TWENTY THIRD CENTURY (PRIVATE) LIMITED
versus
ZIMBABWE MANPOWER DEVELOPMENT FUND
and
PROCUREMENT REGULATORY AUTHORITY OF ZIMBABWE
and
TANO DIGITAL SOLUTIONS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
CHINAMORA J
HARARE 13 July 2022 and 26 July 2022

**Application for review**

*Adv M Ndlovu*, for the applicant
*Adv L Uriri*, for the 1st respondent
*Mr S Muzondiwa*, for the 3rd respondent
No appearance for the 2nd respondent

CHINAMORA J:

**Introduction:**

I have before me an application filed by the applicant on 15 March 2022 for review in terms of section 4 of the Administrative Justice Act [Chapter 10:28] (hereinafter referred to as "the AJA"), and for setting aside the decision of the 2nd respondent made on 22 February 2022. In addition, the applicant seeks the setting aside of the decision of the 1st respondent given on 9 December 2022, which awarded a tender to provide SAP software services to the 3rd respondent. Dissatisfied with this, the applicant sought a determination of the matter by the Review Panel in terms of section 74 of the Public Procurement and Disposal of Public Assets Act [Chapter 22:23] (hereinafter referred to as "the Public Procurement Act". The Review Panel dismissed the challenge, a decision which prompted the applicant to file the present application for review. The grounds on which this application has been lodged are stated as follows:

(1) The findings of the 2nd respondent are a nullity because its Review Panel was not properly constituted.

(2) The decision of the 2nd respondent is grossly unreasonable in that the 2nd respondent did not take into account expert illumination given on the matter by the 2nd respondent.

(3) The 2nd respondent's decision is grossly irrational and unreasonable.

(4) The decision of the 2nd respondent against the applicant was made without hearing the parties in terms of the law and, as such, that decision was arbitrary and void.

Let me give a background to the dispute between the parties.

**Factual background**

The applicant asserts that sometime in October 2021, the 1st respondent published a notice inviting bids for the provision of SAP software support services to it. The tender number was ZPCR 29/2021. Bidding procedures and requirements were also spelt out. The applicant submitted its bid in response to the aforesaid notice, so did the 3rd respondent. Further, the applicant states that, on 9 November 2021 before the result of the bids was released, the applicant gave a notice to the 2nd respondent challenging a condition of the tender on the basis that it was restrictive, unreasonable and anti-competition. The cause of complaint was clause 10 of the tender documents, which required bidders to be holders of a SAP licence. In making the challenge, the applicant relied on section 73 (1) of the Public Procurement Act. In its challenge, the applicant asked for the following to be done:

1. The tender closing period of 18 November 2021 to be suspended in order for the procuring entity (the 1st respondent) to consider the challenge, respond to it and advise the outcome to all the interested parties.
2. Clause 10 which requires bidders to provide proof of being SAP certified partners to be removed from the bid requirements, as that requirement contravenes section 28 (3) (as read with section 4) of the Public Procurement Act.

In the above respect, the applicant submits that it has previously provided the same software support services to the 1st respondent, in particular in 2020, but no condition for holding of a SAP licence was imposed.

The applicant, additionally, made its case for irregularity of the decision to award the tender to the 3rd respondent in paragraphs 18 to 19 of its founding affidavit (at page 7 of the record) as follows.

> "18. Whilst a challenge was pending as against the tender process, the 1st respondent proceeded to grant a tender to the 3rd respondent. This tender was made notwithstanding the pending process before the regulatory authority, the 2nd respondent. This was unlawful and is an irregularity that may not stand.
>
> 19. This application thus seeks the setting aside of these two findings. First is the finding made by the 2nd respondent on 22 February 2022. Second is the setting aside of the decision of the 1st respondent to award a tender to the 3rd respondent while a challenge was yet to be determined by the regulatory authority. The conduct of the 1st respondent undermines the functionality of the 2nd respondent and is at variance with the law".

