



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
MISCELLANEOUS APPLICATION 33 OF 2008

REPUBLIC.....APPLICANT

Versus

THE PERMANENT SECRETARY MINISTRY OF STATE FOR DEFENCE.....RESPONDENT

EX PARTE.....QUALITY MEAT PACKERS LTD.

JUDGMENT

By a Notice of Motion dated 15th February 2008, the ex parte Applicant Quality Meat Packers Ltd. seek the following orders against the Permanent Secretary, Ministry of State for Defence:

- 1) An order of certiorari directed at the Permanent Secretary Ministry of State for Defence to remove and quash the decision to include the preferential treatment clause in 'All tenders' that firms (tenderers) based in certain towns and their environs will have an advantage over firms outside the region;
- 2) That an order of prohibition directed at the Permanent Secretary Ministry of State for Defence prohibiting the State from using and or giving preferential consideration and favours to firms (tenderers) who come from geographical proximity to the various supply points as a condition in all documents;
- 3) The costs be provided for.

The motion is premised on the affidavit of Diamond Velji, dated 28th January 2008 and filed in court on same date, a statement of facts of the same date, and authorities filed in court on 10th June 2008. The Notice of Motion was opposed by grounds of opposition dated 29th April 2008. Replying affidavit sworn by Zachary Mwaura, the Permanent Secretary Ministry of Defence, submissions filed in court on 29th April 2008 and a list of authorities of the same date.

The Applicant took part in a tender that had been advertised by the Respondent in the Daily Nation of 28th November 2007 and paid Kshs.4000/= for the tender documents - The Applicant bought other documents worth Kshs.32,000/=. Upon reading the document after purchase of the tender documents, the Applicant realized that it had a restrictive preferential consideration clause stating that only those tenderers based in the region near the point of supply shall be considered. That the said clause is punitive considering that the clause could only be seen after purchase of the tender documents. That the clause offends the Exchequer and Audit (Public Procurement) Regulations 2001, the Public Procurement and Disposal Act 2005 and the Constitution of Kenya. That the tender should be open and fair to all in order to encourage competitiveness. That the inclusion of preferential consideration is ultra vires the Respondent's mandate. Diamond Velji deponed at paragraph 4 of his affidavit that the clause offends Regulation 4 of the Exchequer and Audit Regulations which provides that the Regulations are to promote the economy and efficiency in public procurement and to ensure that procurement is fair, transparent and non-discriminatory. That the preferential consideration results in loss of tax payer's monies who have to pay much higher prices for the meat products than if the tendering was open. That though the tender is advertised in the National Newspapers, the preferential considerations are silent and it is only after the tender documents are purchased that one finds the clause. That the clause is bound to introduce regionalism (majimboism) in the tendering process and the same should be stopped.

In his affidavit in reply, Mr. Mwaura deponed that under Section 39 (8) of Public Procurement and Disposal Act, 2005 the Respondent has powers to prescribe preferences based on commercial and social considerations and the Respondent applied the said clause in certain regions as advertised in the invitation to tender. That in this case, the successful tenderer was based 4 km from the supply point whereas the Applicant was 200 Kms far away and could not supply meat as demand may arise and that meat being a perishable commodity, proximity from the point of supply was a serious consideration. That the question of a particular tenderer being the preferred one does not arise as this involved competitive bidding. That in any event under subsection 2.5.1, 2.5.2 and 2.6.1 of the tender documents, a dissatisfied prospective tenderer could seek amendment of the documents. That if the Applicant did not consider it necessary to open the tender documents, he cannot come and challenge the preferential clause and this is a demonstration of bad faith. That by participating in the tender process, the Applicant took a commercial risk and cannot claim to have been robbed of his monies. He further deponed that the documents relied upon are standard documents prepared by Public Procurement oversight Authority under the 2005 Act. That a tenderer may withdraw the tender before the deadline for submitting of tender and the Applicant should have opted to do so upon noticing the preferential clause in the tender documents. That if the orders sought are granted, the Respondent would be denied their discretion in tendering. That the application is an abuse of the court process.

The tender in issue was advertised on 28th November 2007. The Applicant contends that the tender process offends the Exchequer and Audit (Public Procurement Regulations, 2001 and Public Procurement and Disposal Regulations 2006. That cannot be the case because the Public Procurement and Disposal Act No. 3 of 2005 came into force on 1st January 2007. That is the law that is applicable to this tender but not the 2001 Act and Regulations.

