



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Misc. Appli. 516 of 2006

AFFILIATED BUSINESS CONTACTS LTD.....APPLICANT

Versus

THE PUBLIC PROCUREMENT COMPLAINTS

REVIEW & APPEALS BOARD.....RESPONDENT

RULING

Affiliated Business Contacts Ltd filed the Notice of Motion dated 1st December 2006 against the Public Procurement Complaints Review and Appeals Board, the Respondent herein, while Telkom K Ltd. and Triton Networks Solution Ltd. were named as 1st and 2nd Interested Parties. This application arises from the decision of this court in HCMISC APPLICATION 1405/04 REP V THE PUBLIC PROCUREMENT AND APPEALS BOARD ex parte AFFILIATED BUSINESS CONTACTS LTD where this court quashed the decision of the Respondent in which the Respondent had declined to hear an appeal filed by the Applicant in which the Applicant challenged tender No. DF 400/TKL/EM TOOLS AND TEST GEARS in which the Applicant lost the bid. The Respondent had declined to hear the appeal for reasons that it had no jurisdiction. The court quashed the Respondents decision on 28th February 2006. The Respondent declined to obey the court's order of 28th February 2006, to hear the Applicant on their appeal and the Applicant filed this motion seeking orders of mandamus to compel the Respondent to hear the appeal.

On 30th April 2008 when this matter came up for hearing, Mr. Gachuhi, Counsel for the Applicant indicated that there were new developments in the matter in that the 1st Interested Party who was the procuring entity, had been privatized and its assets bought by French Telkom and they needed to confirm. On 26th May 2008 when the matter came up for mention, Mr. Gachuhi confirmed that proceeding with the motion will be an academic exercise since the privatization of Telkom Kenya had taken place and he wished to withdraw the matter with no order as to costs. The Counsel of the Interested Parties and Respondent insisted on being paid costs and that is why this matter was adjourned so that the parties could make arguments on the question of costs only.

Mr. Gachuhi has urged that the Applicant should not be condemned to pay costs because the Applicant had nothing to do with privatization of the 1st Interested Party. That it is the Respondent's refusal to obey the court's order of 28th February 2006 that led to this application being made and that the Applicant had offered that this application to be withdrawn with no orders as to costs but the Interested Parties and

Respondents have opposed it and insist on being paid costs. In the Applicant's view, it is the Respondents who refused to obey the court's order and should be liable to pay the costs. That the Applicants had in good faith asked that each party bears its own costs. Lastly that the Interested Parties acted in bad faith in failing to inform the court that the Interested Parties had been privatised.

Ms Mburu appearing for both Interested Parties urged that costs should follow the event. That having been brought to court by the Applicant, the Applicant should bear the costs. She had no objection to withdrawal of the Notice of Motion provided they are paid the costs. She relied on S. 27 of the Civil Procedure Act that the court has the discretion to determine who pays the costs.

I have considered the arguments of both Counsel and taken into account the history of this case. It is not in dispute that this court rendered a judgment on 28th June 2006 in Misc Application 1405/04 quashing the decision of the Respondent in which the Respondent had declined to hear the Applicant's appeal arising from a tender advertised by the 1st Interested Party who was the procuring entity. The Respondent did not go ahead to perform its duty even after the court's decision prompting the Applicant to file this motion seeking an order of mandamus to compel the Respondent to perform its duties.

The Applicant was keen on having this motion heard until they learnt of the privatization of the 1st Interested Party. To date the 1st Interested Party has never disclosed to this court that that process was on going. Counsel for the Interested Party never even alluded to it. The Counsel on record never disclosed when the process began nor is there evidence that the Applicants were aware of it and insisted on proceeding with this motion. Had the Applicant not found out about the privatization of the 1st Interested Party, this motion would have been heard to its conclusion but it would only be an academic exercise. The 1st Interested Party has not acted in good faith by withholding that information from the court.

The Applicant came to court in good faith. They have a judgment against the 1st Respondent arising from an alleged flawed tender advertised by the 1st Interested Party. The Applicant was not in control of the happenings with the 1st Interested Party and cannot be condemned to pay costs for circumstances out of their control. Considering that the Applicant had a good case, arising from the judgment of this court which is not appealed against nor is the court's order of 28th June 2006 set aside, it is my view that it would be unfair to load the applicant with all the costs of this motion. I do order that the motion dated 1st June 2006 be and is hereby withdrawn with each party bearing their own costs.

Dated and delivered this 8th day of July, 2008.

R.P.V. WENDOH

JUDGE

Read in the presence of:

Mr. Gachuhi for Applicant

Mr. Atanda holding brief for Mr. Oyale for Respondent

Ms. Muthoni for the 1st Interested Party

N/A for 2nd Interested Party

Daniel: Court Clerk