



**IN THE COURT OF APPEAL OF THE REPUBLIC OF BOTSWANA HELD
AT LOBATSE**

**COURT OF APPEAL CIVIL APPEAL NO. CACLB-006-09
HIGH COURT MAHLB-000557-08**

In the matter between:

EYE-D SYSTEMS (PTY) LTD

APPELLANT

And

**THE PUBLIC PROCUREMENT AND
ASSET DISPOSAL BOARD**

FIRST RESPONDENT

THE ATTORNEY GENERAL

(Acting for and on behalf of Department of
Road Transport and Safety)

SECOND RESPONDENT

**SYSTEMS CONSULTANCY & SERVICES
(PTY) LTD t/a UNISYSTEMS**

THIRD RESPONDENT

FOR APPELLANT: Mr. M. Kadye (with him Mr. M. Sebonego)
FOR FIRST RESPONDENT: Mr. B. Bolele (with him Mr. T. Mandikate)
FOR SECOND RESPONDENT: Mrs. P. Aisam (with her Mrs. J. Mokoti)
FOR THIRD RESPONDENT: Mr. T. Matilo

JUDGMENT

**CORAM: RAMODIBEDI JA
FOXCROFT JA
HOWIE JA**

RAMODIBEDI JA:

[1] This appeal arises out of an award by the first respondent to the third respondent of a tender for the supply, installation, configuration and maintenance of equipment for the production of driving licence cards and public officer's cards in the Department of Road Transport and Safety ("the Department"). The appellant contends that the award was improper and that it ought to have been made to it. Its application for review was, however, dismissed by the High Court (Walia J). Hence this appeal.

[2] Briefly stated, the facts show that on 11 February 2008, the Department issued an invitation to tender for the supply of the services referred to in the preceding paragraph. Pursuant thereto, the appellant and the third respondent were subsequently short-listed and were called for a demonstration on the proposed hardware. In this connection, it is useful to record that the hardware

components which were necessary for the demonstration were a camera, a printer and a signature pad. Part C of the invitation to tender specifically provided as follows –

“The proposed equipment must be operated using Card Five Card Production System (CFCPS) integrated with Driver’s Licensing System (DLS). Hence the Bidders will be called to come for Demonstration proving that the equipment operates with CFCPS.

The demonstration will be based on passing the following criteria i.e.

- 1. The duration taken to set up the equipment*
- 2. Quality of the picture and signature on the card.*
- 3. Time taken to produce the licence card (maximum of 5 minutes).*
- 4. Compatibility with CFCPS.”*

Furthermore, the appellant and the third respondent were specifically forewarned in writing in terms of annexure “GM2” that the evaluation team would be interested in looking into the functioning of the proposed product, including its flexibility with the Card Five Production Software, (CFCPS).

[3] The parties are on common ground that the first demonstration, held on 28 May 2008, was nullified after it transpired that the interfacing of the Card Five System with the Driving Licence System had not yet been completed. A second demonstration was accordingly scheduled for 9 June 2008. It is the appellant's case that the third respondent should have been disqualified at that stage and that it was not necessary to hold the second demonstration. In my judgment this submission is now academic since the appellant made no objection to the rescheduling of the demonstration. On the contrary, the appellant fully participated in the latter demonstration. It can now not be heard to complain on this issue.

[4] It is strictly unnecessary, in my judgment, to refer to all the accusations and counter accusations concerning the alleged irregularities at the second demonstration which took place on 9 June 2008. It will suffice merely to point

out that, in summary, the material allegations in support of the appellant's case for review were:-

- (1) That the first respondent extended favours to the third respondent by lending it software and allowing it to use its own laptop/computer. The appellant complained, therefore, that the first respondent acted unfairly and that "the playing field was not level."
- (2) That the first respondent's computer which was to be used to install and demonstrate the appellant's equipment had a virus. The appellant complained that this caused a delay of 45 minutes to remove the virus, thus eating into the 60 minutes which had been allotted to it for the demonstration in question. Hence the appellant complained that it was not given an adequate opportunity to do its presentation.

