RICZONE INVESTMENTS (PVT) LTD
Versus
TEL ONE (PVT) LTD
And
JADEYED INVESTMENTS (PVT) LTD

HIGH COURT OF ZIMBABWE
COMMERCIAL DIVISION
CHILIMBE J
HARARE 29 July,2 & 5 August 2024

Urgent chamber application

R.T. Mutero for applicant
N. Tonhodzai for first respondent
F. Chinwawadzimba for second respondent

CHILIMBE J

BACKGROUND

[1] The determination of urgency in this matter depends on the efficacy of applicable domestic remedies. Are the remedies concerned "*effective, available and adequate"*[1]? The remedies under examination are reposed in the Public Procurement and Disposal of Public Assets Act [Chapter 22:23] ("the Act").

[2] The background to the matter is that I invited, upon receipt of the chamber application, the parties to make submissions on urgency. This invite was per rule 40 (6) of the High Court of Zimbabwe (Commercial Division) Rules SI 121 /20 ("the Commercial Court Rules"). I accordingly had the matter set down for mid-day on Monday 29 July 2024.

[3] Meanwhile, first respondent filed its notice of opposition on the morning of 29 July 2024 before the parties convened in chambers. The second respondent only managed to file its

[1] See *Mashabela v Executive Committee Of Burgersfort Local And Distance Association & 3 Ors* (7591/2017) [2018] ZALMPPHC 13 at [11]. See also the more comprehensive test set in *Tribac Tobacco (Pvt) Ltd v Tobacco Marketing Board* 1996 (2) ZLR 52 (S) discussed below.

opposing papers 31 July 2024, well after the first hearing. Nonetheless, midway through submissions on the Monday,29 July 2024, it became necessary that the matter be adjourned.

[4] The reason being to ascertain, whether or not the tender process had not been concluded. In particular, whether the disposal contract at the base of the dispute had in fact been concluded between first and second respondents. This confirmation was in turn, meant to ensure that the matter had not been rendered moot. The parties promptly responded by filing their respective reports and positions on the perceived status of that contract.

[5] The parties were not aligned on the issue. The respondents, on one hand, asserted that the contract concerned had since been concluded. On that basis, they contended that the matter before the court had thus become moot. Applicant, on the other hand, insisted that the contract was yet to concluded. Accordingly, the controversy was still alive, and matter properly before the court. And so the matter resumed on 2 August 2024 to hear further submissions in that regard.

[6] On the papers and in the submissions, a number of preliminary issues were raised, in addition to the issue of urgency. I will deal with them hereunder but before that, the brief factual background to the dispute; -

THE DISPUTE

[7]. Applicant ("Riczone") seeks a provisional order staying the award by first respondent ("Tel One"), of a contract to second respondent ("Jadeyed"). On a date not specified in the papers, (presumably in January or February 2024) Tel One flighted a tender for the disposal of redundant copper cables. This date becomes one of the key considerations relevant to the resolution of the issue of urgency as shall be shortly demonstrated.

[8] The tender was titled "Competitive Bidding Disposal Tender DISP 02-24". Its terms and conditions were recorded in a document bearing the same title. Paragraphs 3.8.1 and 2.6 in that document triggered the present dispute, they provided that; -

> 3.8.1 The tender shall be awarded to the bid with the highest unit price for the Recovered Copper Cables subject to satisfying all sale conditions.
>
> 2.6 [Bidders] Should not be subject of allegations or ongoing investigations on allegations against the bidder or any of its personnel or agents for any illegal dealings in copper or other unethical conduct.

[9] Riczone claims that it won the tender on the basis that, as per paragraph 3.8.1, its bid at US$4,400 per ton, was undisputedly the highest. And so when Tel One`s award notification of 5 July 2024 announced Jadeyed as the successful bidder, Riczone raised issue. It addressed an email to Tel One, the tendering authority, on the very same day, seeking an explanation for the rejection. Tel One invited Riczone to a meeting on 10 July 2024. During that meeting, Tel One apparently informed Riczone that the latter had been disqualified in terms of paragraph 2.6 of the tender document. The disqualification arose from allegations that Riczone had been implicated in theft of, or dealings in copper cables.

