

**IN THE HIGH COURT OF ESWATINI
JUDGMENT**

CASE NO: 610/2021

HELD IN MBABANE

IN THE MATTER BETWEEN

M GLOBAL INCORPORATION (PTY) LTD

PLAINTIFF

AND

ESWATINI SUGAR ASSOCIATION

DEFENDANT

**NEUTRAL CITATION: M GLOBAL INCORPORATION (PTY) LTD
Vs ESWATINI SUGAR ASSOCIATION
(610/2021) SZHC – 96 [27/04/2023]**

CORAM: B W MAGAGULA J

**HEARD: 27/04/2022, 03/05/2022, 30/05/2022, 16/08/2022,
14/11/2022, 02/02/2023, 06/02/2023, 20/02/2023**

DELIVERED: 31/05/2023

SUMMARY:

Civil Law – Law of delict - Plaintiff claiming damages allegedly suffered as a result of an allegedly irregular award of a tender to a competitor – Applicability of the considerations of public policy on a tender issued by a company that is not a public enterprise.

HELD:

*Defendant not a public enterprise as per **The Public Enterprises (control and monitoring) Act of 1999**. As such, **The Procurement Act No. 7 of 2011** is not applicable to the Defendant. The determination of the matter lies on the law of contract. The terms of the tender as published, serves to be the basis on which the tender process and repercussions arising therein should be determined.*

HELD FURTHER:

In light of the Plaintiff's claim being a delict, the first hurdle that the Plaintiff has to overcome is to prove wrongfulness on the part of the Defendant. The Plaintiff could not demonstrate a wrongful conduct, as the provisions of the published tender requirements did not obligate the Defendant to furnish reasons why it chose a specific bidder. The very act of publishing a tender, is an invitation on any interested party to tender, which is based on the

law of contract. The terms that are set out in the published tender document forms the guidelines or terms, which when accepted, establishes the contract between the parties. The terms and conditions of the tender specifically stipulated that, the Defendant need not give reasons for an award it may decide to make.

HELD:

The Plaintiff's claim for damages is dismissed with costs. The Plaintiff has failed to prove the very first essential requirement in a claim of delict, being wrongfulness.

JUDGMENT

BW MAGAGULA J

Back ground facts

- [1] The genesis of the litigation between the parties emanate from an advertisement published by the Defendant which was termed as a request for proposals for bag refurbishment and disposal.

- [2] The Plaintiff is one of two companies that responded to the advertised tender. The necessary documentation was submitted by both companies. Unfortunately for the Plaintiff, the award was not favorable. Being aggrieved, Plaintiff has instituted a delictual claim against the Defendant for pecuniary loss arising out of the failure by the Defendant to award the tender in its favour. It is also contended that it was wrong for the Defendant not to communicate the tender outcome.
- [3] The blow by blow basis for the claim, will be visited later on in the judgment. In support of the claim, the Plaintiff paraded three (3) witnesses.
- [4] It is also worthy of mention that in the book of pleadings before court, there is a pre-trial conference minute duly signed by the parties. It reflects that a pre-trial conference meeting was held by representatives of both parties. It is not immediately apparent that an agreement was reached in respect of the separation of trial, where liability and quantum would be determined separately. Neither of the parties addressed the court pertaining to the implications arising from this omission at the commencement of the trial.
- [5] The court will therefore deal with the matter on the basis that there is no agreement to separate the determination of liability and quantum.
- [6] The Defendant is Eswatini Sugar Association, which the Plaintiff has described as a company statutory body duly established in terms of the

provisions of the Sugar Act of 1967, with its head office situated Nkhotfotjeni Building in Mbabane within the Hhohho Region¹.

- [7] In the plea, the Defendant has admitted that indeed it is a company established in terms provisions of the Sugar Act of 1967². The corporate nature of the Defendant is deliberately highlighted, as it will become pertinent in deciding the question of whether public policy considerations of fairness and the applicability of the Procurement Act No. 7/2011 are applicable to the matter at hand.

Pleadings

- [8] The Plaintiff initiated the claim as per the particulars of claim dated the 29th November 2020. As it is perfectly entitled to do in terms of the Rules of court it amended the particulars of claim on 19th May 2021. There was no objection to this amendment. The gravamen of the Plaintiff's claim as per the amended particulars is summarized as follows;

8.1 In January 2020, Plaintiff responded to a public tender advertisement which was termed as request for proposals for bag refurbishment and disposal.

¹ See paragraph 2 of the Plaintiff's particulars of claim.

² See the Plaintiff's plea at paragraph 1 at page 20 of the book of pleadings.

- 8.2 The Plaintiff was shortlisted and was one of only two bidders for the tender, being the Plaintiff and the successful bidder³. The Defendant disputes that the Plaintiff was shortlisted on the basis that it was unnecessary to do so as there were only two companies that responded to the tender. The inelegant manner of pleading this issue in the particulars of claim in my view is insignificant. What is material is that there were two bidders for consideration. Whether they came about as a result of shortlisting or they were the only two to be considered is immaterial.
- 8.3 The Defendant had an obligation to ensure that the tender process was fair to all bidders and the tender committee was bound to follow the tender document.
- 8.4 To the contrary, the Defendant breached its own tender document and flawed the tender procurement procedure of the Plaintiff.
- 8.5 During the day of the opening of the tender documents, the chairman of the tender committee, unlawfully announced only the Plaintiff's unit costs, without reading the bid costs of the competitor.

