

BREASTPLATE SERVICES (PVT) LTD
t/a NEMCHEN
versus
DELTA BEVERAGES (PVT) LTD
and
BLACKBOX INVESTMENTS (PVT) LTD
and
CHEMATRON PRODUCTS ZIMBABWE (PVT) LTD
and
JW SEARCY (PVT) LTD
and
CHEMICALS MERCHANTS (PVT) LTD
and
INTERGRATED HYGENE SYSTEMS (PVT) LTD
and
CERNOL CHEMICALS ZIMBABWE (PVT) LTD

HIGH COURT OF ZIMBABWE
MUNANGATI-MANONGWA J
HARARE, 6 & 14 July 2022

ER Samukange, for the applicant
G Gapu, for the 1st respondent
T H Nyabeze, for the 2nd respondent
Mr Tsuru, for 7th respondent

Urgent Chamber Application

MUNANGATI-MANONGWA J: The applicant approached this court on an urgent basis seeking the following relief:

Terms of the final order sought:

1. That the interim relief be and is hereby confirmed.

That the first and second respondents jointly and severally be and is hereby ordered to pay costs of suit on the legal practitioner and client scale.

Interim relief granted

Pending the determination of the application for review under HC4317/22 Applicant is granted the following relief

1. First and second respondents be and are hereby interdicted from effectuating carrying into execution and /or performing the tender award to the second respondent described as CIP and Chemicals Tender.

Service of the Provisional Order

Service of this order may be effected by the Applicant's legal practitioners on the respondents or its legal practitioners.

The first respondent flighted a tender dubbed CIP and Chemicals Tender for Harare and Bulawayo. The applicant participated in the tender process and submitted its bid documents timeously. The applicant was then informed on 8 June 2022 that it had not been successful in its bid. The applicants seek relief against the first and second respondents only, and cited the other respondents as interested parties since they participated in the bidding process. Only one person a representative of the seventh respondent attended. It is the applicant's case that on the 29 June 2020 it became aware that an employee of the first respondent one Enita Moyo had interacted with W.F.Mareesa an employee of the second respondent. The applicant alleges that it had not been aware of this interaction and is of the view that second respondent got an unfair advantage over the applicant and the rest of the respondents who submitted bids as second respondent's employee had interacted with the first respondent's employee. It alleges that its view is justified given that the tender was awarded to the second respondent. The applicant submitted that it is grossly irregular for a procuring entity's key official to interact with prospective suppliers during the tender proceedings. They refer to an email by the second respondent's official one Brendon Fisher to Rose Mbelegwa an employee of the first respondent wherein he complained of the inappropriateness of the interaction between Enita Moyo and W.F.Mareesa. The applicant complains that no disciplinary measures were taken against Enita Moyo by first respondent for this inappropriate behavior. It is the applicant's contention that it is entitled to a fair impartial and lawful process by any tribunal hence its rights have been infringed. The applicant further submitted

that it is currently rendering services to the first respondent and has filed a review application seeking the nullification of the tender process and the setting aside of the award. Contending that it has no other remedy, the applicant stated that if the interdict is not granted the review application or any other relief that may be given will be *brutum fulmen*.

The first respondent opposed the application and raises several points *in limine*. The first respondent raised issue with the **urgency** of the application stating that the first respondent had already engaged the second respondent on 1 July 2022. As second respondent had already started rendering services it is too late to hear this application on an urgent basis. The first respondent further submits that the relief sought is incompetent for it cannot operate without a service provider pending the determination of the review application, moreso when the applicant has not provided an alternative solution to the matter. The first respondent argued that there is no legal basis for interdicting the operation of the cleaning contract between the first respondent and the second respondent. The counsel for the first respondent further submitted that the applicant's founding affidavit does not show the irreparable harm that will accrue and does not allege any infringement of the applicant's rights. Thus the first respondent prayed for the application to be struck off the roll of urgent matters.

