

ELECO ELEVATOR COMPANY (PRIVATE) LIMITED
versus
NATIONAL SOCIAL SECURITY AUTHORITY
and
STATE PROCUREMENT BOARD

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 7 June 2016 and 12 December, 2017

Opposed Matter

A Mugandiwa, for the applicant
S. Moyo for the 1st respondents

MANGOTA J: I heard this application sixteen (16) months ago. I delivered an *ex tempore* judgment in which I dismissed it with costs. I entertained the view that the reasons which I spelt out at the time were sufficient to put the matter to rest.

On 10 October, 2017 the applicant wrote through its legal practitioners of record. It requested for reasons upon which my decision rested. These are they:

What took place between the applicant and the second respondent was nothing but a formalised way of an invitation to do business. It is within the purview of the second respondent to invite suppliers of goods and services to do business with such procuring entities as the first respondent.

The second respondent owes its existence to the Procurement Act [*Chapter 22:14*] (“the Act”). The Legislature established it for purposes of transparency and fairness. It charged it with the responsibility of inviting suppliers of goods and services to do business with procuring entities. It, in the process, weeds out underhand dealings and/or corruption.

In *casu*, the second respondent identified the applicant as a competent supplier of goods which could lawfully do business with the first respondent. In identifying the applicant as it did, it was not acting as the agent of the first respondent. It acted on its own accord and in terms of the Act and the regulations which flow from the same.

An effortless reading of the Act and the regulations together with the parties’ submissions as filed of record should have dispelled the applicant’s misconceptions. It should

have shown it that the second respondent cannot act as an agent of any procuring entity as it claimed in this application.

To bring this matter to a clean close, it is pertinent for me to examine and analyse the parties' respective cases, provisions of the Act and the regulations as well as the law of contract together with that of agency.

The applicant hinged its case on para(s) 7-11 of its founding affidavit. These are short in form and substance. I shall therefore repeat them as they appear in its affidavit. They read as follows:

- “7. On the 14th of June 2011, the applicant, in response to Invitations To Tender that were put out by the 2nd respondent on behalf of the 1st respondent submitted offers. The offers were for the supply, delivery, installation and commissioning of 3 lifts at NSSA House, Harare, 2 lifts at NSSA Compensation House, Bulawayo and 2 lifts at NSSA Compensation House, Harare.
8. The Tender Numbers were NSSA 01/2011, NSSA 02/2011 and NSSA 03/2011.
9. The Invitation to Tender and offer in respect of Tender Number NSSA 01/2011 is attached hereto marked Annexure 2.
10. It will be noticed from Annexure 2 that the Invitation to Tender provided in relevant part as follows:
 - 1.13. *Tenderers should note that this is a supply and fix contract. Tender should reflect market prices and the quoted prices should indicate.*
 - *Total price with VAT shown separately.*
 - *Manufacturer's price*
 - *Freight charges and duties*
 - *Exchange rates applicable, discounts and premiums or any other charges.*
 - 1.14. *Where Tenderer requires advance payment for purchase of equipment they shall be required to raise an advance payment bond to cover for the advance payment. The cost of the bond shall be included in the tender.*
11. The applicant's offer was accepted on the 15th of August 2011 in terms of a letter that was written by the 2nd respondent's Acting Principal Officer. The letter stated in part as follows:

‘In terms of section 22 (2) of the Procurement Regulations 2002 as read with the Procurement Act [*Chapter 22:14*], the State Procurement Board has pleasure to advise that your tender with respect to the above has been successful and accepted through PBR 1130 of August 11, 2011 in the sum ...

Against this background, could you please proceed and enter into the necessary formal procurement contract with the National Social Security Authority (NSSA).” (emphasis added).

It was on the basis of the above-described set of circumstances that the applicant insisted that a contract came into being between the first respondent and it. Its assertion was that the offer which it made on 14 June, 2011 was accepted by the first respondent, through the second respondent, on 15 August 2011. It submitted that, in accepting its offer as it did, the second respondent acted as the agent of the first respondent. It stated that the Invitations To Tender and the offers it made in respect of the other two contracts were on all fours with the above cited Invitation To Tender and the offer which it made in the mentioned regard. It stated that it concluded three contracts with the first respondent through the second respondent. It, therefore, moved the court to grant to it the order which it prayed in its draft order.