³ As it then transpired during the evidence that the successful bidder was a company called Swaziland Bag Refurbishment and Maintenance (SBRM).

- 8.6 The Plaintiff therefore avers in the particulars of claim that, the conduct of the chairman of announcing the price of one bidder and neglecting to announce the other bidder's costing, constituted an irregularity in the tendering process, which occasioned prejudice to the Plaintiff.
- 8.7 The Defendant's tender committee failed and or neglected to conduct an inspection at the Plaintiff's premises or physical address.
- 8.8 The Plaintiff was only requested to furnish it's physical address on the same day it had learned that the tender had already been awarded.
- 8.9 The Defendant did not communicate the outcome of the tender to the Plaintiff as a bidder which was in breach of a fair public tendering and procurement process.
- 8.10 There being only two contenders for the tender, the Plaintiff would have secured the tender award, had the Defendant adhered to a fair tender and procurement process.

- 8.11 The award of the tender to the successful bidder constitutes a breach of the tender process, in that SBRM was eventually awarded the tender, yet it has been enjoying a monopoly in this tender for over two decades at the Defendant's establishment.
- 8.12 The Plaintiff submitted a tender document reflecting a cost of E19.00 (Nineteen Emalangi) collection fee per unit per bag, which was within the Defendant's budget at a tender price of E19.41 (Nineteen Emalangi Forty One Cents).
- 8.13 The Plaintiff was shortlisted for the tender because its prices were competitive and within the budgeted prices by the Defendant.
- 8.14 The Plaintiff's claims to have suffered damages in the sum of E4 136 800 (Four Million One Hundred and Thirty Six Thousand Eight Hundred) as a consequence of the fraudulent deprivation of the award by the Defendant. The claim reflects the Plaintiff's out of pocket losses as well as loss of profit consequent to the delictual conduct of the Defendant.
- 8.15 Differently put, the Plaintiff avers that it would have earned the claimed amount, had it not been deprived of the tender award.

[9] The Defendant filed a plea, which basically denies both the liability and the quantum claimed.

Evidence adduced during the trial

[10] I will now examine the evidence led by the Plaintiff's witnesses.

[11] The Plaintiff paraded 3 (three) witnesses to support its case. They were Samkelo Dlamini, Ms Phindile Millicent Matse and the expert witness Mr Sibusiso Moses Shongwe.

Summary of Mr Samkelo Dlamini's evidence (PW1)

[12] This witness told the court that he is the Plaintiff's chief operations officer. The Plaintiff's business premises are situated at the President Centre Office No 1, where the Plaintiff rents a workshop at a multi-purpose hall, at the Matsapha Industrial Site.

[13] He confirmed that he saw the tender in question, published in a local newspaper. The Plaintiff subsequently took a decision to respond to the tender, as they felt they possess the necessary skill and capacity to deliver what the tender required.

[14] This witness continued to tell the court that, after submitting all the necessary documents as per the tender requirements, he attended the tender opening

meeting. During the meeting, he learnt that there were only 2 (two) companies who responded to the tender. It was the Plaintiff and another company called Swaziland Bag Refurbishment and Maintenance (Pty) Limited. In this judgment, I will refer to the latter in its acronym SBRM. This witness alluded to what was pleaded in the particulars of claim and confirmed that at the opening of the tender documents meeting, the chairman of the tender committee only read out the total cost of the Plaintiff's pricing, to the exclusion of the competitor's pricing. This witness also told the court that after the tender opening meeting, he was approached by the director of SBRM, a certain Mr Naidoo. He asked him why did the Plaintiff quote a low price for the tender. He then offered him a bribe in an attempt to coerce him to withdraw from the tender process. The witness told the court that he refused the bribe.

[15] PW1 proceeded to tell the court that after attending the meeting, Plaintiff received no further communication from the Defendant. This is despite that Plaintiff had furnished an email address and contact information. On enquiring from Defendant through one Nomphumelelo Mamba, she advised that she did send an email already on the 19th February 2020. This witness insisted that no such email was received by him, up until a forwarded email on 25th March 2020. This was way after the tender had already been awarded to the Plaintiff's competitor (SBRM).

[16] This witness proceeded to tell the court that on the 30th March 2020, Plaintiff received an email from Defendant which was unrelated to the outcome of the tender. This email was from Sipho Dlamini who was the chairman of the

tender committee. He was requesting the Plaintiff to furnish it's physical address. It was dully furnished. Copies of the email exchanges were admitted as evidence and marked MG4 and MG5 respectively.

[17] According to Mr Samkelo Dlamini, being dissatisfied in the manner in which the tender process was done, then registered a grievance on behalf of the Plaintiff with the then CEO of the Defendant, Dr Phil Mnisi. This was made through a letter marked exhibit "MG6".

[18] The then CEO is said to have appointed the Defendant's Internal Auditor, one Landiwe Dlamini to look into the Plaintiff's complaint. It will soon be apparent from the evidence led by the Defendant, that she was not paraded as one of the witnesses by the Defendant.

[19] As part of the steps she took to investigate the complaint, the internal auditor apparently requested PW1 to resubmit the Plaintiff's documents that were initially furnished as part of the documents supporting the bid. The tender committee had apparently misplaced all the documents previously submitted by the Plaintiff.

[20] This witness also asserts that the internal Auditor did not bother to call him or any official of the Plaintiff for an interview to gather their side of the story.