On 2 February 2022, the 1st respondent gave a response to the challenge. It confirmed that it had been awarded the tender on 20 December 2021, and raised two points *in limine*. The first contention was that there was no application for review before the panel since the letter dated 16 November 2021 submitted by the applicant does not qualify as an application in terms of the Public Procurement Regulations (Statutory Instrument 5 of 2018). Secondly, the 1st respondent stated that there was no valid challenge as the applicant had not paid security for costs. On the merits, the 1st respondent's submission is that the contract was awarded on 9 December 2021 when there was no valid challenge before it.

In the application before me, in paragraph 20 of the applicant's founding affidavit (at page 7 of the record), it stressed that the decision of 22 February 2022 was made by a review panel that was not properly constituted, and as such could not pass a lawful decision on the dispute between the parties. The applicant, in paragraph 21, proceeded to explain its insistency that the review panel was not properly constituted, in the following language:

> "Section 75 of the Public Procurement and Disposal of Public Assets Act governs the question of the constitution of a review panel. In terms of this provision, the review panel must have an individual who is a legal practitioner in terms of the Legal Practitioners Act, a member of the civil service and a person who has expertise as regards to the field in which the dispute is rooted. This provision also makes provision for an individual drawn from the organization(s) representing

> professional associations or bodies or commercial or industrial entities concerned with the dispute. This is provided for in terms of section 75 (2) of the Public Procurement and Disposal of Public Assets Act".

In addressing the averments contained above, the 1st respondent averred that during the hearing on 4 February 2022, the chairperson of the review panel maintained that it had been appointed in terms of section 75 (4) of the Public Procurement Act. When asked by the applicant how each member was appointed, the 2nd respondent wrote a letter dated 9 February 2022 in the following terms:

> "Dear Sirs
>
> **RE: CASE No. PRAZ/RP/02/2021 TENDER FRO THE PROVISION OF SAP SOFTWARE SERVICES FOR ZIMDEF**
>
> Reference is made to the above matter and to your letter dated 4 February 2022.
>
> The secretariat advises that the review panel hearing for the above mentioned matter is properly constituted in accordance with section 75 (4) of the Public Procurement and Disposal of Public Assets (PPDPA) Act [Chapter 22:23].
>
> Mr J Mutizwa, the chairperson of the panel was appointed in accordance with section 75 (4) (a) of the PPDPA Act.
> Mr J Mambara was duly appointed as a member of the panel in line with section 75 (4) (b) of the PPDPA Act.
> Mr M Nkomo was appointed as a member of the panel in accordance with section 75 (4) (c) of the PPDPA Act.
>
> Please be guided accordingly.
>
> Yours sincerely
>
> C Ruswa
> Chief Executive Officer
> **PROCUREMENT REGULATORY AUTHORITY OF ZIMBABWE"**

In fact, in paragraph 6.1 of the 1st respondent's opposing affidavit, which appears at page 236 of the record, the 1st respondent reiterates what is contained in the above letter. It says the following:

> "The applicant cannot be allowed to merely assume, it has placed nothing before this honourable court to show how the members of the review panel are not in compliance with the provisions of the Act. Annexure "C" attached above clearly shows how each member of the panel was appointed in full compliance with the provisions of the Act".

At the hearing before me, the parties agreed to adopt a rolled up approached which entailed arguing the points *in limine* at the same time as the merits, then leaving it to the court to render a judgment on everything at the end of the hearing. *Ms M R Zvimba*, despite her client (the 2nd respondent) being barred for failure to file heads of argument, merely made a brief appearance to advise that the court that the 2nd respondent had no intention to argue the matter and would abide by the court's decision and was excused from participating in the proceedings.

