

HB 01/18
HC 2097/16
X REF HC 2122/16

NYEKILE ONE PENNY HALF PENNY (PVT) LTD

APPLICANT

And

PARIRENYATWA GROUP OF HOSPITALS

1ST RESPONDENT

And

SURDAX INVESTMENTS (PV) LTD

2ND RESPONDENT

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
28 JULY 2017 & 18 JANUARY 2018

Opposed Application

Advocate L. Nkomo for the applicant
Advocate H. Moyo for the 1st respondent
No appearance for 2nd respondent

TAKUVA J: This is an application for review of a decision made by the 1st respondent. The applicant is an unsuccessful bidder in a tender process that was flighted by the 1st respondent. Aggrieved by this decision, it filed this application seeking the following order:

- “1. The informal tender process conducted by the 1st respondent under Tender No. CLE 01/2016 is a nullity and is accordingly set aside; or alternatively
2. The decision of the 1st respondent rejecting the applicant’s tender bid as unsuccessful be and is hereby set aside and is substituted with a decision awarding the tender to applicant as the lowest bidder.
3. The 1st respondent pays the costs of suit.”

The facts are as follows:

In 2016 the 1st respondent floated an Informal Tender No. CLE 01/2016 for provision of cleaning services. The requirements that successful bidders must comply with are set out in Annexure I which contains *inter alia* a chapter on “Method of Evaluation”. For a bid to be successful, it has to comply with the criteria set out in the table therein numbered 1 to 17 at page 13 of Annexure I. After complying with this criteria a bidder is then awarded to the lowest

bidder again in accordance with Annexure I. *In casu* nine (9) bids were lodged after Annexure I was floated. An Evaluation and Assessment of the bids was conducted and results were tabulated on the Evaluation Comparative Schedule attached as Annexure 2 on pages 76-82 of the record. After this process, the applicant's bid was rejected after the preliminary assessment and evaluation because it did not state payment terms as required by item 14 on page 13 of the record.

During evaluation, it was noted that all bid prices exceeded the annual threshold of US\$500 000,00 (Five Hundred Thousand United States Dollars) set out in Procurement (Amendment) Regulations 2015 (No. 18) SI 19 of 2015. As a result, 1st respondent referred its recommendations to the State Procurement Board for a review and an opinion in terms of section 21 of the Procurement (Amendment) Regulations SI 126 of 2015. After considering the recommendations, the Procurement Board, sent a letter dated 18 July 2016 directing that the tender be awarded to the 2nd respondent. Applicant and other bidders were thereafter advised by the 1st respondent of the decision.

Arising from this decision applicant filed this application seeking the nullification of this decision on two grounds namely, the 1st respondent did not comply with the provisions of the "Procurement Act and the Procurement Regulations" and that the 1st respondent's decision is irrational. The 1st respondent opposed the application. It raised a point *in limine* on material non-joinder of the State Procurement Board.

First respondent contended that the applicant should have cited the State Procurement Board because the decision it seeks to review is that of the State Procurement Board and not that of the 1st respondent. Also, it was argued that a reading of SI 126/2015 reveals that tenders both formal and informal are now subject to State Procurement Board's supervision and directions. This is why the State Procurement Board authorized the informal tender to run under its supervision. Accordingly, so the argument goes, this application cannot be determined without citation of the State Procurement Board. Reliance was placed on *MBCA Bank Ltd v RBZ & Anor*

HH-482-15 and *Dynamos Football Club (Pvt) Ltd and Anor v Zimbabwe Football Association & Ors* 2006 (1) ZLR 346 (S).

In my view, the point *in limine* is devoid of merit for a number of reasons. Firstly, the provisions of r87 of the High Court Rules 1971 are clear that no cause or matter shall be defeated by reason of the misjoinder or nonjoinder of any party and the court may in any case or matter determine the issues and questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter.

In any event, where a matter has not been determined, there is no question of non-joinder being fatal because the court has power under r87 (2) of the High Court Rules to order the joinder of a party whose presence is necessary to ensure the effectual and complete adjudication of all the matters in dispute. See *Wakatama & Ors v Madamombe* 2011 (1) ZLR 10 (s); *Capital Alliance (Pvt) Ltd v Renaissance Merchant Bank Ltd & Ors* 2006 (2) ZLR 232 (H) at p232E, PATEL J (as he then was) held that, “Having regard to r87 (1) of the High Court Rules 1971, there is no basis to warrant the striking out of a matter for material non-joinder. Where a party should have been joined to proceedings, a court is entitled, in terms of r87 (2) of the Rules, to order the joinder of such party either on its own motion or on application so (as) to ensure the effectual and complete adjudication of all matters in dispute. See also *Chiadzwa v Commissioner-General of Police & Ors* 2011 (2) ZLR 241 (H) at p241H; *Sibanda v Sibanda & Anor* 2009 (1) ZLR 64 (H) at p64E-F.