- [5] I pause there to note that the appellant relies mainly on s26 of the Public Procurement and Asset Disposal Act (Cap.42:08) (“the Act”). This section provides in relevant parts as follows:-

“26. Unless otherwise provided for in this Act or any other enactment, the Board shall ensure that all public procurement and asset disposal entities, in making their decisions take into account the principles of

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(e) *fair and equitable treatment of all contracts in the interest of efficiency and the maintenance of a level playing field.*

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(g) *integrity, fairness of and public confidence in, the procurement and disposal process.”*

- [6] In approaching the present matter in the light of the Act, it is important to bear in mind the remarks of Marumo J which were quoted with approval by this Court in **Public Procurement and Asset Disposal Board v Researched Solutions Intergrators (Pty) Ltd And Others [2006] 1 BLR 319 (CA)** at 332, namely:-

“Quite clearly the Act constituted the first respondent and clothed it with extensive powers to enable it to play the role of guardian to the public interest in the area of public procurement and asset disposal. It is a momentous fiduciary duty whose gravity should not be downgraded for a moment.”

This Court then proceeded to express the following view:-

“[W]hen ss 26 and 27 say that the Board is to ensure compliance, that requirement cannot be satisfied by a mere examination of reports taken at face value. It requires at least a sceptical and penetrating scrutiny of the material placed before it and a readiness to ask questions to make sure that the material which lies behind the reports and the basis of any recommendations has been properly understood. In a case like this, where a balance has to be struck between undue interference on the one hand and adequate scrutiny on the other it is not possible to formulate a simple rule which can easily be applied to determine what the Board has to do in any particular case.”

- [7] In dismissing the appellant’s review application in the present matter the court a quo expressed itself in these terms:-

“13. *The hardware required to be produced by the applicant and the 3rd respondent was camera, card printer and signature pad. I believe that the provision of the 2nd respondent’s computer was an expedient as that computer was compatible with the CFCPS software.*

14. *I find therefore that in allowing the third respondent to use its own laptop, the 2nd respondent had not in anyway rendered the playing fields uneven, nor can I say that the applicant has suffered any prejudice thereby. I cannot agree that the use of the computer provided by the 2nd respondent was a requirement of the tender or the invitation to demonstrate.”*

[8] In deciding whether or not the court a quo was correct in reaching this conclusion, it is necessary to examine the relevant facts in some detail. A good starting point, in my judgment, is to set out a short chronology of the relevant events.

[9] As pointed out earlier, the demonstration which gave rise to this appeal took place on 9 June 2008.

[10] On 10 June 2008, the Evaluations Committee recommended that the tender in question should be

awarded to the third respondent. This decision was based on a comparison of the strengths and weaknesses of the appellant and the third respondent. In a nutshell, the appellant had scored 1198 points whereas the third respondent had beaten it with a score of 1257.50 points. The disadvantages recorded against the appellant were (1) that the appellant had taken one hour to set up the system. It could not properly set up the printer. (2) the appellant's camera could easily be stolen and that it was "too small to be on the counters." As such it needed proper settings and adjustments. (3) the picture quality was "very poor". In these circumstances, I consider that no fault can be found with the decision of the Evaluations Committee. It was in a better position than the court to evaluate the performance of the two bidders at the demonstration in question.

[11] On 3 July 2008, the first respondent approved the recommendation of the Evaluations Committee. It accordingly awarded the tender to the third respondent.

