IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Civil case No: 892/2014

In the matter between:

ROOTS CIVILS (PTY) LTD	**APPLICANT**
VS	
THE CHAIRMAN OF THE TENDER BOARD	**FIRST RESPONDENT**
THE MINISTRY OF FINANCE	**SECOND RESPONDENT**
THE MINISTRY OF COMMERCE INDUSTRY AND TRADE	**THIRD RESPONDENT**
THE MINISTRY OF ENTERPRISE AND EMPLOYMENT	**FOURTH RESPONDENT**
THE ATTORNEY GENERAL	**FIFTH RESPONDENT**
HEPTAGON CIVILS	**SIXTH RESPONDENT**
DUVAN DEVELOPERS	**SEVENTH RESPONDENT**
KUKHANYA (PTY) LTD	**EIGHTH RESPONDENT**
HOMEBOYS CONSTRUCTION (PTY) LTD	**NINTH RESPONDENT**
AFROTIM CONSTRUCTION (PTY) LTD	**TENTH RESPONDENT**
INYATSI CONSTRUCTION (PTY) LTD	**ELEVENTH RESPONDENT**
POTS CONSTRUCTION (PTY) LTD	**TWELFTH RESPONDENT**
S & B CONSTRUCTION (PTY) LTD	**THIRTEENTH RESPONDENT**

Neutral citation: *Roots Civils (Pty) Ltd vs The Chairman of the Tender Board and Twelve Others (892/2014) [2014] SZHC 430 (2014)*

Coram: **M.C.B. MAPHALALA, J**

Summary

Civil Procedure – interim interdict – application for an interim interdict pending a review of the tender award – essential requisites of an interim interdict considered – held that the applicant has failed to establish on a balance of probability that it was entitled to the interdict – application accordingly dismissed – no order as to costs.

JUDGMENT

18 DECEMBER 2014

---

[1] The applicant instituted an urgent application seeking the following order:

1. **That the rules relating to service and time limits be dispensed with and that this matter be heard and enrolled as one of urgency.**

2. **Interdicting the first, second, third and fourth respondents forthwith from awarding or proceeding with the award of the tender, being "The Construction of Matsapha Industrial Estate Phase II – Tender No. 59 of 2014/15" pending finalization of the review to be**

submitted in terms of section 47 of the Procurement Act No. 7 of 2011.

3. **That any of the sixth, seventh, eighth, ninth, tenth, eleventh, twelfth and thirteenth respondents who may have been awarded the tender be interdicted from proceeding with any works in respect of the said contract pending finalisation of prayer 2.**

4. **That prayers 2 and 3 hereinabove operate forthwith as an interim order pending the finalisation of the review.**

5. **That a *rule nisi* do hereby issue calling upon the respondents to show cause on a date to be stated by the above Honourable Court why prayers 1, 2 and 3 should not be made final.**

6. **That the first, second, third and fourth respondents pay costs of this application in the event that it is opposed.**

7. **Further and/or alternative relief.**

[2] The matter was heard on the 4th July 2014 by His Lordship Justice Stanley Maphalala who granted the rule nisi calling upon the respondents to show cause on the 11th July 2014 why the rule nisi should not be made final. An order was issued by the court dispensing with the rules of court relating to

service and time limits. The first, second, third and fourth respondents were interdicted from awarding or proceeding with the award of the tender pending finalisation of the review to be submitted in terms of section 47 of the Procument Act No. 7 of 2011. The sixth to the thirteenth respondents who may have been awarded the tender were interdicted from proceeding with any works in respect of the said contract pending finalisation of prayers 2 and 3, which were ordered to operate forthwith as interim orders pending finalisation of the review.

[3] In 2008 the Swaziland Government through the Ministry of Enterprise and Employment issued and advertised Tender No. 203 of 2008/09 for the development and construction of a New Industrial Estate in Matsapha. The applicant tendered for the project, and, the contract sum of the project as per the tender amount was E73 938 120.80 (seventy three million nine hundred and thirty eight thousand one hundred and twenty emalangeni eighty cents).

[4] The applicant alleges that after it was awarded with the tender, the Ministry of Enterprise and Employment indicated that the whole project had not been budgeted for; hence, it was agreed with the Ministry that the project would be carried out in two stages, the first stage would be a contract sum of E42 000 000.00 (forty two million emalangeni). The applicant contends that

when it had finalised with the first phase of the project, it awaited the relevant Ministry to advise it on the second phase of the project.