- [21] Mr Dlamini proceeded to tell the court that he then received a call from Defendant's then Acting CEO at that time. Mr Banele Nyamane who advised him that Defendant found no irregularities in the tender process and advised PW1 not to address the matter any further.
- [22] PW1 once again approached the then substantive CEO Dr Phil Mnisi who is said to have met him. In this meeting the CEO undertook to look into the matter further and consult with the Internal Auditor.
- [23] Later, the CEO called and advised PW1 to report the matter to the Anti-Corruption Commission for investigation.
- [24] In cross- examination, PW1 disputed that it was a competent reason to disqualify the Plaintiff for not submitting a workplan. He argued that the tender document did not require a submission of a workplan.
- [25] PW1 further submitted that the Defendant did not advise Plaintiff that they do not qualify for a site inspection because his company had already been disqualified for their alleged excessive pricing.
- [26] PW1 further noted that the CEO had approved the recommendations of the tender committee by the 2nd March 2020, yet the chairman only signed off the recommendation on the 4th March 2020.
- [27] PW1 insisted that he did not receive any email communication from Defendant before the 25th March 2020.

[28] This witness also highlighted that to date, his company has not received a letter advising the outcome of the tender bid. Save for the emails that were forwarded after they had already lodged a complaint.

[29] During cross-examination, PW1 insisted that Plaintiff was disqualified amongst other reasons for not submitting a work plan. Yet the tender document (RFP) did not provide for the submission of same.

29.1 PW1 further submitted that the Defendant did not advise Plaintiff that they did not qualify for a site inspection because they had already been disqualified due to their excessive pricing.

29.2 PW1 further noted that the CEO approved the recommendation of the tender committee on the 2nd March 2020, whereas the chairman only signed off the recommendation on the 4th March 2020.

29.3 It was also the evidence of this witness that he did not receive any email communication from Defendant, before the 25th March 2020.

29.4 PW1 further testified that no letter advising of the tender outcome has been delivered to Plaintiff to date.

PW2 Miss Phindile Millicent Matse

- [30] This witness gave evidence on the 30th May 2022. She told the court that she was employed by the Plaintiff as an Administrator since 2010. She confirmed that she is the one that compiled the documents supporting the tender bid which was eventually submitted to the Defendant. She also confirmed that she signed the bid document.
- [31] She continued to tell the court that she was employed by the Plaintiff as an Administrator since 2010.
- [32] Miss Matse related to the court that the amount claimed by Plaintiff was premised on the quantity of 2 000 (Two Thousand bags) per month for one year. In as much as she confirmed that the tenure of the tender was meant to be 3 years, she alluded to the fact that the initial period was for one (1) year, which could be extended on good performance for a further 2 years. She then told the court that she received an email from the Defendant which had no attachment. This was on the 25th March 2020. She also confirmed that she had never received an email from the Defendant on the 19th February 2020 as alleged. Plaintiff only received an email advising the tender outcome only on the 25th March 2020.
- [33] This witness was subjected to intense cross-examination by the Defendant's Counsel. She was first asked whether she was aware of the nature of the

Plaintiff's claim. Her response was that the claim was not about the amount, but the manner in which things were done. These are her exact words. I find it imperative to interpolate and observe at this juncture that this witness did not unpack what she meant by "things". Nonetheless, she was also asked how were the "things" not done properly? A pointed question was further asked being that, if the Plaintiff was not given a contract, how does the claim arise? The answer proffered was that if "things" were equal and the Plaintiff was given the tender, the Plaintiff would have received an income of E4 100 000 (Four Million One Hundred Thousand). She was then asked on the costs of executing the tender. Her answer was not clear. Her response was that it was an estimated price, as one could never be accurate. She estimated it to be E3 8 00 000 (Three Million Eight Hundred Thousand).

[34] It was eventually put by the Defense Counsel to this witness, that she had failed to demonstrate what the costs are, and she had also failed to explain why Plaintiff had claimed for 1 year.

[35] There was also the following exchange per verbatim, between the Defendant's Counsel and Miss Matse;-

Q – Because you did not get the tender, did you incur the cost that you factored in this figure?

A – No

Q – Did the Plaintiff incur any wage costs?

A – No

Q – If it did not incur those costs why is it claiming E4 100 000-00?

A – The claim is not in accordance with what was done, but if there was fairness that is the money Plaintiff would have made.

Q – But there were costs involved which you did not incur. How do you claim when you never incurred this cost.

A – Because if everything had been done correctly, that was the money the Plaintiff was going to make.

Q – So the E4 100 000-00 is not the actual damages that you suffered.

A – My Lord it's not about the damages, it's about the requirements that were met on the tender document.

Q – In the particulars of claim in paragraph 9, the Plaintiff avers that it suffered damages pursuant to the fraudulent deprivation.

A – I do understand you.

Q – From what you have now told the court, is this amount E4 100 000-00 your profit.

A – It's not

Q – In your evidence in chief, you said on the figure is based on the assumption of 1 year.

A – Yes

[36] In summary, that was the essence of Miss Matse's testimony.

[37] The Plaintiff then called an expert witness as well, Mr Sibusiso Shongwe. In a nutshell, this witness told the court that he was an expert in Information Technology. He possesses an Associate Degree in Information Technology obtained in 2016. He examined exhibits MG2 (a) and MG 2 (b) and confirmed that when he inspected the laptop of PW1, he could not locate an email sent to Plaintiff advising of the tender outcome. It is common course that the Defendant did not call an expert to controvert the evidence of the Plaintiff's expert witness.

