HH 250-24
Ref: HCHC 627/23

PECUS ENTERPRISES (PVT) LTD T/A TAGTEL COMMUNICATIONS

Versus

POWERTEL COMMUNICATIONS (PVT) LTD

And

THE PROCUREMEMT REGULATORY AUTHORITY OF ZIMBABWE

HIGH COURT OF ZIMBABWE

COMMERCIAL DIVISION

CHIRAWU-MUGOMBA J

Harare 27 May, 5, 6, 9, 12, 14, 17 June 2024

*O. Chitowamombe,* for the plaintiff

*T. Chiguvare,* for the first defendant

**TRIAL CAUSE**

CHIRAWU-MUGOMBA J: The dispute in this matter relates to the flighting of a tender by the first defendant for the supply and delivery of 70 kms of 24 core CST armoured cable. The plaintiff in its summons and declaration contends that this tender was flighted on or about the 31st of May 2023 through an email request for quotation. The first defendant communicated on the 13th of July 2023 that the plaintiff was successful in its bid. It directed the plaintiff to pay the sum of USD$2443 to the second defendant to enable release of the contract documents. Despite payment of this amount, the first defendant has failed, refused or neglected to release these tender documents. The plaintiff therefore seeks an order for specific performance to the value of USD$246 743 and payment of costs on a legal practitioner to client scale. Alternatively the plaintiff seeks damages in the sum of $246 743 being the value of the tender and occasioned by the breach of contract.

The first defendant raises a special plea. It contends that the tender award was cancelled in terms of the provisions of the Public Procurement and Disposal of Assets Act [Chapter *22:23*], the "Act". The plaintiff was notified of this cancellation on the 10th of August 2023. The matter is therefore a challenge to procurement proceedings. The plaintiff has not exhausted the internal remedies as specified in the Act. The matter is improperly before the court and ought to be dismissed with costs on a higher scale.

On the merits, the first defendant contends that the plaintiff initially refused to pay administration costs as directed to the second defendant. This impacted on the urgency of the matter and prompted the first defendant to seek approval to cancel the tender award. By the time the proof of payment was submitted, the first defendant had already sought and obtained quotations from other suppliers. It realised then that the amounts charged by the plaintiff were above the market average. Payment to the plaintiff therefore would be contrary to public interest. As for the refund of USD$2443, the plaintiff should engage the second defendant. Further, that there was no contract between the plaintiff and the first defendant. Resultingly, there is no legal basis for seeking an order for specific performance and damages.

The second defendant on the other hand pleaded simply that it had not been approached by the plaintiff for a refund of the ZWL11,006, 749 that the latter had paid. Further, it was not refusing to pay. At a case management meeting held on the 9th of May 2024, the second defendant was excused from the proceedings on the basis that it would pay the said amount in ZIG equivalent upon request. The effect of this is that the amount at stake is USD$244 300, the part on administration costs having been settled.

At the trial, the plaintiff and first defendant led evidence from one witness each as summarised below. Sikhumbuzo Ndlovu is the General Manager of the plaintiff. He testified as follows. On the 31st of May 2023, they received an internal memo to bid for the supply of a 2 core CST cable. The closing date for the bid was the 1st of June 2023. The plaintiff obliged and after that they were awarded the tender and this was communicated through a letter of award. The tender was flighted through an email and it had a specific request that the bidder had to quote for what it had in stock. Exhibit 1 is a copy of the email. A quotation was sent as appears on page 18 of the record, Exhibit 2. After this, the first defendant paid a visit to the premises of the plaintiff to establish whether the goods requested in the bid were

available and to also request for a sample. This was for purposes of assessing the quality. The visiting team comprised of a procurement officer and a technical team member. Exhibit 3 on page 27 is the letter confirming award of the tender bid. The plaintiff duly paid the administration fee as appears on page 19, Exhibit 4. It is not factually correct as contended by the first defendant that refusal to pay the administration fee impacted on urgency and prompted the first defendant to look for other bids. A number of emails were sent to the first defendant requesting for a draft contract. They were only told when they sent the third email that they needed to pay administration fees to the second defendant and this was done. The correspondence appears from pages 20-26 and is Exhibit number 5. The letter of cancellation as per exhibit 6 caught the plaintiff by surprise. The explanation in the letter addressed the issue of due diligence and not public interest. As an awarded bidder there was no need to go through the route of exhausting internal remedies. That is reserved for a bidder who is challenging outcome of a bid. In other words, an unsuccessful and not a successful bidder is the one expected to follow such route. The issuance of the award confirmed the contractual obligation. The plaintiff was never privy to the other bidders and only became aware of other bidders for a totally different bid during case management. The issue therefore of public interest does not come in. In his view, due diligence is conducted before an award as confirmed by the visit from the first defendant. The damages claim primarily captures the aspect of opportunity lost. During the period, the plaintiff was unable to utilise the stock that was in store. They believed that the first defendant would make good on the contract. The format used to arrive at the claim is based on a nominal figure, its actual loss as well and opportunities lost. The probability of getting another buyer for the product is relative to the time period. The year 2023 was an election year so opportunities differ. A percentage cannot be established because it is something that differs. The absence of documentary evidence to support the claim can be explained on the basis that the plaintiff and the first defendant are competitors in the market in terms of service provision. The plaintiff did not see it fit to produce evidence as the first defendant is a competitor.