[5] The applicant further contends that on the 30th April 2014, it received an invitation from the Ministry of Finance in respect of Tender No. 59 of 2014/15; however, it objected in writing to the Ministry of Enterprise and Employment on the basis that the tender was in fact Tender No. 203 of 2008/09 which had been awarded to the applicant and subsequently completed. The applicant contends that it also raised the objection with the Ministry of Finance but did not receive a response thereto.

[6] The applicant alleges that on the 26th June 2014, it served correspondence to the principal secretary in the Ministry of Commerce, Industry and Trade demanding an undertaking that Tender No. 59 of 2014/15 be abandoned forthwith and that the applicant proceed with Tender No. 203 of 2008/09 as per the award.

[7] The applicant contends that it is entitled to the interdict on the basis that it was awarded Tender No. 203 of 2008/09, and, that it stands to suffer prejudice by the advertisement of Tender No. 59 of 2014/15. The applicant argues that Tender No. 208 of 2008/09 constituted a contract and that it was never

cancelled. The applicant further argues that it should have been consulted by the first and second respondents in the event that the contract was being cancelled. The applicant also argues that section 7 of the Procurement Act No. 7 of 2011 makes it mandatory for the first respondent to avail administrative rulings and directives of general applications in connection with procurements.

[8] The applicant argues that prior to the award, there has to be communication in terms of section 45 (1), (2), (3) (a) and (b) of the Procurement Act; and, that in the event that an award has been made, this court can interdict the process to allow for the proper ventilation of issues as per section 32 (a) of the Procurement Act. The applicant contends that it intends pursuing the process in terms of section 47 (1) and (2) of the Procurement Act No. 7 of 2011, and, that it would not make sense if the respondents were to proceed with the process.

[9] The first to the fourth respondents have filed an opposing affidavit. They contend that in 2008 the Ministry of Enterprise and Employment issued Tender No. 203 of 2008/09 valued at E73 938 120.80 (seventy three million nine hundred and thirty eight thousand one hundred and twenty emalangeni eighty cents); and, that the tender was subsequently awarded to the applicant on the 4th March 2009 at a reduced tender. They concede that the applicant had tendered for the entire scope of works for E73 938 120.80 (seventy three million nine

hundred and thirty eight thousand one hundred and twenty emalangeni eighty cents) but that it was awarded the tender at a reduced scope of E42 000 000.00 (forty two million emalangeni). To that extent they contend that during the conclusion of the contract, it was agreed between the Ministry of Enterprise and Employment as well as the applicant that the reduced tender was being awarded at the available sanctioned funds of E42 Million; hence, the site was handed over to the applicant on the 5th March 2009.

9.1 They further contend that before the contract was concluded the Ministry of Commerce, Industry and Trade instructed a consultant ZMCK Consulting Engineers to engage the applicant on whether or not they were prepared to undertake the project at the reduced scope of E42 million; and, the Consultant reported that the applicant had unconditionally agreed to undertake the project at the reduced scope. The consultant was further mandated to draw up a New Bill of Quantities to cover the reduced scope of works; hence, a new contract was concluded between the applicant and the Ministry of Commerce, Industry and Trade.

9.2 They also contend that the outcome of the agreement also resulted in some work which had already been undertaken by the applicant on the original scope of works to be aborted; hence, agreed adjustments were

incorporated in the contract pursuant to the reduced scope of works. They argue that the applicant submitted a claim for extension of time for doing the abortive works as well as disruption caused to applicant's original programming of its work valued at E8 million (eight million emalangeni); hence, it was agreed that together with the ancillary claims, the applicant was to receive E50 721 518.74 (fifty million seven hundred and twenty one thousand five hundred and eighteen emalangeni seventy four cents) for the entire tender.

9.3 They argue that construction on the original contract which was commenced on the 5th March 2009, was to be completed in fifteen months; however, this period was extended to the 3rd May 2011 to compensate for additional work required as well as the abortive works undertaken. The contract was effectively extended by two hundred and twenty five (225) days. They contend further that the applicant only completed the works on the 13th June 2013; hence, it was penalised E1 400 000.00 (one million four hundred thousand emalangeni).

9.4 They further argue that in May 2014 the Swaziland Government invited contractors to tender for Tender No. 59 of 2014/15 which was for the construction of the Matsapha Industrial Estate Phase II. It is common cause that the applicant has lodged proceedings before this court

interdicting the first to the fifth respondents from proceeding with the award of the said Tender; the applicant is also interdicting the sixth to the thirteenth respondents from proceeding with any works in respect of the said tender pending finalisation of this application.