The issue of dirty hands has been raised against the applicant. First respondent contends that the applicant is guilty of lack of probity. Referring to documents attached by the applicant, the first respondent contends that the contents of the documents show that the applicant compromised the first respondent's officers by paying them bribes in the form of ecocash and school fees for their children. The respondent further raised the issue that the applicant wants to benefit from its own wrongs as it paid for Enita Moyo (first respondent's employee)'s children's fees and gave her cash sums through third parties. The first respondent alleges that the illegal and improper relationship subsisted since 2011 when the applicant was contracted by the first respondent to provide cleaning services. Thus first respondent contends that there has been no explanation or an attempt by the applicant to distance itself from the serious allegations. The first respondent thus called for the court to decline to hear the application.

The first respondent raised a further point that the first respondent is a private company hence it has no obligation to conduct a tender process. It contends that there is no law that compels it to flight a tender before it can engage a contractor to offer cleaning services. The respondent

contended that the process it carried out is not subject to scrutiny by this court as first respondent can simply sign a contract without going to tender. In that regard it was argued that the application has no substantive effect and should be dismissed with costs on a legal practitioner client scale.

The second respondent also raised the issue of urgency and it is not necessary to regurgitate the reasons as they are similar to those raised by first respondent. The other points raised *in limine* are that of *locus standi* and incompetent relief. The second respondent contends that the applicant has no *locus standi* to mount this application. Mr Nyabeze contended that the first respondent's tender committee is not a Tribunal in the strict sense of the legal and administrative meaning of the word. It is therefore anomalous for the applicant to seek intervention of the court. This respondent further reasoned that the relationship between first and second respondents is a service provision arrangement between two private juristic entities. In that regard the second respondents argues that the court cannot forestall the contract between the concerned parties through a prohibitory interdict.

The second respondent referred to the issue of lack of probity on the applicant's part alleging that the applicant had not disclosed how it got documents for first respondent which were clearly inscribed "for internal use only". The respondent further referred to the allegations of underhand and corrupt practices involving the applicant which are contained in documents attached by applicant. It is not necessary to repeat this point as it was dealt with in the first respondent's submissions. The second respondent prayed for the dismissal of the application.

In response Mr Samukange for the applicant maintained that the matter is urgent because when it approached the court the tender had not been effectuated and it is surprising that on the hearing date that is when it is indicated that the contract was effectuated on 1 July 2022. Citing the Document Support Centre case 2006 ZLR (2) 240 he further submitted that if the application is not granted there will not be any need to pursue the application for review as the matter will thus be academic.

On the point that the relief sought is incompetent and that the applicant has no *locus standi* Mr Samukange argued that the first respondent had invited for bids in a tender and the applicant duly participated. That being so applicant has a right that entitles any process that affects its interest to be legally correct. Since the internal systems indicate that the tender process was compromised, the process becomes unlawful and that in itself allows the applicant to approach the court. He

contended that the review application identifies the grievances the applicant had with the tender process and this court can review any conduct of any forum. He maintained that the applicant has a real and substantial interest in the tender process. Hence the applicant has locus standi and the relief sought is competent.

On the point of dirty hands, it was argued on behalf of the applicant that: given the condemnation of the tender process and the failure by the first respondent to charge Enita Moyo who communicated with the second respondent's employee Wadzanayi Mareesa, the issue of dirty hands in respect of the applicant does not arise. He further submitted that it cannot be said that the applicant wants to benefit from its own wrong as alleged as it did not seek reflighting of the tender so that it can be awarded to it. It is simply advocating for a lawful process to be conducted.

Mr Samukange disputed that the issue pertaining to the award of the tender was a moot point. He maintained that a tender process which is marred by irregularities and condemned by the internal audit needs to be placed before the court so that it can be determined that the contract ought not to have been effectuated. Thus the matter can be competently determined as first respondent cannot disown its own audit which unearthed the irregularities. He prayed for the dismissal of all the points *in limine*.