[10] On 11 July 2024 Riczone vehemently protested to Tel One and disputed all allegations of involvement in illicit dealings in copper cables. Tel One responded 7 days later via a letter dated 19 July 2024 to Riczone. In that letter, Tel One furnished details of the alleged malpractices. Dissatisfied with this response, Riczone approached this court on 22 July 2024 to file an application for the review of Tel One`s decision under case number HCHC 514/24. It also simultaneously filed this urgent application seeking a provisional order to stop the award of contract to Jadeyed pending finalisation of the application.

[11] Riczone premised its urgent application on the review application HCHC 514/24. In its founding papers herein, Riczone stated that if the present application was not granted (and urgently so) the review application under HCHC 514/24 would be rendered academic. This threat of an ineffectual outcome of HC 514/24 represents the peril which Riczone sought to avert via the present urgent application.

THE PRELIMINARY POINTS

[12] Before addressing the arguments on urgency, I will deal briefly with points raised by the respondents *in limine*. Both Net One and Jadeyed raised a number of preliminary issues which went thus ;- (a) that the certificate of urgency was defective,(b) the matter was not a commercial dispute as defined by rule 3 of the Commercial Court rules, (c) the application was fatal for non-joinder,(d) the relief sought was incompetent given that the tender contract had been concluded, (e) that the application was fatally defective on account of an invalidly deposed founding affidavit, (f) that there was no application before the court because the deponent to the founding affidavit lacked proper authority to institute the present proceedings.

[13] I found none of the preliminary points sustainable and the following are my reasons. On point (a), certificates of urgency are no longer a requirement under rule 40 of the Commercial

Court Rules. See CHIRAWU-MUGOMBA J`s discourse on the point in *Redan Petroleum (Pvt) Ltd T/A Puma Energy v Redan Coupon (Pvt) Ltd* HH 327-22. Likewise, on point (f), the complaint raised over the absence of authority to institute proceedings could be addressed or even cured in the answering affidavit (see *Cuthbert Dube v PSMAS & Anor* SC 79-19).

[14] The resolution of the rest of the points (b) to (e), depends entirely on an assessment of evidence based on the facts borne by the papers. Point (b) or example, requires a ruling on whether the matter is "*.... a dispute of a civil nature considered by the court to be of commercial significance*…." This being the definition in rule 3 of the Commercial Court Rules. Without making a specific determination on the point, I must recognise that this matter carries a number of aspects which exercise the mind over the commerciality of the dispute.

[15] I note in passing that the gross contract price valuation of US$840,210 is not insignificant. More importantly, the dispute relates to a public procurement and disposal award. There are attendant public interest issues associated with such. Not least of which being the quest for fairness and accountability. In addition, there is the intervention of General Notice 164B (further discussed below) which descoped a total of 21 key private and public entities across all sectors of the economy and regulation from the Act.

[16] As such, further reflections based on the full legal and evidentiary spectrum generated by those issues will need to take place. Not just on point (b), but the rest of the preliminary points raised. However, such exercise is presently handicapped if not rendered premature. This is because firstly, the proceedings came by way of motion, and secondly, that the hearing had been convened specifically to determine urgency.

[17] It is an established principle of our law that in motion proceedings, evidence is presented to the court is a sequential process of founding, opposing and answering papers. In terms of the rules of court, parties are further granted the right to elaborate on their evidence through written and finally oral legal arguments. See *Magurenje v Maphosa* 2005 (2) ZLR 44 (H) and Herbstein and Van Winsen in The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa at pages 288 and 419.

[18] On the papers before me, and having regard to the issues raised, it would be undesirable to make conclusive findings of fact before the parties have exhausted the right and opportunity to fully plead and argue their respective cases. In fact, perhaps as demonstration of this very premature status, I observed that both Adv *Chinwawadzimba* and Mr. *Mutero* (for second

respondent and applicant respectively) `s submissions tended to stray into fact and evidence. On that basis, I believe it is best that the disposal of these preliminary issues be deferred to the main dispute.