The first respondent opposed the application. The second respondent did not. My assumption is that it chose to abide by the decision of the court.

The first respondent remained at pains to explain that no contract ever came into existence between the applicant and it. It stated that the second respondent recommended the applicant to negotiate a contract with it. The negotiations, it said, did not ripen into a contract. It submitted that the applicant won a tender the conditions of which were to supply and fix. It stated that the second respondent’s role was to monitor the process to ensure transparency. It placed reliance on s 31 (2) of the Procurement Regulations 2002 in the mentioned regard. It moved the court to dismiss the application with costs.

I will, for argument’s sake, proceed on the basis that an offer was made on 14 June, 2011 and was accepted on 15 August, 2011. If the applicant’s position was to be accepted, the applicant is called upon to explain what persuaded it to wait to enforce its rights in terms of the contract from 16 August, 2011 to 18 December, 2015- i.e. the day on which it filed the present application. If a contract existed as it argued, the probabilities are that the applicant would not have waited for 4 years and 4 months running to enforce it. It would have insisted on specific performance there and then.

A contract is, by definition, an agreement which is intended to be enforceable at Law. Its two basic elements are a firm offer and a firm acceptance. Innocent Maja explained the two elements. The learned author states, in ‘*The Law of Contract in Zimbabwe*’ p 3 that:

“The standard approach is to ascertain whether an offer made by one party, has been accepted by the other. In brief, the approach is as follows:

- (i) Has an offer been made?
- (ii) If an offer has been made, has it been accepted?

- (iii) If the offer has been accepted, there is an enforceable agreement unless either there is no intention to create legal relations or there is a factor that viciates the agreement" [emphasis added]

The discourse which took place between the applicant and the second respondent is completely divorced from the above described definition of contract. The discourse fell more into what is often referred to as an offer to chaffer or an invitation to suppliers of goods to do business with the first respondent than it fell into the definition of contract. The applicant's assertion which was to the effect that the discourse ripened into a contract was, therefore, misplaced.

The letter which the second respondent's Acting Principal Officer addressed to the applicant on 15 August, 2011 was clear and ambiguous. He did not state that the applicant's offer was accepted. He said *the State procurement Board has pleasure to advise that your tender has been successful and accepted....* What that meant was that, among many suppliers of goods who filed proposals to do business with the first respondent, the applicant's proposal came out best and was, therefore, selected for the purpose. It was, for the mentioned reason that the Acting Principal Officer concluded his letter by referring the applicant to the first respondent with whom it was to enter into a formal procurement contract.

That the applicant spent four years and four months negotiating the terms of the contract with the first respondent requires little, if any, debate. The correspondences which each party attached to its papers is ample evidence of that stated fact. The applicant knew that the parties' minds did not meet in so far as the contract which they intended to conclude between them was concerned. That knowledge on its part notwithstanding, it filed the present application for a declaratory order. It based the same on the misconception that the second respondent acted as the agent of the first respondent and concluded a contract with it.

I reiterate that the second respondent which was established in terms of the Act can never act as an agent for any procuring entity. A reading of the Act and the regulations which flow from it demonstrates the validity of the position which I hold of the matter. It was, in my view, never the intention of the Legislature to make the second respondent an agent of any procuring entity. The intention was, and will always be, to allow the second respondent to play an oversight role in all business dealings which take place between procuring entities, on the one hand and suppliers of goods and services, on the other.

A reading of s 5, of the Act confirms my view in the abovementioned regard. The section spells out the functions of the second respondent which the legislature established in terms of s 4 of the Act. Its functions are:

- (a) to conduct procurement on behalf of procuring entities, where procurement is of a class prescribed in procurement regulations; and
- (b) to supervise procurement proceedings conducted by procuring entities in order to ensure proper compliance with this Act; and
- (c) to *initiate investigations* in terms of section *forty-six* and take action pursuant thereon in terms of section *forty-seven*; and
- (d) to perform any other function that is conferred or imposed on the State Procurement Board by or in terms of this Act or any other law [emphasis added].