**Analysis of the case**

*Adv Ndlovu* for the applicant, raised the preliminary point that the review panel was not properly constituted in the manner set out in its founding affidavit. I have already related to this. He argued that the review panel comprised of members who were all legal practitioners, and that such composition was not in accordance with section 75 (4) of the Public Procurement Act. Counsel argued that, while there was compliance with section 75 (4) (a), the appointment did not comply with section 75 (4) (b) and (c). Accordingly, it was argued that the exercise of the review power by the review panel was not authorized by statute. In this regard, he concluded by submitting that as the panel was improperly composed as the appointment was not in accordance with section 75 (4) of the Public Procurement Act, its decision made on 22 February 2022 was a nullity. For this proposition of law, the case of *Muchakata v Netherburn Mine* 1996 (1) ZLR 153 (S) was cited.

Additionally, the applicant submitted that the 2nd respondent failed to comply with section 75 (2) (b) of the Public Procurement Act, which provides that:

> "The Authority shall select persons for inclusion on a list of panellists by- (a) requesting- (i) the Law Society of Zimbabwe; and (ii) the Civil Service Commission; and (iii) organisations representing professional associations or bodies or commercial and industrial entities; and (iv) other organisations which, in the opinion of the Board, have or represent persons who have expertise in fields relating to procurement; to nominate persons for inclusion on the list, and (b) publishing advertisements in newspapers circulating in Zimbabwe, calling on persons to apply for inclusion on the list;".

Having referred to this provision, the applicant contended that, when the 2nd respondent constituted the review panel, there was no advertisement done contrary to its mandatory requirements. It added that such an advertisement was not attached to the opposing papers.

On the merits, the applicant submits the award was made despite the challenge to the tender process. Because of this, it was argued that the challenge should have been dealt with and a decision given on it before results of the tender were announced. The challenge, so contends the applicant, was lodged in terms of section 73 (1) of the Public Procurement Act, which provides that:

> "A potential or actual bidder in procurement proceedings who claims to have suffered, or to be likely to suffer, loss or injury due to a breach of a duty imposed on a procuring entity by or under this Act, may challenge the procurement proceedings by lodging a written notice with the procuring entity in accordance with this section".

I make the observation that section 73 of the Public Procurement Act does not say what should happen once a challenge has been made and is awaiting determination. The applicant argues that, the purpose of such a challenge is to ensure that the tender is not awarded to a competing bidder until it is decided, otherwise its objective is not achieved. Accordingly, it was submitted for the applicant that a purposive approach must be taken in order to obviate an absurdity occurring. I was referred to *Zambezi Gas Zimbabwe (Pvt) Ltd v N R Barber (Pvt) Ltd* SC 3-20, and urged to adopt a purposive approach when interpreting section 73 aforesaid. Counsel for the applicant submitted that logic dictates that the must be determined before a decision is made on the tender.

The applicant also argued that in Twenty Third Century Systems (Pvt) Ltd v Zimbabwe Manpower Development Fund and Ors HH 110-22, TAGU J had made a finding that had not complied with the law by its failure to place advertisements calling for nominations of panel members. It was therefore contended that the matter was *res judicata* on that finding. This is a requirement under section 75 (2) (b) of the Public Procurement Act, which I will address later in this judgment. I have had a look at that judgement, which was interlocutory interdict pending the hearing of this application, and can find nothing which justifies a conclusion of *res judicata.* I agree with Counsel for the 1st respondent that the finding was made in the course of examining whether or not prospects of success existed, and was not deciding a live issue before the court. Accordingly, I dismiss that preliminary point for lack of merit.

In his response, *Adv Uriri* for the 1st respondent submitted that the preliminary points taken by the applicant had no merit and should be dismissed. He began by referring to Rule 62 of the High Court Rules which requires the chairman of the review panel to be served with an application for review of his or her decision. The failure to join the chairman, so the submission continued,

meant that there was no application before this court. He asked the court to strike off this application from the roll. *Mr Muzondiwa* for the 3rd respondent, associated himself with this submission. In addressing this issue, the applicant relied on Rule 32 (11) of the High Court Rules which provides that no cause or matter shall be defeated by reason of non-joinder of a party, and the court may determine the issues in dispute so far as they relate to parties in dispute. Reliance was placed on *Wakatama and Ors v Madamombe* 2011 (1) ZLR 18. In this connection, I recall that in my judgment in *Delta Beverages (Pvt) Ltd v Blackey Investments (Pty) Ltd* HH 778-20, the applicant in that case sought argue that the failure to join the arbitrators was fatal to the proceedings before me. This is what I said in disposing of that argument:

> "Equally, I am not persuaded that the arbitrators in South Africa should be brought into the present proceedings as parties. Their role is to act as impartial arbiters in trying to resolve the dispute between the parties. They cannot, in my view, have a direct and substantial interest in the subject matter of application before this court and its outcome one way or the other. Whether or not the relief sought is granted does not affect any interest of the arbitrators *qua* arbitrators. In fact, it is common cause that no relief is sought against them. It becomes apparent, therefore, that the submission that the failure to cite either Ms Malaba or the arbitrators in South Africa is a material non-joinder finds no support in law. If anything, to sanction such a joinder would amount to a misjoinder of parties who do not in any way assist in the dispositon of the issues before the court".

My sentiments in that case equally apply to the present case, and I endorse them. Let me add that my judgment was upheld by the Supreme Court appeal judgment in *Delta Beverages (Pvt) Ltd v Blackey Investments (Pty) Ltd* SC 59-22. As a result, I dismiss the said point in *limine*.

referring to section 7 of the Administrative Justice Act, and argued that this court has no jurisdiction to hear the application as the said section 7 required the applicant to first exhaust domestic remedies. Let me refer to this provision which provides as follows:

> "Without limitation to its discretion, the High Court may decline to entertain an application made under section *four*, if the applicant is entitled to seek relief under any other law, whether by way of appeal or review or otherwise, and the High Court considers that any such remedy should first be exhausted". **[My own emphasis]**

The argument was that there was an obligation to exhaust domestic remedies placed on the applicant by law. I will return to address this argument. Although accepting that section 7 of the AJA was not couched in peremptory language, Counsel submitted that the applicant had not specifically pleaded that the domestic remedies contemplated by section were inadequate.

In dealing with the argument that the tender was awarded while a challenge was pending determination, *Adv Uriri* asked the court to note that the statutory regime under section 73 of the Public Procurement Act did not provide for suspension of the tender process pending a decision on the challenge. He went on to argue that sections 77 (1) and 77 (2) of the Public Procurement Act provide adequate remedies to an aggrieved bid participant. The said provision reads:

> "A bidder or a 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. (2) In an appeal the Administrative Court shall not set aside the decision of the review panel but may award fair and adequate compensation to the appellant for any patrimonial loss or damage the appellant may have suffered". **[My own emphasis]**

Counsel for the 1st respondent's argument was that, the domestic remedy afforded to a disgruntled party was to appeal to the Administrative Court. I have looked at the above provision and notice that section 77 (1) is couched in elective as opposed to peremptory language. My understanding is that an aggrieved person may choose whether or not to go to the Administrative Court. There is seems to me to be nothing apparent from the architecture of section 77 (1) that precludes the jurisdiction of this court. In fact, if read together with section 7 of the AJA, which is also in elective terms, it becomes evident that the jurisdiction of the High Court is not ousted by that provision. At any rate, I agree with the applicant that the existence of a domestic or alternative remedy does not take away the right to approach this court by way of judicial review. See *Gwaradzimba N O v Gurta* AG SC 10-15. I take the view that there is nothing which prevents an applicant who perceives domestic remedies to be inadequate from coming to the High Court as the applicant has done. In *Tribac (Pvt) Ltd v Tobacco Marketing Board* 1996 (2) ZLR 56 (SC), the Supreme Court defined what constitutes an adequate remedy. The 1st respondent has not shown the court any statutory or judicial authority for the proposition that, if domestic remedies are available, a party must plead their inadequacy before approaching the High Court. When one looks at section 77 (2) of the Public Procurement and Disposal of Assets Act, the following conclusions are inescapable. Firstly, the Administrative Court cannot set aside the review panel's decision, and this a mandatory direction of the legislature. Secondly, that court may award fair and adequate compensation to the appellant for patrimonial loss or damages suffered.

