TSHOLOTSHO RURAL DISTRICT COUNCIL
versus
J MAMBARA, N.O CASE NO. PRAZ/RP/03/2019
And
THE PROCUREMENT REGULATORY AUTHORITY
OF ZIMBABWE CASE NO. PRAZ/RP/03/2019
And
LODZI HUNTERS (PVT) LTD ZIMBABWE

HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 5 FEBRUARY 2020 AND 29 APRIL 2021

Opposed Application

J Sibanda, for the applicant
No appearance for the 1st respondent
No appearance for the 2nd respondent
Advocate P Dube, for the 3rd respondent

TAKUVA J: This is a court application for review. The relief sought is couched in the following terms;

"a) The purported Review Proceedings chaired by the 1st respondent in respect of a tender carried out by applicant under Tsholotsho North Hunting Concession Tender Number TRDC 03/19 be and are nullified.

b) The 3rd respondent shall pay the costs of this application."

The grounds for this application are:

1. Gross irregularity in the proceedings.

2. Gross irrationality in the proceedings.

This is a matter where it is helpful to fully identify the parties. The applicant is a local government authority that superintends over the local governance affairs of Tsholotsho District. The 1st respondent is cited in his capacity as the chairman of a Review Panel established by the 2nd respondent in terms of the Public Procurement and Disposal of Public Assets Act (Chapter 22:23) (The Act) to review the procurement proceedings conducted by the applicant under Tsholotsho North Hunting Concession Tender Number TRDC 03/19.

The 2nd respondent is the Procurement Regulatory Authority of Zimbabwe, a body corporate, established in terms of the Act. It is the entity that supervises procuring entities in Zimbabwe and, in the event of a request of a review of such procurement proceedings by any dissatisfied bidder, establishes Review Panels such as it did when it established the panel chaired by 1st respondent.

The 3rd respondent is Lodzi Hunters (Pvt) Ltd Zimbabwe. It is one of the companies that submitted bids and lost.

BACKGROUND

In or about March 2019, the applicant flighted invitations for bids under Tsholotsho North Hunting Concession Tender No. TRDC 03/19. A number of entities submitted bids inclusive of the 3rd respondent. The bids were eventually opened and a winner announced by way of a letter addressed to the losing bidders dated 24 April 2019. On 29 April 2019, 3rd respondent wrote to applicant pointing out that the notice it received was not in accordance with the law in that it did not show the contract price. Later applicant corrected that error and properly notified the 3rd respondent of the results of the tender. The 3rd respondent lodged a challenge of the procurement proceedings with the applicant on 14 May 2019 without attaching proof of payment of security for costs.

On 24 May 2019, 3rd respondent again lodged its challenge to the procurement proceedings with applicant. Later, on 3rd June 2019, 3rd respondent lodged an application for review of the procurement proceedings with 2nd respondent. Applicant was notified of this review application on 5 June 2019 by letter penned by 2nd respondent. See Annexure A. The 2nd respondent wrote again to advise applicant of the hearing date – see Annexure B. The review panel sat on 18 – 19 June 2019 and issued a Determination. See Annexure C.

The cause of complaint and the basis of this application are the proceedings of the Review Panel as captured in Annexure C. In terms of this annexure, the basis upon which the decision to set aside the procurement proceedings in question was made is a point raised *mero motu* by the panel itself. Applicant's contention is that this vitiated the entire proceedings in that section 61 (4) of the Public Procurement and Disposal of Public Assets (General) Regulations SI 5 of 2018, clearly states that the decision of a Review Panel "shall be confined to the issues raised by the application and the respondent's reply." It was further

argued that the raising of an issue *mero motu* by the Panel and the determination of the matter on that issue, was therefore a gross irregularity in the proceedings.

As regards the alleged concession by applicant's erstwhile Legal Practitioner, applicant submitted that this was in respect of an issue that was outside the powers of the Panel to raise. In addition, such concession was made without consultation with applicant on an issue that clearly required consultation. The concession is therefore improper at law, so the argument goes.

The second reason why applicant sought the nullification of the proceedings is that the Act upon which the application for review was filed provides that an application for review must be filed within 5 days of the challenge being lodged with a procuring entity. In this case, the application was filed by 3rd respondent on 3 June 2019. Some 6 days after lodging the challenge. This is outside the time limits allowed for an application of this nature to be filed.

Finally, the applicant submitted that the Panel chaired by 1st respondent erred in entertaining a fatally defective application. This was irrational according to the applicant. The applicant's prayer was that the review proceedings chaired by the 1st respondent in the said matter be set aside for gross irregularity and irrationality.

The 1st and 2nd respondents have not opposed this application. The 3rd respondent has filed a notice of opposition and an opposing affidavit. *In limine,* 3rd respondent argued that the applicant was "forum shopping" by failing to exhaust "domestic remedies" provided by the Act. The argument here is that the applicant should have appealed to the Administrative Court instead of filing this application in this Court. Alternatively, it was argued that applicant should have pursued its application for review at the Administrative Court.

