therefore, so the second IRC reasoned, in the re – running of the tender process VJ did not have to go through a preliminary examination as it did. VJ had to be evaluated at the subsequent stages that is technical evaluation and financial evaluation.

25. The second IRC Misinterpreted the order of the first IRC. In reviewing and setting aside my decision of 28 August 2015 the first IRC did not substitute its own decision for that of the Ministry of Education. This was despite the fact that the Act expressly empowers an IRC

to substitute its own decision for that of the procuring entity. The first IRC ordered that the evaluation of tenders received under Tender No. 87 of 2015/2016 start afresh that is from preliminary evaluation.”

[15] Countering this argument the 2nd respondent contends in paragraph 10.1 of its opposing affidavit.

“ 10.1 I submit that the evaluation committee was wrong to begin from the preliminary evaluation stage when in fact the IRC had directed in its decision at page 39 paragraph (c) that:

“ c) The evaluation and contract award decisions as well as the proceedings and steps followed by the Ministry of Education and Training as a procuring entity pertaining to the conduct and award of Tender No. 87 of 2015/2016 are hereby annulled and set aside only to the extent that these relate to the evaluation and award proceedings and processes” (underlining added).

[16] The 2nd respondent proceeds in paragraph 10.2:

“ I have been advised that this ruling or order of the IRC directed the Ministry of Education to start from the evaluation stage, not from the preliminary stage because the IRC had found that the Applicant or the Ministry of Education was

wrong in claiming that the 2nd Respondent failed at the preliminary stage yet the facts proved otherwise.”

[17] I must say that I have serious difficulties with the 2nd respondent contention. Firstly the ruling sets aside “ *the evaluation and contract award decisions as well as the proceedings and steps taken by the Ministryonly to the extent that these relate to the evaluation and award proceedings and processes.*”

But as captioned above the order does not end there. It goes on to recommend that the Ministry should

“commence de novo the evaluation of the tenders received under Tender No – 87 of 2015/2016.”

The Procurement Act provides that a tender evaluation process has three stages namely, preliminary examination, technical evaluation and financial evaluation. If one of these stages is not carried out then the tender evaluation, which the IRC directed should start *de novo* is incomplete. The IRC did not order that certain stages in the evaluation process should be skipped. It merely ordered the evaluation process to start *de novo*.

[18] The 2nd respondent contends that the words “ *only to the extent that these relate to the evaluation and award proceedings and processes* “ meant that the preliminary examination stage had to be excluded. I can see no basis for this contention since this is a stage in the evaluation process. Secondly the IRC never ordered any stage to be excluded in the evaluation process.

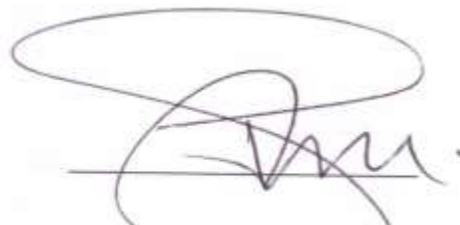
[19] Further, it would not make any sense to exclude that stage since the 2nd respondent had been excluded at that stage and would therefore not be part of the tender process at the subsequent stage. The 2nd respondent would

therefore not be part of the evaluation process unless the IRC had directed that the evaluation should commence at a particular stage and that the 2nd respondent should be included at such stage.

[20] I also note that the 2nd Respondent actually participated in the evaluation process from the preliminary stage and did not object to the proceedings starting at that stage. It started complaining when it was again unsuccessful at the preliminary stage. This suggest to me that 2nd respondent was in agreement with the process as it unfolded and decided to summersault once it had failed to satisfy the requirements of the preliminary stage and was excluded.

[21] For the foregoing reasons I am satisfied that the 2nd IRC misinterpreted the order of the first IRC. In the result the application succeeds and the following order is hereby granted:

- a) The first respondent's decision of 28 June 2015 under the aegis of the Independent Review Commission is hereby reviewed and set aside;
- b) Costs are awarded to the applicant.



J.S MAGAGULA J

For the Applicant: M. Vilakati

For the 2nd Respondent: N. Manzini