[12] The appellant's complaint that the third respondent was unfairly allowed to use a laptop at the demonstration in question can similarly quickly be disposed of. This is so because the appellant was itself the designer of the Card Five Professional System in question. On 26 May 2008, Mr. Gape Morake representing the appellant sent an e-mail to the Senior Systems Analyst, namely, Mr. Samuel Nkomba. Because of its importance to the determination of this appeal this e-mail is reproduced in full and verbatim:-

"Sam,

About your request, everything will be finalised on Thursday, with the submission of the QAT document on Friday. This, according to me, does not affect the Hardware presentation. I believe the demonstration and presentation environment MUST (sic) fair and transparent to all who will be presenting. It is in this regard that I advice (sic) you to consider using the cardfive professional version used for produce (sic) Instructors card for the presentation. The reasons being:

1. The interfacing of DLS and Cardfive SDK is not fully complete.

2. *The cardfive professional version is readily available for use in your office. If any equipment is successful with Cardfive Professional version, it MUST do the same with the resultant application developed from interfacing DLS and Cardfive SDK. The resultant application developed from DLS and Cardfive SDK interfacing will support all equipment supported by Cardfive Professional version. Everyone knows that its (sic) been in the market for over ten years and support a lot of ID card production hardware. Consequently, any failure to print cards, capture portrait and capture signature will be not (sic) associated with the software but the hardware.*

3. *The interfacing of DLS and Cardfive SDK project is been done by Eye-D Systems and it will seem not fair for the other tenderers.*

4. *The main purpose of the demonstration is whether the hardware can print, capture portrait and signature using cardfive.*

5. *You must also remember that the ITT requested for equipment that can work using cardfive.”*

[13] It is, in my view, therefore, a factor decidedly against the appellant that it categorically stated that “any failure to print cards, capture portrait and capture signature” would not be associated with the software but with the hardware. In a nutshell, it is self-evident that the appellant has itself provided proof in this statement that the use of a laptop was immaterial. Furthermore, by

letter annexure “GM6” dated 13 August 2008, and addressed to the first respondent, the appellant’s attorneys crucially admitted that the appellant had the same software as was lent to the third respondent. The letter reads in part as follows:-

“Client however agrees that it has cardfive professional software which it sourced on its own for the purposes of performing its in-house testing.”

[14] Indeed, in paragraph 22 of the replying affidavit of Gape Morake the appellant conceded that the computer used for the demonstration was “the same computer” which he had been using on a daily basis. Clearly, this must be so because the appellant had been employed to design the software system in question. For good measure, the appellant made the following crucial admission in paragraph 21 of the replying affidavit of Gape Morake:-

“For the record and for purposes of clarity Applicant designed the programme in question. The system was designed because the initial system that was in place would not operate with various hardware components. One of the primary objectives was to have systems that can

operate with various hardware. Applicant has designed this system and it has been tested against various hardware and it is working.”

It follows that there cannot have been any possible prejudice to the appellant in these circumstances.

[15] It is a telling factor, in my judgment, that in its first letter of complaint to the first respondent, annexure “GM3”, dated 24 July 2008, the appellant did not raise any complaint about either the use of a laptop or any alleged virus in the first respondent’s computer. The conclusion is thus inescapable in my view that these complaints are nothing but an afterthought.

[16] Although not raised in the appellant’s grounds of appeal, it was submitted on its behalf that it was not given adequate time to do its demonstration. This is denied by the respondents. They aver that the appellant has got only itself to blame in that it failed to set up its equipment timeously. There being a dispute of fact on

the issue, I consider that the respondents' version should be accepted on the authority of **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A)** at 634-635.

[17] It follows from the foregoing considerations that the learned Judge a quo was justified in coming to the conclusions fully set out in paragraph [7] above. Accordingly, the appeal falls to be dismissed with costs. It is so ordered.

DELIVERED IN OPEN COURT AT LOBATSE THIS 30TH DAY OF JULY 2009.

**M.M. RAMODIBEDI
JUSTICE OF APPEAL**

I agree

**J.G. FOXCROFT
JUSTICE OF APPEAL**

I agree

**C.T. HOWIE
JUSTICE OF APPEAL**

