



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. 168 OF 2014

IN THE MATTER OF: THE PUBLIC PROCUREMENT AND DISPOSAL ACT, 2005

AND

**IN THE MATTER OF: THE PUBLIC PROCUREMENT AND DISPOSAL REGULATIONS,
2006**

AND

**IN THE MATTER OF: REQUEST FOR PROPOSALS NO. NCC/ICT/RFP/113-2013-2014 FOR
SUPPLY, INSTALLATION, CONFIGURATION, AND IMPLEMENTATION OF DATA
CENTRE AND STRUCTURED CABLING INFRASTRUCTURE**

AND

**IN THE MATTER OF: A DECISION BY THE PUBLIC
PROCUREMENT ADMINISTRATIVE REVIEW BOARD IN APPLICATION NO. 10/2014 OF
9TH APRIL 2014**

AND

**IN THE MATTER OF: AN APPLICATION BY SEVEN SEAS TECHNOLOGIES LIMITED
FOR ORDERS OF CERTIORARI**

BETWEEN

REPUBLICAPPLICANT

AND

PUBLIC PROCUREMENT

ADMINISTRATIVE REVIEW BOARD.....1ST RESPONDENT

NAIROBI CITY COUNTY.....2ND RESPONDENT

RULING

1. On 1st July, 2015, I delivered a judgement in this matter in which I found that the Board's decision in disallowing the preliminary objection could not be faulted. I further held that whereas, this Court may well form the view that the Board's decision that there was no notification to Lantech since the towns were not indicated in light of the indication of the postal codes, was unreasonable, I cannot say that the said decision was so outrageous in defiance of logic or acceptable moral standards that no sensible person applying his mind to the question to be decided would have arrived at it. I accordingly declined to interfere with the Board's decision dismissing the preliminary objection.
2. I however found that the Board has no jurisdiction in the exercise of its powers under section 98 of the Act to debar a party to the procurement proceedings as such power can only be exercised in accordance with the provisions under Part IX of the Act. I however declined to interfere with the decision annulling the award of the tender made by the procuring entity to Seven Seas Technologies Limited, directing the procuring entity to complete the procurement and render an award as respects the tender within fifteen (15) days from 22nd April 2014 and directing the procuring entity to extend the tender and the bid bond validity period, but proceeded to modify the timelines given by the Board to provide that the fifteen (15) period would run from the date of the decision.
3. By a Notice of Motion dated 9th July, 2015, the applicant herein, Lantech (Africa) Limited, now seeks the following orders:
 1. **That this application be certified urgent and be heard *Ex parte* in the first instance.**
 2. **That pending the hearing and determination of this application there be a stay of the decree given by this honourable court on 1st July 2015.**
 3. **That this honourable court be pleased to grant a review of order number 1 of its decree given on 1st July 2015 and re-hear the Judicial Review Application in respect of issues relating to Order number 1 only.**
 4. **That upon hearing the application aforesaid this honourable court be pleased to set aside, vacate and or discharge order number 1 of the decree given on 1st July 2015.**
 5. **That the cost of this application be awarded to the Applicant**
4. According to the applicant herein, there is some mistake or error apparent on the face of the record or there is sufficient reason to enable the Interested Party to obtain a review of order number 1 of the decree in that whereas the 1st Respondent found as a matter of fact that the *Ex parte* Applicant's bid bond was valid for 83 days instead of the mandatory required 90 days and that the evaluation committee ought to have disqualified the *ex parte* Applicant at the preliminary evaluation stage pursuant to provisions of Regulations 47(1) and (2) of the **Public Procurement and Disposal Regulations** and Section 60 of the Act, this honourable did not address the said findings in issuing an order of Certiorari quashing the 1st Respondent's decision disqualifying the *ex parte* Applicant from further participating in the tender the subject matter of these proceedings.
5. It was contended that instead of disqualifying the *ex parte* Applicant at the preliminary stage for submitting an invalid bond the 2nd Respondent at the conclusion of the evaluation of proposals unlawfully notified the *ex parte* application that it has submitted the successful proposal. To the applicant the evaluation of proposal pursuant to Section 82 of the Act is complete and what is left

is the notification of successful proposal pursuant to Section 83 of the Act. However, given this honourable court's decree the 2nd Respondent, due to its partiality towards the *ex parte* Applicant, will no doubt again notify the *ex parte* Applicant that it submitted the successful proposal instead of disqualifying the *ex parte* Applicant.

Determination

6. In its determination the Board annulled the award to Seven Seas, disqualified it from further participating in the subject tender for failing to provide a valid bid security and held that it ought to have been disqualified at the preliminary evaluation stage. The Board proceeded to hold that subject to the provisions of section 84 of the ***Public Procurement and Disposals Act*** on negotiations Lantech's prayer 3 was premature and directed the procuring entity to complete the procurement process within 15 days from the date of its decision and take steps to ensure that the tender and the bid validity period including that of the Applicant were extended with such period as necessary to enable it complete the procurement in the event that it became necessary to enter into negotiations with Lantech.
7. It is clear that apart from the disqualification of Seven Seas, this Court had no issue with the other holdings of the Board.
8. It is true that the Board's finding that Seven Seas failed to provide a valid bid security was not interfered with by this Court hence the impression created by the decision that Seven Seas may participate in the subject tender is incorrect. The wrong impression in the judgment was occasioned by the language employed by the Board of "disqualifying" Seven Seas. The Court of Appeal held in **Nakumatt Holdings Limited vs. Commissioner of Value Added Tax [2011] eKLR** that the superior court in the matter before the court has the residual power to correct its own mistake. Accordingly, where a mistake is shown to have been committed which is remediable by the Court the same ought to be corrected by the Court in the exercise of its inherent jurisdiction. In my view where a mistake has been brought to the attention of the Court which is capable of being remedied, be it by review or otherwise, I do not see any bar to the Court invoking its inherent powers to do so. The Court has the residual power to make orders that are geared towards effectuation of its decision.
9. Having considered the instant application which was unopposed and I hereby review the decree herein, vary the first order therein and clarify that the decision by the Board to the effect that Seven Seas failed to provide a valid bid security stands and it is incompetent to participate in the tender process.
10. As the application was not opposed there will be no order as to costs.

Dated at Nairobi this 27th day of October, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Nthiwa for Mr Owino for the Applicant/Interested Party

Cc Patricia