Any doubts which gravitate towards the proposition that the second respondent acted as the agent of the first respondent *in casu* is completely removed from one's mind when one reads para(s) (b) and (c) of subs (1) of s 5 of the Act. The position of the second respondent becomes more pronounced than otherwise when one reads the stated paragraphs with subs (2) of s 5 of the Act. Section 5 (2) reads:

“2) except as otherwise provided in this Act, the State Procurement Board shall not be subject to the direction or control of any person in the exercise of its functions under this Act” [emphasis added].

The first respondent is a procuring entity. It owes its existence to section 2 of the Act. The section defines procuring entity to mean:

- “a) The State Procurement Board, to the extent that it conducts procurement proceedings on behalf of any person referred to in paragraphs (b) or (c) of this definition.
- b) Any
 - i) Ministry, department or other division of government; or
 - ii) Statutory body; that engages in procurement; or
- c) Any local authority or other person declared in terms of subsection (2) to be a procuring entity [emphasis added].

The Act defines procurement contract to mean:

‘a contract between a procurement entity and a supplier which results from procurement proceedings.’ The contract was, *in casu*, to ripen into an enforceable agreement as soon as the applicant and the first respondent agreed on its terms and conditions. What took place between the applicant and the second respondent were procurement proceedings. These were to result

in a procurement contract which did not ever come into being as the parties could not agree on its essential elements.

The letter which the second respondent's Acting Principal Officer addressed to the applicant on 15 August, 2011 was in compliance with s 22 (2) of the Procurement Regulations. He, in fact, made reference to the section when he wrote as he did. The section enjoins the second respondent to write in the format which is stated in s 22 (2) of the regulations. It reads:

“the successful tenderer shall be notified promptly in writing by the Board of the tender acceptance” [emphasis added].

The second respondent, it is evident, did not accept the applicant's offer as the latter alleged. It accepted its tender and it advised it so.

The applicant's assertion which was to the effect that the second respondent was the agent of the first respondent cannot hold. It offends the basic principles which relate to the law of agency. An agent acts on the instruction of his principal. He has no power or authority to instruct, let alone supervise, his principal. He acts within the scope of the authority which his principal confers upon him [see *Zimbabwe Mining & Smelting Co v Zakeyo* 2007 (1) ZLR 132 (S); *Mtemereswa & Anor v Tavarwisa & Anor*, 2004 (2) 172 (H) and *Runatsa v Rumani Estates (Pvt) Ltd & Ors*, 2009 (2) ZLR 286 (S)].

A reading of sections 31 (2), 46 and 47 of the Act dispels the notion that the second respondent acted as the agent of the first respondent. Subsection (2) of s 31 of the Act places a duty on the second respondent to monitor procurement contracts. Section 46 of the Act empowers the second respondent to investigate or inquire into a contravention of the Act or any other law by procuring entities and/or suppliers of goods and services. Section 47 of the Act empowers the second respondent, on receipt of the investigators' report, to nullify the procurement proceedings or cancel the procurement contract or condone the contravention where, from a reading, of the investigator's report, it remains satisfied that there has been a contravention of the Act or any other law in relation to any procurement proceedings or procurement contract.

The application was based on the applicant's misconstruction of the principles which relate to the law of contract as read with those of the law of agency. It stood on nothing. The applicant pleaded a legal impossibility when it asserted that it concluded a contract with the first respondent who nominated the second respondent as its agent for the purpose. The applicant, at any rate, did not produce any evidence which showed that the second respondent

was the agent of the first respondent. It made a statement which it could not substantiate. No contract ever came into existence between the first respondent and it. Its application, was, therefore, devoid of merit. The application was, accordingly, dismissed with costs.

Wintertons, applicant's legal practitioners
Scanlen & Holderness, 1st respondent's legal practitioners