

COBRA SECURITY (PVT) LTD
versus
REGISTRAR GENERAL
and
MINISTER OF HOME AFFAIRS

IN THE HIGH COURT OF ZIMBABWE
BERE J
HARARE 3 JUNE 2013 & 19 JULY 2017

Civil Trial

S. Mushonga, for plaintiff
T. Hove for the respondents

BERE J: At the hearing of this matter both parties were in agreement that the factual issues were not contentious and they submitted a statement of the undisputed facts to the court and mutually agreed on the issues that the court had to determine after hearing argument.

For clarity's sake the stated case and the issues were presented as follows:

“Agreed facts

- 1.1 The plaintiff was awarded by the State Procurement Board the tender to provide security services to the Registrar General's Office through PBR 0727B having been the lowest bidder according to required specifications.
- 1.2 That the tender requirements were set out in the request for proposals under tender number REG 01/2008.
- 1.3 That after plaintiff had been awarded the tender it was advised by the State Procurement Board to proceed to enter into a formal procuring contract with 1st defendant on the 10th of December 2008.
- 1.4 That the formal procuring contract was then not signed.
- 1.5 That the first defendant has taken the position that it will not conclude the formal procuring contract with plaintiff and has opened up a new tender process.
- 1.6 That the correspondence to the State Procurement Board of 21 April 2009 and the letter of 5 January 2009 by Registrar General be taken into consideration”.

Issues for determination

Arising out of the agreed facts set out above, the following are the issues for determination.

1. Whether plaintiff and first defendant concluded a contract?
2. If a contract was concluded, what were the terms of such a contract?
3. Whether first defendant breached the terms of the agreement concluded between the parties?
4. If first defendant breached the agreement between the parties, whether plaintiff is entitled to the damages claimed?

Plaintiff's submissions before this court

In broad basis *Mr Mushonga* who appeared on behalf of the plaintiff passionately argued that the plaintiff was awarded a contract by the State Procurement Board as they were the lowest bidder.

Counsel went further to submit that the procuring contract which the plaintiff was supposed to enter with the 1st defendant did not invalidate the tender contract itself.

It was further argued that the terms of the contract had been adequately spelt out in the tender document itself and that by refusing to enter into the operational contract itself the 1st defendant had indeed breached the terms of the contract which it had itself set in the tender document.

Mr Mushonga went on to vigorously defend the letter of 21 April 2009 by the plaintiff which he said was not meant to fundamentally change the positions of both the plaintiff and the 1st defendant as it was justified by the highly inflationary environment to which this country had been plunged into at the relevant time. For this reason, counsel justified the plaintiff's claim for damages computed in United States Dollars.

In conclusion, counsel moved the court to accept the computation of the plaintiff's claim as summarised in the concluding paragraph of the plaintiff's declaration.

Defendant's submissions before the court

In contrast *Mr Hove* who appeared on behalf of the defendants offered a completely different interpretation to the tender that was awarded to the plaintiff by the State Procurement Board.

Counsel's conviction was that the State Procurement Board clearly had no capacity to create a binding contract between the plaintiff and the 1st defendant. Counsel argued that it was against this background that it is worth noting that the Procurement Board's letter of 10 December, 2008 which awarded the tender to the plaintiff concluded by saying:

“... Against this background, could you please proceed and enter into the necessary formal procuring contract with the Registrar General”. (my emphasis)

Counsel submitted that this concluding paragraph clearly shows that at that stage no contract between the plaintiff and the 1st defendant had been concluded. The basic principles of offer and acceptance between the contracting parties had not yet been fulfilled. There was no meeting of the minds at this particular stage until the formal procuring contract had been negotiated, agreed upon and entered into.

It was further forcefully argued on behalf of the respondents that if the plaintiff's position was that the State Procurement Board had created a contract between the plaintiff and the 1st defendant why then would that same Board advise the plaintiff to approach the Registrar General to supposedly enter into the necessary formal procuring contract?

Counsel expressed the view that by referring the winner of the tender to the 1st defendant there was a full appreciation by the Board that there were issues to be further negotiated between the parties and agreed upon before they could enter into a binding contract.

In conclusion, counsel for the defendant argued that there was no contract between the plaintiff and the first defendant which could have been breached. Counsel's firm position was that the State Procurement Board acts on behalf of procuring entities to facilitate the short listing of a suitable candidate. It has no mandate whatsoever to enter into binding contracts on behalf of procuring entities, and that in the unlikely event that the Tender Board had concluded a contract on behalf of the 1st defendant the terms of the contract should have been clearly spelt out.

The issues for determination

The principal issue referred to this court as I understand it is whether or not the plaintiff and 1st defendant can be said to have entered into an agreement by virtue of the plaintiff having been awarded the tender as captured in the letter of 10 December 2008. The other issues are merely off shoots from this issue.