The Defendant's Defence on the Pleadings

[38] The Defendant's defence as set out in the plea is as follows;

38.1 The Defendant's defence contest the Plaintiff's reliance on annexure "NG1" as being the tender document. The Defendant avers that "NG1" was an email that was issued to the prospective tenderers amplifying clause 8 of the request for proposal document which will be herein after referred to as the RFP.

38.2 The Defendant then annexed in the plea the request for proposals (RFP), which is marked annexure "A". It is averred this contains a full set of the material terms of the tender.

38.3 The Defendant admits that the Plaintiff supplied all the mandatory documents which were required in terms of clause 12 of the RFP document. However, the Defendant pleads that it

reserved the sole an absolute discretion whether or not to accept the lowest tender or any of the tenders. Irrespective whether such tenders met the criteria as set out in the RFP document. Therefore, Defendants avers that no claim of any nature lies against it in the way of exercising such discretion. It was also not obliged to give any reason to any tenderer relating to it's decision.

38.4 The Defendant further avers that the tender process was fair to all bidders and that the tender committee did follow the tender document as it was obliged to do.

[39] The Defendant further contends that the Plaintiff was disqualified at the initial stages of the evaluation process, as per clause 14 of the RFP, on the following basis;

39.1 The Plaintiff had no relevant experience and evidenced lack of understanding of the requirements of the tender.

39.2 The Plaintiff had no proposed plan for conducting the refurbishing business including the sites to be used.

39.3 The Plaintiff's tender price was unjustifiably high, compared to the Defendant's budget. Plaintiff put a bid of E176.00 per bag to collect, refurbish and deliver. Yet the Defendant's budget was E19.41.

[40] Lastly, the Defendant denies that the Plaintiff suffered any damages in the amount claimed or any amount at all.

The Defendant's case through the witnesses

[41] The Defendant called the chairman as the first witness to give evidence. Mr Sipho Dlamini told the court that as part of his duties at the tender opening meeting, he explained to the bidders in the presence of the other committee members the purpose of the tender opening meeting. He inspected the documents to ensure that there were sealed. He announced the names of the bidding nominees. He read out the bid prices for the two companies in the presence of everyone in attendance.

[42] This witness referred to the attendance register, which reflects that indeed Mr Samkelo Dlamini represented the Plaintiff and a certain Mr Naidoo represented the competitor, SBRN. The witness also referred to exhibit D4, which are the minutes of the tender opening meeting. In paragraph 2 they reflect that the documents received were from M Global Incorporation and Swaziland Bag Refurbishment (SBRN). The minutes show that both documents were opened in the presence of the tenderers and it was agreed that the prices for M Global Incorporation were not presented per unit. Hence, a

calculation would have to be made to come up with the prices per unit. The bids for both companies were depicted as follows:-

Company		Collection	Disposal
Swaziland	Bag	E18.49	E6.51
Refurbishment			
M Global Incorporation		E176	5.734

[43] The Defendant's second witness was Nompumelelo Mamba (DW2). She told the court that she advised PW1 that she sent an email on the 19th February 2020.

[44] The last witness by the Defendant was Nompumelelo Shantel Mamba (DW2).

44.1 Her testimony is that she is in employ of the Commercial Administration Assistance.

44.2 DW2 testified that she was sent by DW1 to forward an email to the Plaintiff and allegedly sent the email MG (2) (a) on the 19th February 2020.

44.3 She testified that exhibit but MG (2) (a) contained MG 8 as an attachment.

44.4 DW2 showed the Honourable an email that was forwarded and not the original text and or email allegedly sent to PW1.

- 44.5 Upon trying to clarify she said an email was sent at 0942 hours and the other reflects the time as 0741 hours.

Issues for determination

[45] Having considered the pleadings filed by the parties and having listened to the evidence, I extrapolate the issues which fall for determination to be the following;

- 45.1 Whether the chairperson of the tender committee read out the Plaintiff's prices only and excluded those of SBRM during the tender opening and if he did what are the implications on the Plaintiff's claim.
- 45.2 Whether the Defendant as a matter of fact, failed to communicate the outcome of the tender process to the Plaintiff. If it did, what are the ramifications of that lapse of judgment on the Plaintiff's claim.
- 45.3 The consideration on whether the Defendant had breached it's own tender conditions by failing to do an inspection on the Plaintiff's premises will also form part of the issues for determination.

- 45.4 It will also be imperative to consider the nature of the Plaintiff's claim, in light of the manner in which it has been pleaded as a delictual claim for damages *vis-a-vis* the Defendant's alleged transgression, especially in light of the terms and conditions of the tender as published.
- 45.5 It will also be necessary to ascertain whether through the adduced evidence, the price submitted by the Plaintiff was not competitive, as compared to the bid price of the eventual winner of the tender.
- 45.6 The issue of the Plaintiff's competitor Director Mr Stando, Mr Naidoo offering a bribe will also be visited. The veracity of the allegations and its relevance and implications on the Plaintiff's claim.
- 45.7 Whether as a matter of fact, the letter informing the Plaintiff of the outcome was indeed sent to the Plaintiff. Either electronically or otherwise. If not, what are the implications of that omission on the Plaintiff's claim.

Analysis

- [46] In considering the contentions between the two parties, I find it improbable that the Defendant would engineer minutes reflecting amounts that were the actual prices that were tendered for by the bidding companies accurately spelt

out. In my view, the probability of that happening is minimal. Also, what would the chairman serve to achieve by omitting to read out the Plaintiff's price, when it was there for all to see. In the event the insinuation is that the chairman sought to give the competitor some form advantage by stealthily concealing the bid price of the competitor, then against which price would the Plaintiff's bid have been compared with? Moreover, it was common cause that there were only two bidders. If that is the case, it would have served no point to conceal the bid prices of SBRM at the tender opening meaning. What purpose would it have served?