URGENCY: THE LEGAL PRINCIPLES

[19] In *Documents Support Center (Pvt) Ltd v Mapuvire* 2006 (2) ZLR 240 (H), this court per MAKARAU JP (as she then was) sounded the reminder that a party`s cause of action and relief sought are key factors in determining urgency. This consideration is a useful aid in the better understanding of the well-established principles on what constitutes urgency. It is also particularly relevant to the peculiar facts of the present matter, especially the issue noted above regarding applicability of the Act. In *Documents Support Centre*, the Learned Judge President held at 243 F-G that; -

> "Without attempting to classify the causes of action that are incapable of redress by way of urgent application, it appears to me that the nature of the cause of action and the relief sought are important considerations in granting or denying urgent applications.

[20] Against this advice to pay attention to relief and causa, I turn to the authorities on urgency. Citing the decision of *Kuvarega v Registrar-General & Anor* 1998 (1) ZLR 188 (H), this court held in *Dexprint Investments (Pvt) Ltd vs Ace Property and Investments Company (Pvt) Ltd.* HH 120/2002 at pages 2 and 3 as follows: -

> "For a court to deal with a matter on an urgent basis, it must be satisfied of a number of important aspects. The court has laid down guidelines to be followed. If by its nature the circumstances are such that the matter cannot wait in the sense that if not dealt with immediately irreparable prejudice will result, the court can be inclined to deal with it on an urgent basis. Further, it must be clear that the applicant did on his own part treat the matter as urgent. In other words if the applicant does not act immediately and waits for doomsday to arrive, and does not give a reasonable explanation for that delay in taking action, he cannot expect to convince the court that the matter is indeed one that warrants to be dealt with on an urgent basis…" [Underlined for emphasis].

[21] The above guidance was further elaborated in *Madzivanzira & 2 Ors v Dexprint (Pvt) Ltd & Anor* HH 145-02. The court reiterated the importance of pleading with clarity so as to lay

bare the facts (and evidence thereof) justifying urgency. In addition, the court echoed the established position that the existence of harm or prejudice, did not automatically translate to urgency. Even where such harm is in fact irreparable. It was held as follows at page 4; -

> "I would add that if the application is one that cannot wait, then that opinion must be brought home to the court, not as an opinion but as a matter of fact. The affidavit must establish that the applicant will suffer some form of prejudice or harm, and probably irreparable at that, if relief is not afforded him *instanter*. As rightly emphasised by the learned judges in the above cases, the element of harm should not be confused with urgency – *Power N.O. v Bieber* 1955 (1) SA 490 (W). [Underlined for emphasis]

APPLICATION OF THE LAW TO THE FACTS

[22] In summary, the applicant seeking to have its matter heard on an urgent basis must align its causa and relief sought to the risk or calamity anticipated. Its papers must demonstrate timely diligence in the defence of rights and interest by such applicant. In the matter before me, the first step is to examine the Riczone`s cause of action. In doing so, the following considerations become pivotal. The parties` dispute traces its source to the relationship created between Tel One as the procurement authority, and Riczone as bidder. The tender in question was raised in terms of the Act.

[23] The tender document itself says so clearly. Paragraph 2 of part 1 (Invitation) states as follows; -

> "Bidding will be conducted in accordance with the Public Procurement Public Procurement and Disposal of Public Assets Act [Chapter 22:23] and is open to all bidders. References to the Regulations are to the Public Procurement and Disposal of Public Assets (General) Regulations Statutory Instrument No 5 of 2018.The terms and requirements in the Act and Regulations govern the submission of Bids and should be read by all Bidders."

[24] In addition, part 2 (Eligibility and Qualification Criteria) refers to section 28 of the Act. Part 2.5 specifically cites section 72 (6) of the Act and 74(1) of the Regulations. This observation leads to the obvious conclusion that the cause of action derives from the tender`s

terms and conditions. These being in addition to the other key terms and conditions already noted in paragraphs [7] to [11] above.

[25] Yet all may not be what it seems. The correctness of the presumption that the Act governs the parties` relationship was thrown into contention. And as noted in the opening paragraph [1] above, the resolution of the question of urgency hinges on the question; -does the Act (inclusive of the remedies therein) apply to the parties` relationship? Put differently, it must be established whether the rights and interests driving Riczone`s cause of action flow from the tender document as a condensation of, and the wider provisions in the Act.