I am more inclined to accept the argument that it would be overstretching the role of the State Procurement Board if one were to the parties the view that once it awarded the tender to the plaintiff then the plaintiff must have been deemed to have entered into an agreement with the 1st defendant.

As I will demonstrate hereunder it occurs to me that the awarding of the tender to the plaintiff only amounted to an invitation to the parties to enter into a contract to contract or what is often referred to as agreements to agree. The parties' reading of the tender award must be that they fully appreciated the need to negotiate in order to come up with a valid and binding agreement.

It was in this spirit that immediately after being furnished with the letter of 10 December 2008 the 1st defendant immediately wrote to the principal officer of the State Procurement Board raising certain legitimate concerns about the conduct of the plaintiff. One of those concerns was that the plaintiff was demanding payment in foreign currency, which aspect had not been part of the tender documents. None of the parties had tendered in foreign currency because during that

time the official local currency was in force. The 1st defendant indicated that it was illegal to deal in foreign currency and that it had no capacity to do so.

The court will take judicial notice of the fact that at the time this particular tender was awarded the country was experiencing unprecedented hyper inflation which ultimately led to the condemnation of local currency. It was not unusual for service providers to demand payment in the unofficial currency or foreign currency. The concerns of the 1st defendant which were addressed to the State Procurement Board which ultimately led to the opening up of new tender process must be understood within this context.

If there was doubt that the plaintiff was demanding to be paid in foreign currency, then the letter by the plaintiff of 21 April 2009 would serve to put the issue beyond doubt. The letter read in part as follows:

“Dear Sir

RE: SECURITY SERVICE CHARGE: REGISTRAR GENERAL’S DEPARTMENT
TENDER NO. 901/08

We refer to the above subject matter.

We hereby advise that the tender bid for the Registrar General Department which was successfully awarded and accepted through PBR 0727B of 4 December 2008 referenced SPB/A/14B was quoted in Zimbabwe Dollars in the sum of \$2 682 000,00. However, the changes in the economy and fiscal policy have resulted in goods and services being charged in foreign currency or multiple currencies.

Accordingly, the current security service charges based on SAZ/ZINSA minimum tariff are:

- a) 1 x 24 hrs service coverage USD640,00
- b) 1 x 24 hrs service coverage USD320,00

...”

My first observation is that it was not accidental that this letter was addressed to the State Procurement Board. Under normal circumstances if the plaintiff had entered into a contract with

the 1st defendant as alleged by the plaintiff, this letter would have been addressed to the 1st defendant.

Secondly, this letter confirms the concerns raised by the 1st defendant which contributed to the failure by the plaintiff and the 1st defendant to reach an agreement which in my view is an acknowledgment that the parties had no contractual agreement merely by virtue of the plaintiff having been awarded the tender.

I accept the argument as put forward by *Mr Hove* for the defendant that the awarding of the tender to the plaintiff did not on its own entail that it had entered into a fully fledged contractual agreement. If special regard is had to the wording of the letter which was written to the plaintiff, one cannot help but conclude that that letter was merely advising the parties to enter into a *pactum de contrahendo*¹. The parties had to negotiate, which they did and failed to reach an agreement.

In the case of *PTC vs Support Construction (Pvt) Ltd*², MUCHECHETERE JA (as he then was) dealt with an almost similar situation than the one I am seized with. In that case, and unlike in the instant case, the parties had exchanged correspondence which made it possible for the court to conclude that the appellant's conduct spoke of nothing except an intention to create a binding contract with the respondent.

In this case, one sees a spirited effort by the plaintiff to try and change the whole tender document by demanding payment in the currency which had not been part of the tender process. Such a demand was in complete violation of the whole tender process and in that regard the 1st defendant had no obligation to enter into a contract with the plaintiff.

1. See *Business Law in Zimbabwe*, by R.H. Critie, Juta & Company Ltd 1998 p 33
2. 1998 (2) ZLR 221 (S)

The whole idea by the plaintiff of trying to substitute the Zimbabwe dollars with US dollars meant that the plaintiff, in the process of negotiating was trying to force a contract which was outside the confines of the whole tender process. When the parties submitted their bids, the 1st defendant and all concerned must have had legitimate expectations that the ultimate contract would be pegged in the local currency.

Disposition

In the result, the court makes a specific finding that the principal issue must be decided in favour of the defendants.

There was no contractual agreement between the plaintiff and the 1st defendant, the parties having failed to reach one.

Flowing from this, the plaintiff's case must be dismissed with costs.

Messrs Mushonga Mutsvairo & Associates, plaintiff's legal practitioners
Messrs Muzunga & Associates, defendant's legal practitioners