The Applicant alleges that the tender was conducted contrary to the objects of the Public Procurement and Disposal Act 2005. I must set out what the objects of the Act are. They are set out in Section 2 which reads as follows:

“2 The purpose of this Act is to establish procedures for procurement and the disposal of unserviceable, obsolete or surplus stores and equipment by public entities to achieve the following objects:

- (a) To maximize economy and efficiency;
- (b) To promote competition and ensure that competitors are treated fairly;
- (c) To promote the integrity and fairness of those procedures;
- (d) To increase transparency and accountability in those procedures;
- (e) To increase public confidence in those procedures;
- (f) To facilitate the promotion of local industry and economic development.”

All procurement has to be done with the above objects in mind. The Applicant's complaint is that after buying the tender documents, he found an appendix to the instructions to tender at provision No. 11 reading 'preferential consideration' That is what has offended the Applicant that offensive paragraph reads

“pursuant to para 2-25 preferential consideration.

In respect of this tender only, firms based in Nanyuki and its environs will have an advantage, over firms outside Nanyuki region.”

Section 39 of the Public Procurement and Disposal Act 2005 does allow a procuring entity to prescribe preference considerations in the tender. S. 39 (2) and (8) do allow preferences and reservations in consideration of the economic and social development factors. That Section reads as follows:

39 (1) Candidates shall participate in procurement proceedings without discrimination except where participation is limited in accordance with this act and the regulations.

(2) Subject to subsection (8), the Minister shall, in consideration of economic and social development factors, prescribe preferences and or reservations in public procurement and disposal.

(3) The preferences and reservations referred to in subsection (2) shall-

- (a) be non-discriminatory in respect of the targeted groups;
- (b) allow competition amongst the eligible;
- (c) be monitored and evaluated;

(4) The preferences and reservations shall apply to-

- (a) candidates such as disadvantaged groups, micro, small and medium enterprises;

(b) works, services and goods, or any combination thereof;

(c) identified regions; and

(d) such other categories as may be prescribed

(5) A procuring entity shall, when processing procurement, comply with the provisions of this Act and the regulations in respect of preferences and reservations.

(6) To qualify for a specific preference or reservation, a candidate shall provide evidence of eligibility.

(8) In applying the preferences and reservations under this section –

a. exclusive preference shall be given to citizens of Kenya where-

i. the funding is 100% from the Government of Kenya or a Kenyan body; and

ii. the amounts are below the prescribed threshold.

(b) a prescribed margin of preference may be given-

(i) in the evaluation of bids to candidates offering goods manufactured, mined, extracted and grown in Kenya; or

(ii) works, goods and services where a preference may be applied depending on the percentage of shareholding of the locals on a graduating scale as prescribed.

The Applicant has to bring themselves within the provisions of this section.

The Applicant cannot generally contend that the Respondent did not comply with the law because Section 39 is explicit that preferences can be included in the tender, taking into account the economic or social circumstances of each case. The Respondent's contention is that because meat is a perishable commodity, it had to be sourced within the local vicinity but not 200 km away where the Applicant is based. The Respondent also considered the fact that in case of urgent need, the commodity should be delivered promptly. Under S. 39(3), the Applicant had to demonstrate that the preferences are discriminatory; do not allow competition amongst those eligible or that those eligible were not monitored or evaluated. The Applicant has not endeavored to do that. Instead he alleges that he was discriminated against contrary to S. 82 of the Constitution which is not applicable here for reasons I will give later in this judgment. The reasons given by the Applicant for including the preferential clause are plausible and the Applicant has not shown otherwise.

Under the Public Procurement and Disposal Act Cap 2005 a party aggrieved by the decision of the Tender Committee or if there is any breach of duty by the procuring entity, the party will seek review of the decision before the Review Board under S. 98 of the Act. The Applicant through its predecessor, Hurlingham Butchery Ltd. did file proceedings before the said Board challenging the preferential consideration. On 18th May 2007, the Board dismissed the appeal. The Act also provides that the aggrieved party can then move the court for Judicial Review under S. 100 of the Act. That process should commence within 14 days of the Board's decision. It was not until 25th January 2008 that the Applicant moved this court for Judicial Review orders well out of the time allowed. The Applicant did not take advantage of the above procedure under the Act and no explanation has been given as to why the Applicant did not challenge the Board's decision nor has the delay been explained. Instead, the Applicant started the process afresh by challenging the decision of the procuring entity to have the preferential clause in the tender documents before this court. That is unprocedural.