[47] I therefore find as a matter of fact, that the Plaintiff's assertion that the prices were not read out, is not supported by the evidence adduced before court. I therefore, reject the Plaintiff's assertion that it's bid prices were not read out.

[48] There is also a further contention in the Plaintiff's particulars of claim, to the effect that the Defendant breached it's own tender conditions by failing to do an inspection on the Plaintiff's premises.

[49] In it's amended particulars, the Plaintiff articulates the contention by stating that the tender committee flawed the tender process by so doing⁴. The court has considered the evidence adduced on behalf of the Plaintiff. No single witness of the Plaintiff pin pointed to the court, any term in the RFP which states that the Defendant is obliged to conduct an inspection on any of the

⁴ Reference in this regard is made to para 8 and 8.1 of the Plaintiff's amended particulars of claim.

premises of the tenderers as part of the evaluation process. I have also considered the RFP, which is annexure “A”, no such condition exists.

[50] I now turn to the nature of the claim as pleaded. The nature of the Plaintiff's claim is one of delict. I will now examine the averments as pleaded together with the evidence adduced by the witnesses. The court will ultimately have to determine whether the necessary averments made in the particulars of claim, considered together with the evidence adduced sets out a delictual case.

[51] The Plaintiff contends that one of the reasons adduced by the Defendant for its disqualification, is that it failed to submit a workplan. The Plaintiff contends *contra* that this requirement was not part of the tender conditions. The court has considered the requirements as out in the RFP document. Indeed, there is nowhere in this document where the tenderers were required to submit a workplan. The mandatory documents to be submitted are spelt out in clause 12 of the RFP are the following;

51.1 Company profile

51.2 Valid tax clearance

51.3 Valid trading licence

51.4 Reference from clients

51.5 Any other document

[52] The RFP clearly articulates that it will be at the discretion of the tenderers to submit any other document which it may consider relevant.

[53] I have also reviewed the email which was for clarification as sent by one Thuli Dube to the prospective tenderers on the 24th January 2020. Even in this email, there is no requirement to submit a workplan. I therefore, make a finding of fact, that it appears the Plaintiff's contention is correct. It was not a requirement of the RFP that either of the parties should submit a workplan.

[54] The consequences of such an omission on the Plaintiff's claim, will be considered in the adjudication part of the judgment. That is where I will consider the law applicable on a claim of the Plaintiff's nature. For now, it suffices that factually the Plaintiff is correct that it was not part of the tender requirements for bidders to submit a workplan.

[55] It is also part of the Defendant's plea that as part of the reasons why the Plaintiff was not awarded the tender is because the price it submitted was not competitive. This is a factual issue. I have reviewed the evidence by the witnesses in its entirety. In particular, the testimony of Miss Matse and the cross examination that ensued thereafter. I have gone further to consider the documents submitted in court in relation to the price issue. Exhibit D4 reflects that the unit price that was submitted by SBRM is E1849. In as much as the Plaintiff did not submit the unit prices, but a globular price of E176. A simple arithmetic calculation and as per the Plaintiff's case in their pleadings⁵, the unit cost was E19.00 per unit bag.

⁵ See para 9.4 of the Plaintiff's particulars of claim.

[56] If one considers the price that was submitted by the competitor SBRG, it is indeed lower than the one submitted by the Plaintiff. As a question of fact, the Defendant is correct in pleading that the Plaintiff's price was not competitive as compared to the eventual winner.

[57] The issue of the competitor's director Mr Naidoo offering a bribe was also part of the contentions by the Plaintiff. Again, I have reviewed the evidence adduced by all the 3 witnesses. Other than the bare allegations of offering a bribe, there is no evidence that indeed the competitor's director offered a bribe. Even if he did, the Plaintiff has failed to connect how this accusation is relevant to support the nature of its claim. If that bribe was offered to the Plaintiff's director, what does that have anything to do with the Defendant. PW1 told the court that the bribe was alleged offered to him after and outside the tender opening meeting. This means any alleged acts of corruption or attempted inducement, took place between the two directors outside the formal tendering process of the Defendant. If that is the case, where does the Defendant feature in that conduct. In any event, the court was not informed what steps the Plaintiff's Director took to report such an act of criminality to any law enforcement agent. Either the Eswatini Royal Police or the Anti-Corruption Commission.

[58] The other contentious issue that warrants factual determination, is whether as a matter of fact the Defendant was advised of the tender outcome. I have considered the evidence of PW1 and PW3, the expert evidence. I have also

noted that the Defendant did not call it's own expert witness to controvert the expert testimony of PW3.

[59] In the totality of the evidence, in my view, when looking at the dates of the emails, it is highly likely that the Plaintiff did not get the letter advising that it's tender bid was successful.

[60] DW1, the chairman, alluded to the fact that the Defendant has a messenger driver who delivers mail for the Defendant to various destinations. He said the driver must have delivered the letter. However, the driver was not called to testify. There was also no document presented in court either in the form of a mail delivery register or a signed proof of receipt reflecting that the letter was indeed delivered and signed for at the Plaintiff's premises. Clearly, there is nothing before court that dispels the Plaintiff's version that the letter was not delivered.