Secondly, the non-joinder of the State Procurement Board *in casu* is neither a material non-joinder nor fatal in that the matter in dispute is capable of effectual and complete adjudication between the parties without occasioning any prejudice to the State Procurement Board. This is so because the informal tender process sought to be nullified was conducted by the 1st respondent’s Adjudication and Procurement Committees. Notwithstanding the State Procurement Board’s letter dated 18 July 2016 the decision to reject the applicant’s bid as non-compliant to mandatory requirements and specifications was made by the 1st respondent’s said

committees. Therefore, the State Procurement Board has no direct and substantial interest in the relief sought by the applicant. The 1st respondent is the procuring entity.

In *Mugano v Fintrac & Ors* 2013 (2) ZLR 452, it was held that:

“The right of a defendant to demand the joinder of another party and the duty of the court to order such joinder or ensure that there is a waiver of the right to be joined are limited to cases of joint owners joint contractors and partners and where the other party has a direct and substantial interest in the issues involved and the order which the court may make. Such an interest is one in the right which is the subject matter of the litigation and not merely a financial interest which is only an indirect interest in such litigation. (my emphasis)

Consequently, I take the view that there is no conceivable prejudice likely to be suffered by the State Procurement Board if it is not joined in these proceedings in light of the specific relief sought by the applicant. The non-joinder is neither material nor fatal. Therefore, the point *in limine* is dismissed.

On the merits the applicant contends that by conducting an informal tender process when the annual contract price threshold required that a special informal or formal tender be conducted, 1st respondent violated the following statutory provisions;

- (a) Section 4 of the Procurement Regulations as amended
- (b) Section 30(1) (b) as read with sections 31 and 32 of the Procurement Act.

It was further contended that the State Procurement Board’s opinion that it had “No objection” to the 1st respondent’s award of the tender to the 2nd respondent could not confer the informal tender process with any legality or validity. Applicant relied on *PMA Real Estate Agency (Pvt) Ltd v ARDA* 2011(2) ZLR 355(H) where it was held that what was contemplated by the Procurement Act was that every procurement entity must adopt a method that complies with the general procedures elaborated in the regulations and that any departure from the prescribed proceedings must be sanctioned under the Act or Regulations.

The issue here is whether the tender process conducted by the 1st respondent is contrary to the provisions of the Procurement Act Chapter 22:14 and its regulations? It is common cause that section 4 sets out the monetary threshold for informal and formal tenders. It is also common cause that the bid prices exceeded the threshold for an informal tender that had been flighted. Further, it is also common cause that when faced with this predicament, 1st respondent sent a bid evaluation for review to the State Procurement Board in terms of section 21 of SI 126/15. The section states:

“Board shall review Accounting Officer’s awards for formal tenders.

21. The Board shall review the Accounting Officer’s recommendations and issue an opinion based on the facts presented, the opinion does not exonerate the Accounting Officer from mis-procurement when additional information contrary or in addition to the initial presentation are received.”

In submitting its report to the State Procurement Board the Accounting Officer complied with the provisions of section 16 of SI 126 of 2015. The State Procurement Board received the report and deliberated on it fully before issuing its opinion to the 1st respondent.

The real issue is whether an informal tender flighted as such could be lawfully transformed into a special Informal or Formal Tender in terms of section 21 *supra*. In order to fully appreciate how section 21 was invoked, it is necessary to examine the relevant communication between the 1st respondent’s Group Chief Executive and the State Procurement Board. The former wrote in the following terms:

“... with reference to your correspondence SPB/A/12/B of 27 June 2016, we hereby submit our evaluation report for the above-mentioned tender for your review.

The total annual cost of the contract will exceed the Informal Tender threshold as anticipated. Please find attached bid documents, tender documents and signed evaluation report.

Your opinion and guidance will be appreciated.”

In response, the State Procurement Board wrote:

“Reference is made to your minute dated July 7, 2016 concerning the above.

At its Meeting No.50/2016, Members observed that the Accounting Officer floated a Limited Tender without prior approval of the Board in violation of section 7 (1) of the Procurement Regulations.

Accordingly, the State Procurement Board has, through PBR 0699 of July 14, 2016, having reviewed the Accounting Officer’s submission in line [with] SI 126/2015, resolved that:

- There is “No objection” to the Accounting Officer’s request to award Informal Tender No. CLE 01/2016 for Provision of Cleaning Services, to SURDAX Investments P/L the lowest bidder to specification, in the sum of US\$536 345,28.
- In terms of SI 159/2012, the Accounting Officer should pay US\$900 administration fees as per State Procurement Board invoice for violating sections 7(1) and 25(4) of the Procurement Regulations as amended by floating a “limited Tender” and limiting participation to Registered Suppliers without prior approval by the Board.

