FREED TECHNICAL CONSULTANTS (PRIVATE) LIMITED
t/a ROCE CONSULTING ENGINEERS
versus
NATIONAL UNIVERSITY OF SCIENCE AND TECHNOLOGY

HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 10 FEBRUARY 2017 AND 16 MARCH 2017

Special Plea

S Huni for the plaintiff
N Mazibuko for the defendant

MOYO J: In this matter plaintiff issued summons against the defendant seeking the following relief:

(a) Payment of US$120 249-81 in respect of engineering consulting services rendered to defendant by plaintiff at defendant's special instance and request.
(b) Payment of interest at the prevailing interest rates bring charged by MBCA Bank from the date of service of summons to date of full payment.
(c) Costs of suit on an attorney and client scale.

The background of this matter is that plaintiff is a firm of engineers which allegedly did work for the defendant which is a state university and derives its legal status from the Act that incorporates it, namely the National University of Science and Technology Act [Chapter 25:13] (herein after referred to as the NUST Act).

Plaintiff alleges that it performed its part of the contract but the defendant did not perform its part resulting in this litigation. The defendant filed a special plea against plaintiff's summons and it raised mainly two arguments, that the University is a state institution and as such falls within the purview of the State Liabilities Act [Chapter 8:14] particularly section 6 thereof

and therefore plaintiff should have given it 60 days' notice prior to commencing this action. Secondly, that the contract being the subject matter of these proceedings is invalid for want of compliance with the Procurement Act [Chapter 22:14].

The defendant is a university incorporated in terms of the laws of Zimbabwe. Section 2 of the National University of Science and Technology Act [Chapter 25:13] provides thus:

> "The University shall be a body corporate with perpetual succession and shall be capable of suing and being sued in its own corporate name and, subject to this Act, of performing all acts that bodies corporate may by law perform."

Section 6 of the State Liabilities Act provides as follows:

> "Notice to be given to institute proceedings against state and officials in respect of certain claims.
>
> 1) Subject to this Act, no legal proceedings in respect of any claim for—
>   a) Money, whether answering out of contract, delict or otherwise, or
>   b) The delivery or release of any goods, and whether or not joined with or made as an alternative to any other claim, shall be instituted against
>   i) the state or,
>   ii) the President, a vice President in any Minister or Deputy Minister in his official capacity or any officer or employee of the state in his official capacity, unless notice in writing of the intention to bring them claim has been served in accordance with subsection (2) at least sixty days before the institution of the proceedings."

In fact the State Liabilities Act specifies itself as an Act to impose liability upon the state in respect of acts of its employees. It goes further to state in section 3 that such proceedings governed by it are to be taken against the Minister of the department concerned. This is obviously not concerning other autonomous bodies owned by the State where the Minister cannot be sued like in this case.

I wish to point out that I do not hold the view that a University incorporated in terms of a statute as a body corporate with capacity to sue and be sued in its own name, can purportedly be referred to as "the state" regardless of the fact that it's a state owned institution. I believe the mischief that the legislature intended by enacting the State Liabilities Act *(supra)* was to protect the property of the state and to cater for the bureaucracy that normally prevails within

government, it being a huge organization, so that the relevant authorities have adequate notice of pending litigation as well as giving them adequate time to follow protocol in making decisions relating thereto.

I do not believe that the State Liabilities Act *(supra*) would apply where the state has chosen to operate through another autonomous body like a University, which, despite the fact that the state owns it, the state has agreed to let it loose, and set it free in so far as self governance is concerned. I do not hold the view that for instance, the contractual liabilities of the University are state liabilities in the strict sense. The University is a body corporate incorporated through an act of parliament and it has been given the powers that every other body corporate has, including the capacity to contract and to sue and be sued.

> A body corporate is defined in the Business English online Dictionary as: "an organization such as a company or government that is considered to <u>have its own legal rights and responsibilities.</u>" (My emphasis)

I do not hold the view that the state can incorporate an entity as a body corporate with the usual capabilities where it wants that entity to be clothed with the same identity that the state has. Allowing a University to operate as a body corporate entails that the state has permitted the university to have its own legal rights and responsibilities. Its rights and responsibilities accordingly cannot be that of the state. It is a separate entity in the true sense of the word. The university's rights and responsibilities are therefore truly separate from those of the state and the state liabilities Act consequently cannot be held to apply to it.

I am thus persuaded by the findings of MAKONI J in the case where she found where a similar argument had been raised that it was untenable. MAKONI J dismissed a similar argument in the case of *Zimbabwe Platinum Mines Pvt Ltd* vs *Zimbabwe Revenue Authority and others* HH 169/15.

MAKONI J held that a body corporate cannot be part of the State. She did so as she interpreted section 3 of the Zimbabwe Revenue Authority Act [Chapter 23: 11] which provides that;

> "There is hereby established an authority, to be known as the Zimbabwe Revenue Authority being sued as the Zimbabwe which shall be a body corporate capable of suing

> and being sued in its own name and subject to this Act, performing all acts that bodies corporate may by law perform."

She dismissed in that case the argument that notice should have been given in terms of the State Liabilities Act. I cannot agree more. I find that this point *in limine* should fail on this premises.

On the second point *in limine*, where the defendant avers that procurement procedures were not followed at the material time, I hold the view that this is a premature argument, if at all it is valid it's a point in the merits, as obviously the parties would first have to lead evidence in open court on how the contract was entered into and precisely how the award of the contract was made, for one to then invoke non-compliance with the Procurement Act [Chapter 22:14]. I hold the same view with regard to the point raised on the validity of the contract for the reason that it was not signed by the Vice Chancellor.

It is for these reasons that I find that both points *in limine* are without merit and are accordingly dismissed.

The special plea is dismissed with costs.

Messrs Coghlan & Welsh, plaintiff's legal practitioners
Messrs Calderwood, Bryce, Hendrie & Partners, defendant's legal practitioners