In response the first respondent's counsel persisted that there is nothing stopping the first respondent from signing another contract without going to tender as it is not under any obligation to conduct a tender process in seeking service providers. He referred to the fact that the applicant did not indicate which law was breached by the first respondent. Further the applicant had not denied the engagement in bribery activities by it and Enita Moyo hence the dirty hands issue is material. In contrast, Mr Fisher of the second respondent had complained that the first respondent's employee had gotten in touch with his employee hence he did not seek to corrupt the tender process. Equally the second respondent's counsel stated in reply that there is nothing at law that obliges the first respondent to consider applicant *viz* the award of the contract as applicant lacks legal interest at law. He maintained that there is nothing to show that the proceedings were marred by irregularities as it is not alleged that Enita Moyo sat on the Tender Committee.

It is my conviction that before a court or a judge delves into a matter and decides on any issue the court or a judge has to be satisfied that there are parties before the judge or the court. This is pertinent lest the court or judge goes on a wild goose chase where it purports to deal with

adversaries when it has only one party before it. In that regard the issue of *locus standi* precedes all matters including urgency. It is my belief that it is only when the court is satisfied that it has parties before it that it can enquire whether the matter is urgent or not. Thus, the initial question I have to decide is whether the applicants are properly before me, and whether they have the legal capacity to institute the current proceedings.

No doubt the first respondent is a private entity. It is not disputed that it flighted a tender for the procurement of provision of service wherein the applicant participated. However given its nature there is no law that obliges the first respondent to flight a tender before it can procure services. That being so, can a participant take the first respondent to task *vis a vis* the manner in which it conducted the tender process? I do not believe so. This is because the first respondent not being a statutory body or a public entity is not governed by the Public Procurement and Disposal of Public Assets Act [Chapter 22:23]. The applicant failed to point to any law that places an obligation on the first respondent to flight a tender and go by any rules. First respondent is an entity which can contract with any other entity and this is underpinned by the principle of freedom of contract. It is thus incompetent for the applicant to seek to prevent through an interdict first respondent from bringing into life a contract freely entered into with another entity. It has no legal standing to do so. I thus uphold the point that the applicant has *no locus standi* to bring this application.

Intertwined with the *locus standi* objection is the point raised that the relief sought is incompetent. I cannot grant an interdict pending review of a decision which is not reviewable in terms of Section 26 of the High Court Act [Chapter 7:06]. This court derives its powers of review from the common law and the High Court Act. The relevant section reads:

26 Power to review proceedings and decisions

“Subject to this Act and any other law, the High Court shall have power, jurisdiction and authority to review all proceedings and decisions of all inferior courts of justice, tribunals and administrative authorities within Zimbabwe.”

The decision complained of is that of a Tender Committee of a private entity. That committee does not fall under a tribunal or administrative authority given the definition of the same. The Administrative Justice Act [Chapter 10:28] provides the definition of an administrative authority and it states:

2 Interpretation and application

(1) In this Act—

“administrative authority” means any person who is—

(a) an officer, employee, member, committee, council, or board of the State or a local authority or parastatal; or

(b) an committee, or board appointed by or in terms of any enactment; or

(c) a Minister or Deputy Minister of the State; or

(d) any other person or body authorised by any enactment to exercise or perform any administrative power or duty;

and who has the lawful authority to carry out the administrative action concerned;

Thus the actions of a private entity are not reviewable under s 26 of the High Court Act nor the common law hence to grant an interdict in circumstances which seek to humstring an entity whose actions cannot be reviewed by this court would not only be an injustice but a fatal misreading of the law. Given the foregoing, I find that the relief sought is incompetent and I will uphold the point *in limine*. I hasten to point that there seems to be a lot going on in the first respondent’s company in terms of ethical issues which is abhorrent but legally this court cannot interfere with the freedom of contract that the entity enjoys. This is more informed by the fact that the applicant’s contract was terminated and hence there is no contractual relationship which this court is being called upon to adjudicate upon. The matter pertains to a tendering process.

I do not find it necessary to deal with all the points *in limine* raised as the two that I have dealt with in the foregoing paragraphs decisively puts the matter to rest. Having upheld the points on lack of *locus standi* and incompetent relief sought, it is clear that the application cannot be salvaged. Accordingly the application is dismissed with costs.

SamukangeHungwe Attorneys for applicant
Scanlen &Holderness for first respondents
Mlotshwa Solicitors for second respondent