On the merits, 3rd respondent submitted that it was proper for PRAZ to raise a preliminary point *mero motu* since it concerned the legality of the proceedings. It also argued that applicant committed itself to the concession and is bound by it. It was contended that 3rd respondent's challenge was timeous in terms of the procurement law and regulations. During the hearing 3rd respondent's counsel argued that 3rd respondent received applicant's decision on 1st June 2019 and not on 24 May. The 3rd respondent argued that if the challenge was out of time, applicant should have engaged the domestic remedies with the Administrative Court.

Finally, 3rd respondent submitted that the relief sought by the applicant is incompetent to the "extent of it being inconclusive of the substantial issue in dispute." The argument is that nullifying the Review Panel proceedings does not resolve the underlying dispute.

I perceive the following to be the issues in this matter;

IN LIMINE

1. Whether 3rd respondent's notice of opposition and opposing affidavit are in substantial compliance with rule 233 of the High Court Rules 1971? If not

2. Whether it should be condoned in terms of Rule 4C of this court's rules.

ON THE MERITS

3. Whether applicant exhausted domestic remedies.

4. Whether the review panel acted *ultra vires* its powers by raising *mero motu*, an issue that was not raised by the parties in their submissions and determining the matter on the issue raised by it.

5. Whether the application for review by the 3rd respondent complied with section 74 (1) (b) of the Public Procurement and Disposal of Public Assets Act 5/17?

In respect of the first issue, 3rd respondent conceded that it did not use Form 29 A as is required by rule 233 but argued that it "faulted in an inconsequential manner" and that the court should invoke rule 4C to condone a "*bona fide* human mistake." It was contended that the 3rd respondent has met the requirements of the doctrine of substantial compliance. Reliance was placed on the following cases;

(1) *Zimbabwe Schools Examination Council* v *Moses Chinhengo (NO) and Tarch Print Zimbabwe Ltd* HH 160-18.
(2) *Zimbabwe Open University* v *Mazembwe* 2009 (1) ZLR 101 (H) and
(3) *Telecel Zimbabwe (Pvt) Ltd* v *Potraz & Others* HH 446-15.

The 3rd respondent made an oral application for condonation during the hearing.

On the other hand the applicant strongly argued that the 3rd respondent is barred for failure to comply with rule 233. It contended that the rule is peremptory and the court has no power to condone what is not done in terms of a peremptory norm. Applicant relied on the following cases;

a) *Solomeo Farms (Pvt) Ltd* v *The Unlawful Occupants* HB 58-17.

b) *Mwayeya* v *Chivizhe* SC 16-16.

c) *Zimbabwe Open University* v *Mazembwe supra*.

Rule 233 of the High Court Rules 1971 states; A respondent who intends to oppose an application against him,

"(1) shall ….. file a Notice of opposition in Form 29 A.

(2) …

(3) A respondent who has failed to file opposition papers in terms of subsection (1) shall be deemed to be barred."

Form 29 A indicates that a Notice of Opposition shall contain the date of service of the application. A notice of opposition that complies with rule 233 should:

a) indicate that it is a notice of opposition.

b) be accompanied by an opposing affidavit, and

c) indicate the date of service of the application being opposed.

In casu, one requirement is missing, namely the date of service of the application. The notice of opposition indicates that it is a notice of opposition and it is accompanied by an opposing affidavit. The applicant has not alleged that it suffered any prejudice as a result of the omission of the date. The courts have stated the principle thus;

> "… whilst it is imperative for litigants to comply with rules of court, non-compliance should not automatically result in dismissing the offending litigant's case. The interests of justice demand that matters be determined on merit rather than technicalities. Applying the rules stringently may lead to injustice to litigants and would go against the principle and purpose of encouraging persons to follow the law." See *Zimbabwe Schools Examination Council* case *supra*.

In this case, I find that the 3rd respondent has substantially complied with rule 233. In any event, rule 4C of the High Court Rules 1971 applies to the departure by 3rd respondent.

The rule empowers a Judge to "direct, authorize or condone a departure from any provisions of these rules, including any extension of any period specified therein, where he/it, as the case maybe, is satisfied that the departure is in interests of justice." In my view, it is in the interests of justice that the non compliance be condoned. Accordingly, the application for condonation is granted.

This brings me to the second issue relating to the need for applicant to exhaust domestic remedies. According to the 3rd respondent, these remedies are provided for under the Act. In particular section 77 (1) of the Act which provides;

> "77(1) A bidder or procuring entity aggrieved by a decision of a review panel may appeal against the decision to the Administrative Court within twenty days after the panel's decision was notified to the party concerned." (my emphasis)

It was further contended during the hearing that 3rd respondent's papers show that it is aggrieved by the decision.

I take the view that 3rd respondent misunderstands the law in that applicant is not aggrieved by the decision of the review panel but by the process by which the decision was arrived at. It seeks that such process be nullified.