It is my view that, a litigant who desires the setting aside of a decision made without jurisdiction or irregularly arrived should not be prevented from getting redress in the High Court

by way of review. This is apparent from section 77 (2) of the Public Procurement Act, which starts with the words: *"In an appeal the Administrative Court shall not…."* Undoubtedly, this is a clear indication that the remedy of compensation by way of damages arises only in the context of an appeal. It must be borne in mid that the Administrative Court does not have jurisdiction to hear applications for judicial review. That power is vested in the High Court. This reality further undermines the 1st respondent's argument that this court has no jurisdiction by virtue of section 7 of the AJA. In light of this, I find the contention that this court lacks jurisdiction without merit and proceed to dismiss it.

The 1st respondent also submitted that the 1st respondent was improperly cited as it was not a *legal persona*. Reliance was placed on section 47 (1) of the Manpower Planning and Development Act [Chapter 28:02], which provides:

> "The Zimbabwe Manpower Development Fund, established by section 23 of the Manpower Planning and Development Act 1984 (No 36 of 1984), shall continue in existence under this Act"

The argument continued that section 23 of the now repealed Manpower Planning and Development Act 1984, established a fund and not the legal status of the 1st respondent. It was the 1st respondent's submission that, in terms of section 47 (4) of the Manpower Development and Planning Act, the said fund vests in the Minister as a trustee, and is administered by the Chief Executive. Thus, the 1st respondent contended that the 1st respondent was trustee and, consequently, had no *locus standi* to sue or be sued. The court was referred to *Commissioner for Inland Revenue v McNeillie's Estate* 1961 (3) SA 833 (A) at 840E as well as *Crundall Brothers (Pvt) Ltd v Lazarus N O and Anor*: 1991 (3) SA 812 (ZH). *Adv Ndlovu*, in confronting this argument submitted that the 1st respondent can be sued, and referred me to the case of *Tamanikwa and Ors v Zimbabwe Manpower Development Fund* SC 53-13. The response by *Adv Uriri* was that the issue of the 1st respondent's *locus standi* did not arise in the *Tamanikwa case* and was, therefore, not decided. In that case, GOWORA JA (as she then was) just described the Zimbabwe Manpower Development Fund as a statutory body created in terms of section 47 (1) of the Manpower Development and Planning Act. It appears to me, though, to be significant that the Zimbabwe Manpower Development Fund was recognized by the Supreme Court judgment as a statutory body. I take the view that nothing precludes the 1st respondent from suing and being sued in its name. For that reason, I dismiss the point in *limine*.

I now examine the jurisdictional point in *limine* raised by the applicant. The pleadings before me reveal that the issue of the impropriety of the composition of the review panel was persistently raised by the applicant. The applicant challenged the 2nd respondent on the appointment of the panel members which he vehemently asserted to be contrary to the requirements of section 75 (4) of the Public Procurement Act. To put the issue in context, it is necessary to look at what this provision says. Section 75 (4) provides as follows:

> "A review panel for any challenge shall consist of at least three members appointed by the authority from a list of panelists, of whom - (a) one shall be a registered legal practitioner or former legal practitioner or a member or former member of the judiciary; and (b) one shall be a former member of the Civil Service with experience in procurement; and (c) one shall be a person nominated by an organization referred to in subsection (2)(a)".