I do agree with the Respondent's submission that the procedure adopted is wrong. In fact what the Applicant has done is to challenge the procuring entity's decision to include the preferential clause in the tender twice which is irregular and the orders cannot be granted even if they were deserved. Due process is provided in the Act and the same has to be observed. Since they were dissatisfied with the Review Board's decision they should have moved this court for review of the Board's decision as provided for under the Act.

Under Order 53 Rule 4(1) Civil Procedure Rules, the affidavit that is filed in support of the Chamber Summons is the one which should be served with the Notice of Motion and which is relied upon at the Hearing of the Notice of Motion. A party may however file other affidavits with leave of the court. In this case the Applicant filed the affidavit dated 28th January 2008 with the Chamber Summons. When the Applicant filed the Notice of Motion on 15th February 2008, the same was accompanied with affidavit dated 15th February 2008. The Counsel informed the court that the affidavit dated 15th February 20-08 is what he relied upon to support the Notice of Motion. The affidavit dated 15th February 2008 is irregularly on record because leave of the court was never sought to file it. I note that the contents of the affidavit dated 15th February 2008 are slightly different from that of 28th January 2008 and having been filed without the leave of the court, it is hereby struck off. The Applicant should only have relied on the affidavit dated 28th January 2008 filed with the Chamber Summons.

The Applicant complains that it is only after purchase of the tender documents that they noticed the preferential clause and that is why they find that clause unfair. It means that had they notice of that clause they may not have bought the documents. On the other hand, the Respondent contends that the Applicants have acknowledged having perused the tender documents as indicated in their 'Form of tender' dated 23rd November 2007 addressed to the Permanent Secretary and signed on their behalf. At paragraph 1 thereof, the author states that he had examined the tender documents and acknowledged receipt. It is signed on 14th December 2007. According to Ms Keli, Counsel for the Respondent, if the Applicants were dissatisfied with the contents of the tender documents, they would have raised issue at that stage once

they read them. It seems the Applicants had notice of the offensive clause in good time and did not take the necessary remedial measures. Clause 2.5.1 of the tender documents does allow the tenderer to seek clarification which has to be responded to by the procuring entity within 7 days. Under Clause 2.5.2, the procuring entity shall reply to the clarifications sought within 3 days to enable the tenderer to make a similar submission of its tender. All these above clauses are to clarify all issues to enable the tenderer commit himself to enter into the contract with a clear mind of what it entails. Under Clause 2.6.1, the procuring entity can amend its documents upon request or on its own motion. See also S. 53 (2) of the Act.

There is no evidence that the Applicant took advantage of these redress mechanisms under the tender documents but instead went ahead to purchase several tender documents thus incurring the costs he complains of. In any event, there is no explanation as to why he bought several tender documents instead of one. That is a risk he took and he must bear it. It cannot be blamed on the Respondent.

Counsel for the Applicant submitted that the Act envisions fair play but that the preferential clause contravenes S. 82 of the Constitution which protects the Applicant against all manner of discrimination. This is a Judicial Review application not brought under the Constitutional provisions. Judicial Review proceedings are a special jurisdiction which cannot be mixed with the Constitutional jurisdiction. In HOTEL KUNSTE V THE COMMISSIONER OF LANDS (1994-1998) KLR 1 the Court of Appeal described Judicial Review as Special jurisdiction to which other statutes do not apply ie. the Government proceedings Act nor does. The Civil Procedure Act and Rules do not apply to it. If the Applicant had moved the court under the Constitutional provisions however, he would have been entitled to seek even Judicial Review orders because S.84(2) of the Constitution gives the court a wide discretion to grant any orders, writs or give any directions for purposes of ensuring enforcing and securing the individuals fundamental rights under S. 70-83 of the Constitution. Invoking of S. 82 of the Constitution in a Judicial Review application was misplaced.

Having considered all these submissions and the cases cited I find that the Applicant is trying to have a 2nd bite at the cherry by bringing this application before this court. He cannot challenge the procuring entity's decision before this court, an appeal having been determined by the Review Appeals Board. He should have challenged the Board's decision in this court. The Applicant has obviously flouted procedure under the Act and cannot get any redress from this court. Further to that, I find no merit in the Notice of Motion and the same must be dismissed with costs.

Date and delivered this 18th day of June 2009.

R.P.V. WENDOH

JUDGE

Present

Ms. Keli for the Respondent

Muturi: Court Clerk