For the first defendant, evidence was led from one Kudakwashe Gutusa in his capacity as the procurement manager. His testimony is as follows. The first defendant is a wholly owned subsidiary and ICT arm of the Zimbabwe Electricity Transmission Authority (ZESA). It is also registered under category A with POTRAZ. He confirmed that the plaintiff

participated in a request for quotation for the supply and delivery of 24 core armoured cable. The tender process is regulated by the second defendant in terms of the Act and S.1 5/2018 as well as the Public Finance Management Act [ Chapter *22:19*]. There are also circulars and directives issued from time to time by the relevant Ministries. He was involved in the tender process for the current dispute. The first defendant proceeded on a request for authority to tender through request for quotations as per exhibit 7 on pages 51-53. The request was specifically that they be granted authority for procurement above USD$10 000 pending finalisation for running tenders. This involves soliciting quotations from reputable suppliers. A response was received from the second defendant as appears on page 56 , exhibit number 8. The effect of the response was an approval of the request. The terms of the approval appear on page 57, i.e the second page of the letter. On page 58, exhibit 9, the second defendant condoned the fact that the first defendant had already solicited for quotations without prior approval. He further testified that two entities, one of whom is the plaintiff successfully bid under the request for quotation procurement method. The tender amount was USD$244 300. This translates to a unit price of USD$3.49 per metre. However, no written contract was entered into. Subsequently, the first defendant sought the approval of the first defendant to set aside or cancel the award. The response from the second defendant was to the effect that it was not responsible for issuing directives and that the second defendant should comply with s14 of the Act. On the 10th of August 2023, the second defendant cancelled the contract in line with s42 of the Act specifically on the ground of public interest. Another request for quotations had been done and it emerged that the price charged by the plaintiff was above the market value. Some bids were for as low as 0.91 cents a metre. In line with s45 of the Act that frowns upon irregular expenditures, and guided by a circular from the parent Ministry which emphasised due diligence on all running tenders and contracts, the award was cancelled. Pages 82-102 is a list of quotations including one from the plaintiff as well. The second defendant relies on public funds and it must be seen to be utilising them in a manner that does not constitute wasteful expenditure. The approach by the plaintiff to the courts is unprocedural because they ought to have challenged the procurement proceedings. The claim for damages is invalid because there is no written contract.

From this evidence, certain facts are common cause. These are that the plaintiff was invited by the first defendant to participate in a bid through a request for

quotation procurement method. The plaintiff duly complied and submitted one and it was successful in the bid. The second defendant notified the plaintiff of this fact. The plaintiff paid the requested amount as of administration fees to the second defendant ,which it complied with but was never given tender documents. Therefore there is no written contract between the parties. The second defendant subsequently cancelled the award. There was a second request for quotations that the plaintiff participated in and was unsuccessful.

At a case management meeting convened on the 9th of May 2024 in terms of R18 of the High Court (Commercial Division) Rules, 2020, the following issues were identified for trial.

I. Whether or not the plaintiff ought to have exhausted preliminary remedies as specified in the Public Procurement and Disposal of Assets Act [ Chapter *22:23*]? (special plea).

II. Whether or not the 1st defendant was justified in cancelling the tender award on the basis of public interest?

III. Whether or not the 1st defendant breached the contract?

IV. If so, whether or not the plaintiff is entitled to damages and if so the quantum?

Part X of the Act generally deals with challenge to procurement proceedings. Specifically s73 provides as follows,

> **73. Challenge to procurement proceedings**
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> ( 1) A potential or actual bidder in procurement proceedings who claims to have suffered, or to be likely to suffer, loss or injury due to a breach of a duty imposed on a procuring entity by or under this Act, may challenge the procurement proceedings by lodging a written notice with the procuring entity in accordance with this section.
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> (2) Where notice of the award of a contract has not yet been issued, a challenge may be lodged at any stage of the procurement proceedings up to the date on which such notice is issued: Provided that, where the grounds of a challenge concern alleged improprieties in the invitations to bid or to pre-qualify which have become apparent before bids were opened, the challenge shall be lodged prior to bid opening.
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> (3) Where notice of the award of a contract has been issued, a challenge may be lodged only within the fourteen-day period referred to in section 55(2) or 60(14).