That challenge necessarily required the 2nd respondent to demonstrate how each member of the panel satisfied the criteria established by the legislation. I observe that, instead, the 2nd respondent merely stated that the panel members were appointed in terms of section 75 (4). In this context, it bears mentioning that in paragraph 21 of his founding affidavit, the applicant stated the requisite criteria for panel membership, and demonstrated in what way the composition was not non-compliant with what section 75 (4) envisaged. My observation is that the 1st respondent's response as it appears in the letter on record and in its founding affidavit woefully falls short of illuminating how each panel member qualifies for appointment under section 75 (4). To be precise, the answer only states that section 75 (4) was complied with. Because the applicant had fully set out his reason for the view that the law had been flouted, the answer should have gone on to explain how the selected members met the provisions of section 75 (4) (a) to (c). For example, the 2nd respondent ought to have said, in the case of Mr Mutizwa, is a current registered legal practitioner; Mr Mambara is either a former member of the civil service [having worked in such and such capacity], and has experience in procurement [with reasons being given to back this up. Finally, in the case of Mr Nkomo, the 2nd respondent ought to have stated that he is a person nominated by any of the organizations named in section 75 (2) (a). I will deal with this provision later in my judgment. None of that was done. The question of whether or not an appointee meets the stipulated statutory criteria cannot be left to conjecture. The papers on record do not demonstrate that the panel members complied with section 75 (4).

In addition, the applicant drew the attention of this court to section 75 (2) of the Public Procurement Act. The specific averment was that the 2nd respondent did not place advertisements asking eligible persons to be included on the list of prospective panelists, in spite of this being a mandatory requirement. The 2nd respondent did not dispute that no advertisement envisaged by section 75 (2) was made and, in fact, no such advertisement was produced before this court. I am therefore unable to disagree with the submission by the applicant that the review panel was not properly constituted, thereby making its decision of 22 February 2022 a nullity. In this respect, the effect of an order granted in the absence of jurisdiction was spelt out by Supreme Court in *Muchakata* v *Netherburn Mine supra*, at 157B-C, where KORSAH JA accepted the following:

> "If the order was void *ab initio* it was void at all times and for all purposes. It does not matter when and by whom the issue of its validity is raised; nothing can depend on it. As Lord Denning MR so exquisitely put it in *MacFoy* v *United Africa Co Ltd* [1961] 3 All ER 1169 at 1172I*:*
>
> > 'If an act is void, then it is in law a nullity. It is not only bad, but incurably bad ... And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.'"

In fact, there is support for the position that this court can set aside an irregularly granted order invalid without the need for any particular procedure to be followed. It is interesting to note that in *Folly Cornishe & Anor* v *Topwamwa NO & Ors* SC 26/14, GARWE JA referring to *Muchakata* v *Netherburn supra* made the following germane observation:

> "To the above remarks by KORSAH JA that it does not matter when and by whom the issue of validity is raised, I would add that it matters not how the issue is raised or what procedure is adopted. If it is clear upon a consideration of all the circumstances, that an act is void, then everything that is predicated on that act would be equally void".
> **[My own emphasis]**

At any rate, I would add that on the authority of *Manning* v *Manning* 1986 (2) ZLR 1 (SC) at 3G-4A, the Supreme Court has determined a declaration of invalidity to be unnecessary. MCNALLY JA had the following to say:

> "..judicial decisions will ordinarily stand until set aside by way of appeal or review, but to that rule there are certain exceptions, one of them being that, where a decision is given without jurisdiction, it may be disregarded without the necessity of a formal order setting it aside – per FANNIN J in *Mkhize* v *Swemmer & Ors* 1967 (1) SA 186 (D) at 197C-D".

On the above authorities, there is undisputed legal percent for me to conclude that the decision of the review panel is a nullity on the ground of lack of jurisdiction by reason of its improper constitution. Accordingly, I proceed to uphold the point *in limine*. Having made my decision based on this preliminary point, I do not find it necessary to delve into the merits or otherwise of the application. On costs, I see no reason from departing from the traditional rule that costs follow the result, which I will award on the scale requested by the applicant.

**Disposition**

Accordingly, I make the following order:

1. The decision of the Review Panel of the 2nd Respondent dated the 22nd February 2022 dismissing the application made by the applicant be and is hereby set aside.
2. The decision to award the 3rd respondent a contract by tender for the provision of software services to the 1st respondent dated 9 December 2021 be and is hereby set aside.
3. The 1st and 3rd respondents shall bear the costs of this application.

*Dube Manikai & Hwacha*, applicant's legal practitioners
*Dube Tachiona & Tsvangirai*, 1st respondent's legal practitioners