9.5 They contend that the contract which was eventually concluded between the Government and the applicant relates to the reduced tender of E42 million. However, there is a confusing letter written by the Ministry of Enterprise and Employment and signed by Caleb D. Motsa, the Industrial Township Engineer, on behalf of the Principal Secretary; the letter is directed to the applicant. It reads in part as follows:

> **"Re: Tender No. 203 of 2008/2009 Infrastructure Development, Construction of a New Industrial Estate in Matsapha**
>
> ---
>
> **Following our conversation over the phone on the above subject-matter about the contract sum of the price of E42 000 000.00 (forty two million emalangeni), this letter serves as an assurance that the actual contract sum of the project is per the Tender amount.**
>
> **The Ministry is still waiting for the deliberation of the budget in Parliament to give out the outstanding amount in the project to make it complete as per the Tender amount to the contract sum of E73 938 120.80 (seventy three million nine hundred and thirty eight thousand one hundred and twenty emalangeni eighty cents).**

Your co-operation will be highly appreciated in this regard, thanking you in advance."

[10] The above quoted letter gives the impression that only E42 million is available in respect of the Tender of E73 938 120.80 (seventy three million nine hundred and thirty eight thousand one hundred and twenty emalangeni eighty cents), and, that the Ministry of Enterprise and Employment was still sourcing the balance of the contract sum from Parliament. The letter expressly states that it "serves as an assurance that the actual contract sum of the project is per the Tender amount".

[11] On the 4th March 2009, the Secretary to the Central Tender Board wrote a letter to the applicant in respect of Tender No. 203 of 2008/2009 and stated the following:

"I am directed by the Central Tender Board to inform you that you have been awarded the above cited tender at the reduced contract sum of E42 million.

You are required to contact the Principal Secretary, Ministry of Enterprise and Employment for further details."

[12] On the 5th March 2009, the applicant's Managing Director Reuben F. Msibi wrote and signed a letter of acceptance to the Principal Secretary of the

Ministry of Enterprise and Employment. The letter is copied to Sandile Makhubu of ZMCK Consulting Engineers. The letter reads in part:

> **"Re: Tender No. 203 of 2008/2009 – Infrastructure Development, Construction of New Industrial Estate In Matsapha**
>
> ---
>
> **With reference to the above mentioned contract, we greatly appreciate the Board awarding our company the tender and hereby forward our letter of acceptance for the reduced contract sum of E42 000 000.00 (forty two million emalangeni).**
>
> **We are looking forward to a good working relationship and do not hesitate to contact us in case of any query."**

[13] The first to the fourth respondents have attached a Bill of Quantities to their opposing affidavit signed by all the parties for the reduced contract sum of E42 million; the applicant's Managing Director, Reuben Msibi, signed the documents on the 7th August 2009. A memorandum from the National Tender Board to the Principal Secretary of Commerce, Industry and Trade is attached to the opposing affidavit, and, it is dated 2nd March 2012; it is copied to the Accountant General as well as the Auditor General. It reads in part as follows:

> **"Tender 203 of 2008/2009: Increase to the Contract Amount for the Construction of Matsapha Industrial Estate Infrastructure**
>
> ---

I am directed by the National Tender Board to inform you that your request for approval of the above cited contract amendment has been approved.

The approved service contractor is Roots Civil (Pty) Ltd. The contract sum of E42 000 000.00 (forty two million emalangeni) is increased by E8 000 000.00 (eight million emalangeni) to be E50 000 000.00 (fifty million emalangeni).”

The certificate of completion of works in respect of Tender 203 of 2008/2009 is also annexed to the opposing affidavit and duly signed on the 13th June 2013 by the applicant’s Managing Director as well as ZMCK Consulting Engineers.

[14] The first to the fourth respondents contend that the applicant was one of the contractors in categories 3 and 4 registered with the Ministry of Works and Transport who were invited to apply for Tender No. 59 of 2014/2015. They further contend that the applicant participated in the tender process including attending site meetings but was not successful. They deny that the applicant had filed an objection to the tender on the basis that it was the same as Tender No. 203 of 2008/2009. The respondents contend that the two tenders are separate and independent of each other, and, that tender No. 59 of 2014 /2015 was awarded to the sixth respondent, Heptagon Civil, on the 24th June 2014.