The Act defines procurement proceedings or process as, meaning " all stages or any stage of the procurement of goods, construction works or services conducted by a procuring entity from the pre-bid stage up to and including the award of the contract." The contention by the

first defendant is that the plaintiff ought to have utilised the above provisions whilst that of the plaintiff is that it applies only to unsuccessful bidders.

Section 55(2) reads as follows,

> **55. Contract award**
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> (2) Before the expiry of the period of bid validity, the procuring entity shall notify-
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> ( a) the successful bidder of the proposed award and of the time within which the contract must be signed, subject to any intervening challenge filed in accordance with Part X; and
>
> (b) the other bidders of the name and address of the proposed successful bidder and the price of the contract;

and the contract shall not be signed until at least fourteen days have passed following the giving of that notice.

Section 60(14) reads as follows,

**60. Quality and cost- based selection method**

> (14) After negotiations in terms of subsection (12) or, as the case may be, subsection ( 13) have been successfully completed, the procuring entity shall promptly notify other firms on the short-list that they were unsuccessful, and shall not sign a procurement contract with the successful firm until at least fourteen days have elapsed following the giving of that notice.

It is deliberate that the period of 14 days appears in S73(3), 55 (2) and 60(14). It is in my view a time when even if a bidder is notified that they have been successful, nothing will take place even in terms of signing the contract. As per exhibit 3, the first defendant notified the plaintiff that its bid was successful on the 13th of July 2023. The plaintiff was advised to pay administration fee to the second defendant which it duly did. The fourteen-day period would in the event that the plaintiff wanted to challenge the proceedings, have expired on the 27th of July 2023 without factoring in weekends and public holidays and on the 2nd of August 2023 if these were factored in. However, there was at that stage, nothing to challenge as the plaintiff was satisfied with the award and was awaiting receipt of a written contract. The parties were in communication. The first defendant cancelled the award on the 10th of August 2023, way after the fourteen -day period. I find it baffling and insincere on the part of the first defendant to raise a special plea averring that the plaintiff ought to have challenged the procurement proceedings. Within the fourteen days window period calculated from the date of award, there was nothing to challenge. I therefore dismiss the special plea of the first defendant.

The reason advanced by the first defendant in its evidence in chief for cancellation of the award was that the plaintiff was unwilling to pay the administration fees. As per exhibit 10 the first defendant falsely claimed that the plaintiff had refused to pay the administration fee. Under cross examination, the first defendant persisted with the false narrative. The evidence from the plaintiff proves, as appears on pages 20-26 exhibit number 5 that the two parties were in constant communication over the administration fees with the plaintiff finally paying after persisting with its request. The first defendant also averred that since the entity had been given authority by the second defendant to proceed on the request for quotation method, they conducted a second bid process which showed that the pricing of the plaintiff was way beyond the average. For the same unit price that the plaintiff was quoting at $3.49, other bidders quoted $0.91, $1.09 and Rand 8,50 as appears in exhibit number 11 pages 84-102. The first defendant explained further that it relies on tax payers funds and it would be foolhardy to proceed with the award in circumstances where the plaintiff's bid price was four times higher. That would constitute wasteful expenditure Indeed it is noted that the contract was subject to due diligence. The plaintiff asked a pertinent question regarding the stage at which this was supposed to be conducted. From the evidence led, the first defendant did not deny that its representatives visited the plaintiff's premises, satisfied themselves that the merx was in stock as well as the quality. It appears to me that the first defendant is conflating the first and second tender bids. The first one is that which was awarded to the plaintiff. The second tender bid using the same method of requesting for a quotation cannot be by any means be used as a due diligence process. In my view, had the quotes from the second bid come during the first tender bid process, the first defendant's assertion may have held water. As I have already pointed out and for emphasis, the reason advanced by the first defendant for cancelling the contract proved to be a falsehood. There was no comparison or evidence as to the quality of the merx nor was there evidence of site visits by the first defendant. This, puts paid to the first defendant's argument regarding cancellation on grounds of public interest and lack of due diligence. Having made this finding, let me hasten to state that, this is not the crux of the matter.