It is wrong to attribute to section 77(1) the meaning that all proceedings of reviewing panels can only be challenged by way of appeal mounted in terms of that section. The ordinary grammatical meaning of section 77(1) is that an aggrieved party may file an appeal with the Administrative Court. The procurement law therefore only gives the Administrative Court appellate jurisdiction not power to review proceedings of review panels. The 3rd respondent conscious of this fact then went on a long circuitous route to find review jurisdiction of the Administrative Court over decisions of review panels. The issue in my view is not whether the Administrative Court generally, in the administrative domain enjoys review powers. It is whether the Administrative Court has been conferred with jurisdiction to review decisions or processes of review panels established in terms of section 5 of the Public Procurement and Disposal of Public Assets Act (Chapter 22:23). The answer is in the negative. I find therefore that the Administrative Court does not provide domestic remedies to the applicant as that court has no review jurisdiction to entertain such a review application.

On the other hand, this court has, at common law, power to review the proceedings of all administrative tribunals, both statutory and domestic. That power was codified into law in

terms of sections 26 and 27 of the High Court Act. Such power has indeed long been recognized. The inherent nature of the powers of this court means that as long as the grounds for review are established, the court must act in terms of section 28 of the High Court Act to either set aside the impugned proceedings or correct them. Section 77(1) does not oust the High Court's review powers.

In the present matter, 3rd respondent strenuously defended the PRAZ deliberations as proper. It contended that PRAZ *mero motu* observed a patent illegality "that starred it" in the face, that is the applicant had not sought and obtained clearance by Cabinet before commencing any tender proceedings involving joint ventures. It also supported its defence of these proceedings on the fact that applicant's erstwhile legal practitioner "conceded that the procurement proceedings in issue should be set aside." Again during the hearing applicant raised a fresh argument that section 24 of the Interpretation Act empowers the review panel to look at the case in the manner it did. There is no doubt in my mind that the above argument has no merit. It is clear that the review panel acted *ultra vires* its powers by raising *mero motu*, an issue that was not raised by the parties in their submissions and determining the matter on the issue it raised. In terms of the law, that is section 61(4) of the Public Procurement and Disposal of Public Assets (General) Regulations SI 5/2018, the review panel is required to confine its deliberations to the issues raised by the applicant and the respondent's reply. It did not do that, instead it strayed into the bush, no wonder 1st and 2nd respondents have not opposed this application. Failure to oppose amounts to a concession that the proceedings they conducted were flawed.

The review panel is not a court of law but is a creature of statute. Its powers are confined to reviewing what has been raised in the papers by the parties. Therefore, the raising of issues by the panel in this case vitiated the proceedings making them irregular. It appears the concession by applicant's erstwhile legal practitioner was bad at law as it related to an irregularity already committed by the panel itself. Whatever happened there or whatever was said there becomes of no consequence. In my view section 24 of the Interpretation Act does not give the panel power to go outside the issues raised by the parties.

The 4th and final issue relates to the late filing of the application for review by 3rd respondent in contravention of section 74(1)(b) of the Public Procurement and Disposal of

Assets Act 5/17. In its response, 3rd respondent in an opposing affidavit sworn to by one Paradzai Nemashakwe states in paragraph 15 that;

> "15 AD para 22-29
>
> 3rd respondent's challenge was timeous and meticulously in terms of the procurement law and regulations… In any case and if indeed 3rd respondent's challenge was out of time (which is denied) applicant was at large to engage the domestic remedies as are provided for in the procurement law." (my emphasis)

The problem is that the 3rd respondent has not told the court when it filed its review application with the 2nd respondent. I agree with *Mr Sibanda* for the applicant that it would be remarkably disingenuous of 3rd respondent to say that it filed its application on time without telling the court when such application was filed to show it was filed on time. The 3rd respondent's new argument during the hearing that the applicant's "decision" was made available on 1st June 2019 has no merit. See paragraph 11 of the Notice of Opposition on paragraph 22. This is moreso in light of the clear factual averment by the applicant that the 3rd respondent lodged its challenge with applicant on 24 May 2019. Third respondent filed its application for review on 3rd June 2019. Applicant went further to state that the five (5) days within which to lodge the application with the Authority in terms of the Act expired on 31 May 2019. The 3rd of June was one day outside the time allowed by the law that birthed the panel.

I take the view that the review panel fell into a grave error in considering an application that was filed outside the time allowed by the mother Act. In fact there was no application before the panel. It should have struck the matter off the roll. What the review panel purported to do is a legal nullity which must be set aside. The 3rd respondent mounted defective proceedings before the 1st respondent's review panel.

I do not find any merit in 3rd respondent's complaint that what applicant seeks in this matter would not resolve the matter, in that no substantive relief is sought. If this court declares the proceedings a nullity and proceeds to set those proceedings aside, that will be a substantive relief to the applicant.

DISPOSITION

It be and is hereby ordered that;

a) The purported review proceedings chaired by the 1st respondent in respect of a tender carried out by applicant under Tsholotsho North Hunting Concession Tender Number TRDC 03/19 be and are nullified.

b) The 3rd respondent shall pay the costs of this application.

Job Sibanda and Associates, applicant's legal practitioners
Messrs Ncube Attorneys, 3rd respondent's legal practitioners