[15] The sixth respondent is opposing the application and has consequently filed an opposing affidavit; however, it concedes that it was awarded the tender on the 24th June 2014. It contends that it has purchased expensive machinery and further engaged an additional skilled and non-skilled workforce in anticipation of concluding a contract with the Swaziland Government after being awarded the tender. A letter awarding the tender to the sixth respondent is attached to the opposing affidavit; it is written and signed by the Secretary of the National Tender Board, and it reads in part as follows:

> **"Tender No. 59 of 2014/2015: Appointment of Contractor for Infrastructure Development Construction of the New Industrial Estate Phase II at Matsapha**
>
> ---
>
> **I am directed by the Swaziland Government Tender Board to inform you that you have been awarded the above cited tender at a Contract sum of E72 056 609.28 (seventy two million fifty six thousand six hundred and nine emalangeni twenty eighty cents).**
>
> **Please contact Principal Secretary Ministry of Commerce, Industry and Trade for signing of a contract."**

[16] The basis of the interdict is set out at paragraphs 13 to 17 of the founding affidavit. The applicant contends that it has a clear right to protect on the basis that Tender No. 59 of 2014/15 and Tender No. 203of 2008/09 constitute the same tender which it was granted for a contract sum of E73 938 120.80

(seventy three million nine hundred and thirty eight thousand one hundred and twenty emalangeni eighty cents). To that extent the applicant argues that the first to the fourth respondents cannot re-advertise the tender without consulting them, and, that the tender was to be carried in two phases with the initial phase at E42 million.

[17] However, it is apparent from the evidence that the applicant was awarded Tender No. 203 of 2008/09 at a reduced contract sum of E42 million on the 4th March, 2009. It is further apparent from the evidence that on the 5th March 2009, the applicant accepted the tender for the reduced contract of E42 million. A firm of Engineers ZMCK Engineers was also instructed to engage the applicant to ascertain whether or not it was prepared to undertake the project at a reduced contract sum of E42 million; hence, a new bill of quantities was drawn up to cover the reduced scope of works.

[18] It is apparent from the evidence that a valid contract was concluded between the applicant, and the Government for the reduced sum of E42 million. An amount of E8 million was allowed after the applicant had submitted a claim for extension of time in respect of abortive works as well as disruption caused to applicant's original programming of its work. Accordingly, it was agreed that the applicant would receive E50 721 518.74 (fifty million seven hundred and twenty one thousand five hundred and eighteen emalangeni seventy four cents)

for the tender. As stated in the preceding paragraphs, the certificate of completion of works is attached to the opposing affidavit filed by the first to the fourth respondents and signed by the applicant's Managing Director as well as ZMCK Consulting Engineers in respect of Tender 203 of 2008/09 for the reduced contract sum of E42 million.

From the aforegoing it is apparent that Tender No. 203 of 2008/09 and Tender No. 59 of 2014/15 are separate and distinct tenders. Tender 203 of 2008/09 has been finalised and Tender No. 59 of 2014/15 is a new tender which was awarded to the sixth respondent on the 24th June 2014.

[19] It is not in dispute that on the 30th April 2014 the Ministry of Commerce, Industry and Trade invited suitably qualified civil engineering contractors registered with the Ministry of Public Works and Transport under categories 3 and 4 in respect of Tender No. 59 of 2014/15 for the Infrastructure Development and Construction of Matsapha Industrial Estate Phase II. The applicant was one of the contractors that was invited and participated in the tender process.

[20] On the 5th May 2014 the applicant lodged an objection to Tender 59 of 2014/15 on the basis that it was the same as Tender No. 203 of 2008/09 which was awarded to the company on the 4th March 2009. Notwithstanding the

objection, the applicant undertook to attend the site inspection and do all that is necessary as per the tender requirement.

[21] On the 26th June 2014 the applicant's attorneys demanded that the Ministry of Commerce Industry and Trade should abandon the process of Tender No. 59 of 2014/15 on the basis that the tender was awarded to the company under Tender No. 203 of 2008/09. The applicant contends that the second respondent should have consulted it before re-advertising the tender because it had a substantial interest in the project. The applicant's contention was based on the wrong assumption that the two tenders constituted one and the same tender which had previously been awarded to the applicant under Tender No. 203 of 2008/09. I have dealt with the two tenders in the preceding paragraphs. Suffice to say that the objection lodged by the applicant has no merit since the applicant was only awarded a tender for a reduced contract sum of E42 millions.