[26] This question is triggered firstly, by General Notice 164B of 2022 published on 8 February 2024.This General Notice "exempted" Tel One`s procurement and disposal activities from the Procurement Act. The exemption being in terms of section 3(9) of the Procurement Act which provides as follows; -

> 3(9) The President of the Republic of Zimbabwe, in consultation with the Authority, by notice in the Gazette, may exempt from the application of this Act a prescribed public entity operating in competitive markets and/or which is managed under a management contract by a third party which is not a public entity and which third party owns not less than thirty per centum of the entire issued shares of that public entity, for such period as shall be specified in the notice.

[27] Neither section 3(9) of the Procurement Act, nor General Notice 164B elaborates what "exemption" is. Accordingly, the ordinary meaning of the word "exempted" must be adopted. The word denotes the extension or granting of a reprieve to a party which releases such party from previously applicable obligation. Implicit in the general privilege of an exemption is the benefit, in certain circumstance of choice.

[28] To that extent, the effect of General Notice 164B on deals or transactions commenced, but not concluded before its issuance, becomes unclear. Nor do the savings provisions of sections 17,18 and 19 of the Interpretation Act [Chapter 1:01] assist because the General Notice 164B did not repeal the Act. The possibility that by General Notice 164B, the Act no longer applies impacts the parties` rights and interest under the tender arrangement. And more pertinently on that score, Riczone`s causa and relief sought herein. This issue of the effect of General Notice 164B was not adverted to in the founding affidavit.

[29] Nor did Mr. *Mutero,* despite admirably adroit efforts in that direction, seem properly ready to address the issue when it was raised by his opponents. In the same respect, those very colleagues on the opposite side fared no better in fully articulating the impact of 164B.This point alone means that the applicant`s causa becomes clouded with unresolved challenges. These challenges, in turn, become more acute given Riczone`s immediate quest to demonstrate urgency.

[30] I would however, not be inclined to conclude the matter on that basis alone. The alternative position is that the Act is still applicable despite General Notice 164B.Which then necessitates reverting to the provisions of the Act which are relevant to (a) the causa, (b) whether Riczone acted timeously and (c) whether the harm alleged was in fact correctly identified in the founding affidavit.

[31] To begin with, section 55 of the Act provides that the contract award following a tender evaluation shall not take place until a period of 14 days elapses. It is on the basis of this provision that both Tel One and Jadeyed disputed the urgency claimed by Riczone. The two respondents insisted that given the 14-day window created by section 55, the need to act arose on 5 July 2024 when Riczone became aware that its bid had been unsuccessful. It is common cause that Riczone only acted on 22 July 2024, well past the expiry of the 14-day period.

[32] Mr. *Mutero* argued however, that Riczone could not have acted immediately on 5 July 2024. It had no basis to do so. It could only act once furnished with the reasons for its disqualification in writing by Tel One. Those reasons were eventually availed on 19 July 2024.Counsel therefore submitted that the need to act arose on that date. And given that Riczone filed both the present and review application HCHC 514/24 on 22 July 2024, the question of delay ought not arise.

[33] Indeed, I do note that section 67 (2) of the Procurement Act allows unsuccessful bidders to submit requests for information from the tendering authority. Where such request is made, as in the instant case, no contract shall be awarded until the information in question has been furnished. Herein, the request was made on 11 July 2024, delivered on 19 July 2024 and the application made on 22 July 2024.Based on these facts, and all matters being equal, it may be concluded that Riczone did act timeously.

[34] But this conclusion must pass a further test in order to advance Riczone`s case further. This is because the respondents challenged the very propriety of Riczone`s election to file both

the review, as well as present applications in this court. It was submitted by Adv *Chinwawadzimba* (with Mr. *Tonhodzai* fully associated), that Riczone in doing so, spurned the efficacious remedies provided for in the Act.