You are therefore advised to proceed as follows:

1. Take all necessary steps as directed by the resolution.
2. In all communications, please quote the above PBR number and the date.”

It follows therefore from the above that the State Procurement Board has authority to review an Accounting Officer’s recommendations and proffer an opinion and directions. There is nowhere in the regulations where it is stated that an informal tender may not be reviewed by the State Procurement Board and applicant’s counsel has not drawn my attention to any such provision. In my view s21 provides the legal basis for reviewing an informal tender so as to convert it to a formal tender where necessary. Therefore I find no merit in applicant’s contention that the informal tender was a nullity because the bids exceeded the informal tender threshold stipulated in the Regulations. The informal tender process was found to be valid by the State Procurement Board despite the imposition of an administrative fee for violating sections 7(1) and 25(4) of the Regulations.

I note with interest that the procedure that applicant complains about did not in any way prejudice it. The manner in which the tender was issued and the subsequent conversion has nothing to do with the reasons why applicant's bid was rejected.

For the above reasons, the main ground for review is hereby dismissed.

In the alternative, applicant argued that the decision of the 1st respondent to reject its tender bid on the basis that it failed to meet mandatory requirements in that it did not specify payment terms is irrational, or so wrong that it must have been reached, "deliberately or inadvertently, by failing to apply the right criteria or through bias, malice or corruption on the part of 1st respondent."

The totality of applicant's argument on this ground is captured in paragraphs 21 and 22 of its heads of argument. I hereby reproduce them verbatim.

"21. Item 14 under Evaluation Criteria of the Request for Proposals required bidders to state; "Payment strictly after provision of service". In response to that requirement the applicant stated that: "Payment terms: 30 days". The 1st respondent contends that the applicant's stated payment terms do not meet the requirement to state "Payment strictly after provision of service". The 1st respondent contends that the applicant should have stated that "Payment terms: 30 days strictly after provision of service". It is submitted that the 1st respondent's contention is manifestly flawed and irrational because it would be unnecessarily repetitive for the applicant to repeat the wording "strictly after provision of service" when same is already stated in item 14 of the evaluation criteria in the Request for Proposals. 22. There was therefore no vagueness or failure to meet the mandatory requirement to state payment terms in the applicant's bid. The stated payment term of "30 days" is a sufficient response to the requirement in item 14 of the Request for Proposals." (my emphasis)

It is clear from the above argument that applicant does not deny that it did not exactly do what it was required to do by the 1st respondent. Its contention is that what it did is sufficient to meet the requirement. What is vague is what is not clear and applicant's phrase "30 days" is not clear in that it is unknown when the 30 day period begins to run. In other words does it start to run before or after the service has been rendered. Applicant's tender was inelegantly drafted and

it was not the procurement committee's duty or role to search for a meaning. The committee acts as an umpire, it cannot add words or supplement one bid in favour of another – see *Premier Free State and Ors v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA) at para 30.

As regards irrationality, it is trite that a court sitting as a review court can only set aside a decision if it is satisfied that it was so grossly unreasonable that no reasonable person applying his mind to the facts before him would have come to that conclusion. See *EXP MUSS X* 1993 (1) ZLR 233 (H) at 239C; *Charumbira v Commissioner of Taxes & Ors* 1998 (1) ZLR 584 (S) at 585D-E and *Muringi v Air Zimb Corp & Anor* 1997 (2) ZLR 488 (S) at 490F.

In the present case, the 1st respondent's decision cannot be described as so grossly, unreasonable that no reasonable person applying his mind to the facts before him would have come to that conclusion.

As regards bias, corruption and malice, I concur with counsel for the 1st respondent that these allegations are “a red herring”. In fact the applicant betrays itself by stating that “it has shown a well-grounded apprehension of bias and malice against it in that the 1st respondent previously refused to allow the applicant to commence the provision of tendered services after the applicant was declared a winning bidder.” One wonders why applicant thought this allegation was relevant.

Applicant's prayer that he be awarded the tender as the “lowest bidder” is baseless because the lowest bidder is the 2nd respondent.

In conclusion, I find that the bidding process followed by 1st respondent was in tandem with the procurement laws and dictates of justice and fairness. Consequently, the alternative ground for review is devoid of merit and is hereby dismissed.

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Accordingly, the application is dismissed with costs.

Ncube & Partners applicant's legal practitioners
Kantor & Immerman 1st respondent's legal practitioners