[61] On the issue of the Plaintiff not being advised of the tender outcome, when considering the evidence, it tilts in the favour of the Plaintiff. It is most probable that the letter was not delivered to it. Having made that finding of fact, the legal consequences of this lapse will fall for consideration later on in the judgment.

The Law Applicable

[62] The court has considered the dossier of legal authorities cited and submitted by the Plaintiff. I have read the cases referred to by the Plaintiff. I come to the

observation that most of those authorities pertain to reviews of tender processes relating to state owned enterprises in South Africa. The matter at hand is not one for review, but a claim for damages pursuant to an alleged delictual transgression. This distinction therefore make the legal principles espoused in all the cases referred to, not to be applicable on the issue for determination before court.

- [63] I now proceed to revisit the applicable law on a delictual claim of this nature. Academic authorities such as **HB Klopper** in his work **damages; Lexis Nexis 2017** at pages **188 – 189**, had an occasion to traverse on this interesting legal subject matter. He states that types of negligent conduct which do not directly affect the property or personal rights of a person are diverse. They include loss suffered by an unsuccessful tender because of a fraudulent award of a contract.
- [64] In applying this principle to the matter before court, it appears to me, a Plaintiff who has suffered damages subsequent to a fraudulent tender award, is entitled to sue for damages. Like in any other claim predicated on delict, such a Plaintiff is expected to satisfy all the requirements of a delictual claim, which I set out in detail later in the judgment.
- [65] It is therefore imperative to consider whether the Plaintiff in the matter at hand has been able to allege and demonstrate through evidence all the requirements. What now needs to be unpacked, is whether the case that has been set out by the Plaintiff passes the muster of the law.

[66] In the matter of **Minister of Finance and Others vs Goreno** [2007] 1 all SA 309 (SCA), 207 SA 111 and also see **South African Post Office vs Delang and Another** [2009] 3 all SA (47) SCA, 209 (5) SA [255] SA where the position of the law in respect of negligent conduct was also emphasized. It was stated that damages suffered by an unsuccessful tenderer as a result of a fraudulent award of a contract is competent.

[67] The Plaintiff's claim being premised on delict would necessitate a consideration of the requirements that the Plaintiff needs to fulfil.

[68] The Plaintiff's claim is for pure economic loss, arising from an alleged irregularity which occurred during the adjudication of the tender bids. I now turn to set out the essential requirements of a delictual claim generally.

Wrongful act or omission

[69] In order to attract liability, there must be a wrongful act or omission on the part of the Defendant. The Plaintiff must allege and prove the act or omission on which the cause of action is based. If wrongfulness cannot be inferred from the nature of the loss suffered, the Defendant's legal duty towards a Plaintiff must be defined and the breach alleged must be proven⁶.

⁶ See also *Coronation Brick (Pty) Limited v Strachan Construction Co. (Pty) Limited*, 1982 (4) SA 371 at page 378
See also *Amlers Precedents of Pleadings*, 7th Edition at page 258

Negligence

[70] The Plaintiff must allege and prove that the Defendant was negligent; See **Gouda Boerdery BK vs Transnet Ltd [2004] 4 All SA 500 (SCA), 2005 (5) SA 490 (SCA)**, where it was held that, depending on the circumstances, it may be convenient to assume the existence of a legal duty and consider first the issue of negligence. It may also be convenient for that matter, when the issue of wrongfulness is considered first, to assume for that purpose the existence of negligence.

Causation

[71] The Plaintiff must allege and prove the causal connection between the negligent act relied on and the damages suffered.⁷

[72] **Amlers Precedents of Pleadings**⁸ is authority for the notion that wrongfulness can manifest itself in different ways. For example, a breach of;

71.1 A Common Law right;

71.2 A particular Statutory duty; or

71.3 A duty of care

[73] The Plaintiff's case by and large is that it is the wrongful conduct on the part of the Defendant that caused it patrimonial or pecuniary loss⁹. The Plaintiff

⁷ Minister of Police v Sikhosana, 1977 (1) SA 31 (a)
Amlers Precedents of Pleadings, 7th Edition, page 259

⁸ **Amlers Precedents of Pleadings 7th Edition**, page 258

⁹ See para 10.3 of the Plaintiff's Heads of argument.

has further captured, correctly so, the position of the law in this area being that a wrongful infliction of pecuniary loss as a form of delictual conduct can be generally defined as a wrongful and culpable conduct which causes harm to a Plaintiff¹⁰. It is imperative that I probe whether all the essential requirements of a delict as alleged by the Plaintiff, were infact committed by the Defendant in it's conduct. I will start with the first requirement of wrongfulness.

[74] It is the Defendant's argument as I have briefly alluded to earlier in the judgment, that the Defendant committed a wrongful conduct when it's tender committee flawed the tender process. As a result, the Plaintiff was fraudulently (underlining my own) deprived of the award when it was due to win the tender. This begs the question, did the tender committee as a matter of fact blemish the tender process?

[75] The particular acts constituting the fraud is that the tender committee failed and /or neglected to conduct an inspection on the Plaintiff's premises. Further, the Defendant did not communicate the tender outcome. I have already made a finding of fact, that indeed the outcome was not communicated to the Plaintiff or rather that on a preponderance of probabilities there is no evidence that the Plaintiff received the communication. The pertinent question though is that do all the alleged transgressions constitute a wrongful act or a flaw of the tender process that suffice to meet the requirements of delictaul liability?

¹⁰ See para 10.3.2 of the Plaintiff's Heads and the case referred thereto being **The Minister of Justice vs Hofmeyer 1993 (3) SA (131) AT 152**

Further, has the Plaintiff adduced evidence to prove the fraudulent act it has alleged?