DOMESIC REMEDIES: PART X OF THE PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS ACT [CHAPTER 22:23]

[35] Mr. *Mutero* in response, argued that the domestic remedies set out in the Act were insufficient for purposes of protecting Riczone`s interests. Counsel specifically indicated that the procedure lacked the facility of an interdict. Only the High Court could offer Riczone such relief, hence the present application. In, *Tribac Tobacco (Pvt) Ltd v Tobacco Marketing Board* 1996 (2) ZLR 52 (S), the Supreme Court,[2] restated the requirements of efficacious domestic remedies as follows at page 56; -

> "The alternative remedy must (a) be adequate in the circumstances; (b) be ordinary and reasonable; (c) be a legal remedy; and (d) grant similar protection."

[36]A reading of Part X of the Act, as against the above test exposes counsel`s position on the domestic remedies as incorrect. The Act does carry sufficient safeguards in that respect. In fact, I hold the view that the legislature paid the greatest of attention to the need to resolve procurement challenges effectively and speedily. It created a procedure and facility designed to address challenges such as the one now before us, unless Riczone proffers evidence to impugn the process. I say so for the following reasons; -

[37] Firstly, section 73(1) permits an unsatisfied bidder to challenge a tender process on the basis that the procurement authority breached statutory obligations. In the Act, the term "breach of duty" is used to define the grounds upon which a bidder`s may challenge a tender process. The Procurement Act creates a framework that obliges procurement authorities to administer procurement activities in a fair, transparent and punctilious manner.

[38] This high standard of efficiency and accountability is further underwritten by the Administrative Justice Act [Chapter 10:23] ("the Justice Act"). Any proven aberration, including the sort alleged by Riczone herein, would clearly amount to a "breach of duty", a wrong actionable under the challenge procedure set out in the Act.

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[2] Cited with approval, the classic case of *Setlogelo v Setlogelo* 1914 AD 221 at 227 and *PTC Pension Fund v Standard Chartered Merchant Bank, Zimbabwe Ltd & Anor* 1993 (1) ZLR 55 (H)

[39] Secondly, the challenge procedure itself is simple, clear and predicated on strict timelines. Within the 14-day period fixed by section 55 (2), Riczone could have filed its challenge as per section 73(3). The interdict which Riczone bemoaned as being unavailable in the Act is in fact provided for under section 74 (4). This provision requires a procurement authority to freeze the award of contracts in contested tenders pending adjudication of any challenge filed.

[40] Thirdly, section 75 of the Procurement Act sets out the appointment and qualifications of a review panel. The number, experience and qualifications of persons constituting the review panel clearly reflect the legislature`s intention. Namely to create a review panel sufficiently empowered in capacity and process to effectively discharge its mandate. This aspect is fortified by sections 76 and 77 dealing respectively with procedure of the review panel, and the right of appeal to the Administrative Court.

[41] Fourthly, section 76 (5) of the Act sets out clearly, the relief available to a complainant bidder. The relief panel may, in determining a bidder`s challenge; -

a) prohibit the procuring entity from reaching any decision or doing anything in an unauthorised manner or from following incorrect procedure; or
b) annul in whole or in part any unauthorised act or decision of the procuring entity, other than an act or decision bringing the procurement contract into force; or
c) order the procuring entity to begin the procurement proceedings afresh; or
d) award damages to the bidder to compensate for any loss he or she has suffered.

[42] As fifth point, paragraphs (a) to (d) of section 76(5) ought to quell any further contest over the sufficiency of domestic remedies. I discussed the rationale behind the age-old principle behind the need to exhaust domestic remedies in *Madzingira v Provincial Magistrate I. Mhene NO and Anor* HH 166-23[3] where I noted that; -

> "[24] Courts have always recognised the need to fully exploit the efficacy and readiness of statutory/administrative facilities in the resolution of disputes. GOWORA J (as she then was) stated so in *Francis Rateiwa v Kambuzuma Housing Cooperative & Anor* 2007 (1) ZLR 311(H), where she held [at 316 C] that; -

[3] See also *Tutani v Minister of Labour and Ors* 1987 (2) ZLR 88 (H) *; Moyo v Forestry Commission* 1996 (1) ZLR 173 (H) *; Girjac Services Pvt Ltd v Mudzingwa* 1999 (1) ZLR 88(H) *Makarudze & Anor v Bungu & Ors* 2015 (1) ZLR 15 (H))