[22] The applicant contends that there has been no communication made by the National Tender Board of the award to the contractors which participated in the tender required by the Procurement Act. The applicant argues that it only learnt of the award to the sixth respondent on the 10th July 2014 when it received the opposing affidavit of the first to the fourth respondents to which was attached the award dated 24th June 2014.

[23] Section 45 of the Procurement Act provides the following:

> **"45. (1) The awarding of contract shall be recommended to the best evaluated tenderer, as determined by the evaluation methodology and criteria specified in the invitation document.**
>
> **(2) The contract award decision shall be taken by the appropriate approvals authority, but the award decision does not constitute a contract.**
>
> **(3) Following the contract award decision, the procuring entity shall prepare a notice indicating the name of the best evaluated tenderer, the value of the proposed contract and any evaluation scores. The notice shall be –**
>
> > **(a) sent directly to all tenderers who submitted tenders by letter and, where appropriate, by fax or email; and,**
> >
> > **(b) published on the Government's public procurement website.**
>
> **(4) A procuring entity shall allow a period of at least ten working days to elapse from the date of despatch and publication of the notice in accordance with subsection (3) before a contract is awarded.**
>
> **(5) The provisions of subsections (3) and (4) shall not apply-**
>
> > **(a) where the value of the procurement does not exceed the threshold specified in public procurement regulations; or**
> >
> > **(b) in any other circumstances specified in public procurement regulations."**

[24] The essence of the notice referred to in section 45 of the Procurement Act is to assist a tenderer who wishes to lodge a review in accordance with section 46 of

the Act. However, section 47 of the Act requires that the aggrieved tenderer must show that he has suffered loss or injury caused by a breach of a duty imposed on a procuring entity by this Act. What is required is that the applicant must show that there was a serious irregularity in the tendering process capable of nullifying and setting aside the award of the tender. In the present matter, the founding affidavit does not disclose such an irregularity as envisaged by section 47 of the Act.

[25] The applicant seeks an interim interdict pending finalisation of a review to be submitted in terms of section 47 of the Act. Holmes JA delivering a unanimous judgment of the full bench of five judges in *Eriksen Motors Ltd v. Protea Motors and Another* 1973 (3) SA 685 AD at 691 said the following:

> **"The granting of an interim interdict pending an action is an extra-ordinary remedy within the discretion of the court. Where the right which it is sought to protect is not clear, the court's approach in the matter of an interim interdict was lucidly laid down by Innes, JA in *Setlogelo v. Setlogelo,* 1914 AD 221 at p. 227. In general the requisites are:**
>
> **(a) a right which "though *prima facie* established, is open to some doubt";**
> **(b) a well grounded apprehension of irreparable injury;**
> **(c) the absence of ordinary remedy.**
>
> **In exercising its discretion the court weighs, inter alia, the prejudice to the applicant, if the interdict is withheld, against the prejudice to the**

respondent if it is granted. This is sometimes called the balance of convenience.

The foregoing considerations are not individually decisive but are interrelated; for example, the stronger the applicant's prospects of success the less his need to rely on prejudice to himself. Conversely, the more the element of "some doubt", the greater the need for the other factors to favour him. The court considers the affidavits as a whole, and the interrelation of the foregoing considerations, according to the facts and probabilities . . . ."

[26] Friedman AJP in *Minister of Law and Order v. Committee of the Church Summit* 1994 (3) SA 89 at 98 had this to say:

"Whether the applicant has a right is a matter of substantive law."

The onus is on the litigant applying for an interdict to establish on a balance of probability the facts and evidence which shows that he has a clear right or *prima facie* right in terms of substantive law.

See Minister of *Law and Order v Committee of the Church Summitt* 1994 (3) SA 89 AD at 98. It is well-settled that amongst the requirements of an interdict, whether final or interim, is the right; and, that the other requirements are predicated on the presence of the right to the subject-matter of the dispute. See the case of *Maziya Ntombi v Ndzimandze Thembinkosi* Civil Appeal case No. 02/2012 at para 43.

[27] Herbstein & Van Winsen[1] deals with the requirements of an interdict as follows:

> **"In order to succeed in obtaining a final interdict, whether it be prohibitory or mandatory, an applicant must establish:**
>
> **a) a clear right;**
> **b) an injury actually committed or reasonably apprehended;**
> **c) the absence of similar or adequate protection by any other remedy**
>
> **An applicant for a temporary interdict will obviously succeed if able to satisfy the above three requirements, but the court has a discretion to grant a temporary interdict even where a clear right has not been proved. This the court will do if:**
>
> **(a) the right that forms the subject-matter of the main action and that the applicant seeks to protect is *prima facie* established, even though open to some doubt;**
> **(b) There is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing the right;**
> **(c) The balance of convenience favours the granting of interim relief; and**
> **(d) The applicant has no other satisfactory remedy."**

See *Setlogelo v Setlogelo* 1914 AD 221 at 227.