[76] The Plaintiff relies *inter alia* on the alleged Defendant's breach of a fair tender process and flouting its own tender document. I deem it necessary to deal with the contention that the tender committee failed to conduct an inspection at the Plaintiff's premises first. I will consider the tender conditions as published, to see if it contained any condition that made it mandatory for the Defendant to conduct an inspection of the premises of any of the tenderers before making the award.

[77] The condition relating to the evaluation of the submitted tenders is contained in clause 14 of the RFP document¹¹. In this section, there is no requirement that the Defendant as part of the evaluation process, it must inspect any of the bidder's premises. It is on that basis therefore, that the inspection of the Plaintiff's premises as a ground for breach of the tender process based on which wrongfulness is relied on, does not find support on the RFP document to which all the tenderers responded to. It therefore follows that the Defendant cannot be faulted for not having inspected the Plaintiff's premises. It again follows that such an omission on the Defendant's part, cannot constitute wrongfulness.

¹¹ RFP is an acronym of Request For Proposals.

[78] I have already made a finding of fact, that the duty to furnish the reasons for not awarding the tender to any of the tenderers was also not part of the terms set out in the RFP. Again, this conduct on the Defendants' part could not have constituted a wrongful act as to satisfy one of the essential requirements for a delictual claim, being a wrongful conduct.

[79] In the arguments advanced by the Plaintiff much reliance has been made on case of **STATE OF OUNISA VS DHAIRANI COHAR (2004) 5 SEC 58**. Which is that reasons pursuant to a decision is the heartbeat of every conclusion and without same it becomes lifeless. It is further contended that the right to reason is an indispensable part of a sound judicial system. The reasons given must be sufficient to indicate an application of mind to the matter, so the argument goes.

[80] It is also contended that, when evaluating the tender, the committee was exercising a quasi-judicial function. The contention being that a person appearing before any administrative authority has a right to be given reasons in writing for decision of the authority.

[81] In essence I follow the arguments by the Plaintiff and they encapsulate the correct position of the law. Especially relating to a public body or an administrative authority which is called to make that decision. Unfortunately when I consider the Plaintiff's legal arguments in light of the specific corporate nature of the Defendant. I come to the conclusion there has been a misdirection in applying the legal principles to the facts of the case at hand.

The Defendant is not a public body. It is also not an administrative authority to whom **Section 33 of the Constitution Act of Eswatini Act of 2005** applies.

[82] The Defendant is a statutory body established in terms of the Sugar Act of 1967.¹² The Plaintiff also does not argue that it's a public body nor an administrative authority. There is therefore no reason why the interpretation of the relationship between the parties before court should go beyond the RFP document which constitute the terms and conditions of the tender that was published by the Defendant.

[83] In our law, the all-time honored way of formulating this question of delict is in the form of the famous but for test. Can it be said that, but for the wrongful act complained of, the concerned harm would not have ensued to the Plaintiff? Applying this test requires the process of inferential reasoning as described by *Corbert CJ in International Shipping Co (Pty) Ltd vs Bentley*¹³. What would have happened if the wrongful conduct is mentally eliminated and hypothetically replaced with a lawful conduct? A Plaintiff who can establish that in such event, the loss would on a preponderance of probabilities not have occurred. The rationale is that causation is regarded as having been established as a fact. A Plaintiff who cannot do so, will get nothing. That there is no discount either way, stems from the nature of the inferential process. The verdict must go one way or the other, even if the scales are tipped only slightly in one direction. *See Allied Maples Group vs Simmons and Simmons*.¹⁴

¹² See paragraph 51

¹³ 1990 (1) SA 680 (700 F2H)

¹⁴ [1995] R.W.T.R [1995] 4 ALL 1995 ER 907

[84] Considering the facts of the matter at hand, if one factors that the wrongful conduct as alleged against the Defendant is nonexistent. Then there is no reason to even continue with the enquiry any further, as the Plaintiff's case fails on the very first requirement of a delictual claim. The wrongfulness aspect of the alleged Defendant's conduct is not there.

[85] in buttressing it's arguments Plaintiff has further relied on the decision of *Westing House Electric Belgium SA vs Eskom Holdings (SOC) Ltd & another 2016 (3) SA 1 (SLA)*, particularly for the notion that a contracting authority may not rely on any other criteria, other than that expressly communicated to the bidders on the tender document.

[86] This argument supports the narrative that the tender document which is exhibit "MG1", did not call for the bidders to submit a proposed plan for carrying out the works.

[87] I have already made a finding of fact on this issue, that indeed the Plaintiff's contention is correct. The requirement to submit a proposed plan for carrying out the works was not part of the tender document. Be that as it may, the matter does not end there. This was not the only reason based on which the Plaintiff's tender was rejected. There were other reasons adduced especially considering the contents of exhibit "D4"¹⁵ which captures the following;

¹⁵ There are the minutes of the committee which also comprise the reasons of the award.

87.1 The Plaintiff was found to be a distribution company with no relevant experience.

87.2 The Plaintiff was found not to have demonstrated an understanding of the requirements for the tender.

87.3 The pricing was also considered by the committee and the budget limit had been confirmed to be E91.41 for refurbishment and E6.94 for disposal. The Plaintiff was found to have overpriced the priced the Defendant for their tender, and the Defendant formed the view that negotiating the price with them would not be visible.