> "In deciding whether or not the court should withhold its jurisdiction and insist that a litigant first exhaust the domestic remedies provided for a court has to have regard to a number of factors. Amongst these are ***[1]*** the subject matter of the statute**,*[2]*** the body of persons who make the initial decision and ***[3]*** the bases on which it is to be made, ***[4]*** the body of persons who exercise appellate jurisdiction and ***[5]*** the manner in which that jurisdiction is to be exercised including the ambit of any rehearing on appeal, ***[6]*** the powers of the appellate tribunal, including its power to redress or cure the wrongs of a reviewable character, and ***[7]*** whether the tribunal, its procedures and powers are suited to redress the particular wrong of which the applicant complains."
>
> [annotations inserted for emphasis].

[43] The reasoning in *Rateiwa v Kambuzuma Housing Cooperative* (supra) merely underscores two critical principles; -jurisdiction and pragmatism. As regards jurisdiction, this court discouraged, in *ANZ & Anor v Minister of Information and Publicity* 2007 (1) ZLR 272 (H), the usurpation of an administrative authority`s mandate. This for the reasons that such jurisdiction may be specifically ousted by statute or other instrument (as in *Murowa Diamonds v Union Makumbe* SC 16-09).

[44] Or that the court is precluded by circumstance, from effectively exercising its jurisdiction. It was also noted in that decision, that this consideration explains why parties will, in any event, normally seek an order that a matter be referred back for redetermination by the lower tribunal. On pragmatism, domestic remedies usually provide purpose-built, specialised processes with ready and requisite capabilities to focus on and dispose of the subject matter at hand. Such subject matter includes technical aspects best left to those more attuned to such issues. (See also *Livison Chikutu &2 Ors v Minister of Lands* & 3 Ors HH 02-22.)

[45] In that regard, where a party insists on inviting the court`s jurisdiction nonetheless, then such party must amply justify its request. In doing so, the litigant must expose the lack of efficacy in the domestic processes concerned. This being the very onus which Riczone has not, in my view, been able to discharge in the present matter. Following the leading authorities like *Tutani v Minister of Labour* (supra) DUBE JP expressed this requirement as follows in *JK Motors (Pvt) Ltd v Zimbabwe Revenue Authority* HH 762-22 at *[13]*; -

> "13. The duty to exhaust domestic remedies compels a person challenging the conduct of an administrative body to pursue first the available judicial or administrative

procedures available to him to their final conclusion before he resorts to other mechanisms of 5 HH 762-22 HC 2447/22 resolving the dispute. This general requirement has exceptions. There must be good reason why a litigant cannot exhaust the domestic remedies available to him. A litigant is not expected or required to pursue domestic remedies where the domestic remedies available are incapable of affording effective redress, are unfair, cause undue delay. He cannot be expected to exhaust domestic remedies where no remedy exists in terms of the legal framework available."

DISPOSITION

[46] This conclusion becomes dispositive of the issue of urgency. It exposes Riczone`s error in forum selection, which in turn generated the peril which the party now faces. By electing out of the challenge procedure available to it under Part X of the Act, Riczone failed to act timeously. And timeous action, according to the well-established principles on urgency, means the timely pursuit, through the correct procedure, of relief competently claimable under a specific cause of action.

[47] And additionally, to conclude a point earlier noted, Riczone failed to properly plead the extent of its rights and interest under the tender arrangements given the publication of General Notice 164B.This failure put its cause of action into further contention, together with the rights, interest as well as relief sought. That in turn limited its capacity to demonstrate the existence of urgency based on the established principles, including the guidelines set in *Documents Support Centre v Mapuvire*.

It is accordingly ordered as follows; -

1. That this matter be and is hereby declared as not urgent and that it be removed from the roll of urgent matters with costs being borne by applicant.
2. That the preliminary points raised be deferred for determination with the main matter.

Tabana & Marwa -applicant`s legal practitioners
Musendekwa-Mtisi Legal Practitioners-first respondent`s legal practitioners
Mutindi-Bumhira -second respondent`s legal practitioners

[CHILIMBE J__4/8/24]