The fundamental issue that has to be decided is that of the contract between the parties. There can be no breach without a contract in place. This necessarily requires a proper

analysis of the evidence relating to the award. As per the dicta by CHITAKUNYE JA, in *Delta Beverages (pvt) Ltd vs. Blakey Investments (pvt) Ltd,* SC-59-22,

> "It is trite law that a contract is an agreement by two or more parties entered into with the serious intention of creating a legal obligation. In order for a contract to be binding it must meet the following criteria: it should be freely entered into, lawful, possible to perform, parties must have contractual capacity, made with the serious intention to contract, the parties must be ***ad idem*** and the agreement must not be vague."(my emphasis).

In *PTC vs. Support Construction (pvt) Ltd*, 1998 (2) ZLR 221 (S), the Supreme Court had occasion to deal with a matter involving a tender bid. In that matter, The appellant corporation invited tenders for the construction of a post office in Marondera. The tender documents were to be submitted to the Secretary of the Government's Tender Board. The respondent submitted a bid, and the appellant wrote to the respondent to say that the bid had been successful. Shortly afterwards, a further letter was sent, enclosing contract documents, to be signed by the respondent and returned to the appellant. A few months later, the appellant wrote to the respondent, saying that the Tender Board had ordered it to cancel the contract and to accept a bid by another company. After fruitless discussions with the appellant, the respondent finally pointed out that the appellant was, in terms of the contract, obliged to pay the compensation for cancellation provided for in the contract. The appellant 's response was that there was no contract. It was argued that acceptance of the respondent 's bid should have been by the Tender Board, not by the appellant; alternatively, that the documents signed by the respondent had not been signed by the appellant and thus did not constitute an agreement. It was held that the evidence was clear that the respondent had submitted his bid to the Tender Board, as required. It was further held that the tender was put out as a —PTC Tender and the contract was to be entered into between the PTC and the successful bidder. The acceptance of the bid was therefore to be by the appellant, not by the Tender Board. Further that, that the evidence showed that there had been acceptance by the appellant of the tender. An invitation to tender is an invitation to treat. The tender is the firm offer and the acceptance of the tender results in a binding contract. The wording of the appellant's letter was not conditional. Even if the first letter could not be taken as an acceptance, the second one clearly stated that the respondent's bid had been accepted. Even if the letters did not constitute acceptance, the contract was concluded when the respondent signed, stamped and returned the contract

documents sent to it by the appellant. It was not necessary for the appellant to sign them for the contract to be binding.

In *casu,* in the letter notifying the plaintiff of the award, it was specifically stated that a draft contract payable in local currency at the prevailing rate was being prepared for review by the plaintiff and subsequent signing. The plaintiff, in its correspondence with the first defendant consistently referred to the draft contract that it was awaiting to review. The question then becomes one of formation of the contract – was it intended to be legally binding only when reduced to writing? This question was answered by the Supreme Court in the case of *Mhute vs. Chifamba*, 1999(2) ZLR 115(S). The *dicta* in that matter is that the burden of proof rests on the party who asserts that the verbal contract was not intended to be binding until it is reduced to writing and signed. In my view in *casu*, the understanding between the parties from the letter of the award is that there needed to be a written contract. It appears to me that constant reference even by the plaintiff to a draft contract bears credence to this conclusion. I am further fortified in my view by the fact that the Act addresses the signing of the procurement contract by the accounting or other person so delegated in terms of s55(4). I did not hear the plaintiff placing specific terms of the contract before the court.

While cognisant of the *dicta* in the *PTC Construction (pvt) Ltd* case that an invitation to bid constitutes an invitation to treat, I distinguish that matter from the present in that in the former, contract documents were send and the award was not conditional. In *casu,* the offer was conditional on the plaintiff receiving a draft contract and reviewing it- See generally , Christie, *Business law in Zimbabwe*, Juta and Company Ltd (2016) edition at pp52. None of this was done hence the constant clamour by the plaintiff for the first defendant to avail the draft contract. I therefore make a finding that there was no contract between the plaintiff and the first defendant. As a result, it is not necessary to deal with whether or not the first defendant could cancel on the basis of public interest. Having made a finding also that there was no contract, there cannot be breach of a non -existent contract. The question of the alternative remedy of damages also falls away.

On the question of costs, it seems to me that both the plaintiff and the first defendant were not entirely successful. The first defendant did not succeed in its special plea and the plaintiff in the main claim. I, will therefore order that each party shall bear its own costs.

**DISPOSITION**

1. The plaintiff's claim be and is hereby dismissed.

2. Each party shall bear their own costs.

*Shava Law Chambers*, plaintiff's legal practitioners.

*Muvirimi Law Chambers*, first defendant's legal practitioners.