87.4 There was also a finding that the Plaintiff's business is not in line with the tender.

[88] To then base the claim for damages on only one reason that was given, out of many, does not depict a holistic approach of reasoning. Even if you take into consideration the fact that the Defendant was incorrect to include the issue of the work plan as a reason, the other reasons still remain and they are valid. When one takes into consideration those reasons, the Plaintiff would still have not been eligible to be awarded the tender.

[89] The other issue that I consider material for determination, is the fact that when the Plaintiff decided to participate in the tender process, it tacitly accepted to be bound by the terms and conditions of the tender document. It is therefore

my assessment that, the Plaintiff cannot therefore rely on considerations of public policy, when the RFP document adequately regulates the tender process and contains specific terms and conditions which include the following;

- *That by submitting a tender, the tenderers accepts in full and with restriction the conditions governing conduct as the sole basis of the tendering procedure, irrespective of the suppliers own conditions of sale which it hereby waves.*
- *It is common cause that the Plaintiff was one of the tenderers and by submitting it's tender it was then bound by the conditions as spelt out in the RFP document, as the only basis for tendering.*
- *The contracting authority (Defendant) had the sole an absolute discretion whether or not to accept the lowest tender or any of the tenders, whether such tenderers qualify in terms of the criteria set out in the document or not. No claim of any nature would lie against the contracting authority in the event of it exercising such discretion and it shall furthermore not be required to give to any reason to any tender relating to it's decision¹⁶.*

¹⁶Western House Electric Belgium Societe Anonyme Skom Holdings and Another [2015] BOW ZAC SA 208 and the case Consortium vs Mayor Buffalo City Metropolitan Municipality and 2 Others Case No. 641/2012

[90] It is common cause that the contracting authority referred to in the above clause, is the Defendant. A close reading of the conditions reflect that in as much as the Defendant gave reasons as evident in the minutes, it was actually not obligated do so, when one considers the provisions of clause 17. The use of the word shall which is mandatory is instructive in that regard.

[91] The Plaintiff by submitting the tender, bound itself to such a condition. Further, it is part of the conditions that no claim of any nature shall lie against the Defendant in the event of it exercising such discretion.

[92] The very core basis of the current proceedings is that the manner in which the evaluation of the tender was done, does not accord to the principles of fairness and public policy. The basis given was not part of the tender conditions. Even if I would assume for a second, that the Plaintiff is correct with this argument, which I do not for the reasons which I have set out above. The Plaintiff's case would still have failed in light of clause 17. For the mere reason that the participation in the tender process by the Plaintiff constituted a contractual act on it's part, as per the terms as outlined in the tender document. Plaintiff was therefore bound by the conditions as set out therein. As I have stated above, the tender document stipulates that no claim of any nature would lie against the Defendant in the event such discretion is exercised. Therefore, the discretion by the Defendant in awarding the tender, is unassailable in the circumstances.

[93] I have considered at length the cases that has been cited by the Plaintiff in the bundle of authorities in support of it's heads of arguments. In as much all of them enunciate the correct legal principle. However, they are inapplicable to the matter at hand, as they pertain to public owned enterprises in South Africa, such can be equated to parastals established in terms of the Public Enterprises (Control and Monitoring Act of 1989) in our jurisdiction. This Act applies only to public enterprises which the Defendant is not.

[94] I agree entirely with the Defendant's argument that the Defendant is not a public Enterprise as determined by the **Public Enterprises Control and Monitoring Act of 1989** as read with **The Procurement Act No. 7 of 2011**. These pieces of legislation do not apply to the Defendant. Their procurement of goods and services is not done in terms of the aforesaid legislation. Infact it was done specifically in terms of the RFP as advertised. It is therefore, my conclusion that the reliance on all the cited judgments is irrelevant. They apply to public procurements and to public institutions. Therefore the exercise of quasi-judicial discretions finds no application in the matter at hand. The Defendant is an umbrella organization which brings together all growers and miller of sugar cane in Eswatini. No evidence has been adduced before court that the Defendant is a Public Enterprise.

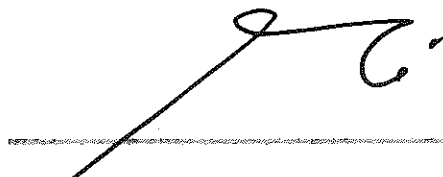
[95] It is therefore my conclusion that in light of the consideration that in a delictual claim such as this one, there must be a wrongful act or omission on the part of the Defendant. The Plaintiff must allege and prove the act or omission on which the cause of action is based. The case of **Coronation Brick (Pty)**

Limited vs Stracham Construction Co (Pty) Limited, 1982 (4) SA 371 at page 378 is instructive in this regard. Wrongfulness cannot be inferred from the nature of the loss suffered. The evidence adduced before court has failed to show any wrongful act or omission on the part of the Defendant. As I conclude, I deem it necessary to also consider the Plaintiff's assertion that there were corrupt practices on the part of its competitor that eventually won the tender. Despite that there is no evidence that was placed before court of such acts of corruption after that the allegation by the Plaintiff's director that he was offered a bribe. Even then, how is that act connected with the Defendant.

[96] It is against the backdrop of the foregoing that the Plaintiff's case ought to fail. It is accordingly dismissed with costs.

ORDER

The Plaintiff's claim is hereby dismissed with costs at an ordinary scale.



BW MAGAGULA

JUDGE OF THE HIGH COURT OF ESWATINI

For the Plaintiff:

S. Mngomezulu - Mngomezulu Attorneys

For the Defendant:

E. J. Henwood - Henwood & Company