[28] Clayden J in *Webster v Mitchell* 1948 (1) SA 1186 (W) at 1189 said the following:

[1] Herbstein &Van Winsen, The Civil Practice of the High Courts of South Africa, Andries Charl Cilliers *et al*, fifth edition Vol. 1, Juta & Co. 2009 at pp 1456-1457

> **"The use of the phrase 'prima facie established though open to some doubt' indicates I think that more is required than merely to look at the allegations of the applicant, but something short of a weighing up of the probabilities of conflicting versions is required. The proper manner of approach I consider is to take the facts set out by the respondent which the applicant cannot dispute, and, to consider whether, having regard to the inherent probabilities, the applicant could on those facts obtain final relief at the trial. The facts set up in contradiction by the respondent should then be considered. If serious doubt is thrown on the case of the applicant, he could not succeed in obtaining temporary relief for his right, prima facie established, may only be open to 'some doubt'. But if there is mere contradiction, or unconvincing explanation, the matter should be left to trial and the right be protected in the meanwhile, subject of course to the respective prejudice in the grant or refusal of interim relief."**

[29] It is well-settled that in order to establish a *prima facie* right entitling an applicant to an interim interdict, an applicant should make out a case that he is entitled to final relief. However, if on the facts alleged by the applicant and the undisputed facts alleged by the respondent, a court would not be able to grant final relief, the applicant has not established a *prima facie* right and is not entitled to interim protection. See *Ferreira v Leviw NO*; *Vryenhoek v Powell NO* 1995 (2) SA 813 (W) at 817 as well as *Rizla International BV v Suzman Distributors (Pty) Ltd* 1996 (2) SA 527 (C) at 530.

[30] Holmes J as he then was in *Olympic Passenger Service (Pty) Ltd v Ramlagan* 1957 (2) SA 382 (D) at 383 brilliantly summarised the law relating to interim interdicts as follows:

". . . where the applicant's right is clear, and the other requisites are present, no difficulty presents itself about granting an interdict. At the other end of the scale, where his prospects of ultimate success are nil, obviously the court will refuse an interdict. Between those two extremes fall the intermediate cases in which, on the papers as a whole, the applicants' prospect of ultimate success may range all the way from strong to weak. The expression '*prima facie* established though open to some doubt' seems to me a brilliantly apt classification of these cases. In such cases, upon proof of a well-grounded apprehension of irreparable harm, and there being no adequate ordinary remedy, the court may grant an interdict; it has a discretion to be exercised judicially upon a consideration of all the facts. Usually this will resolve itself into a nice consideration of the prospects of success and the balance of convenience; the stronger the prospects of success, the less need for such balance to favour the applicant: the weaker the prospects of success, the greater the need for the balance of convenience to favour him. I need hardly add that the balance of convenience is meant the prejudice to the applicant if the interdict be refused – weighed against the prejudice to the respondent if it be granted."

[31] Having regard to the evidence before me, the applicant has no prospect of success in the final relief, and, to that extent, it is not entitled to the interim interdict. The applicant has failed to establish on a balance of probability that Tender No. 203 of 2008/09 and Tender No. 59 of 2014/15 constitute one and the same tender. Similarly, the applicant has failed to establish that Tender No. 203 of 2008/09 was awarded for a contract sum of E73 938 120.80 (seventy three million nine hundred and thirty eight thousand one hundred and twenty emalangeni eighty cents). On the contrary the evidence shows that the contract concluded between the parties was for a reduced contract sum of E42 million representing the first phase of the project.

[32] Accordingly, the following order is made:

(a) The *Rule nisi* issued on the 4th July 2014 and further extended on the 11th July 2014 pending finalization of the application is hereby discharged.

(b) The application is hereby dismissed.

(c) No order as to costs.

M.C.B. MAPHALALA

JUDGE OF THE HIGH COURT

For Applicant:	Attorney S. Mdladla
For First to Fifth Respondents:	Crown Counsel Nolwazi Kunene
For Sixth Respondent:	Attorney Thabiso Fakudze