HB 331/17
HC 2687/17

GLENULAS TRADING (PVT) LTD
t/a SITATUNGA ZIMBABWE

versus

BEITBRIDGE RURAL DISTRICT COUNCIL

And

NENGASHA SAFARIS

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO20 & 26 OCTOBER 2017

Urgent Chamber Application

V. Majoko, for the applicant
J. Tshuma for 1st & 2nd respondents

TAKUVA J: The 1st respondent's Chief Executive Officer invited tenders from interested, reputable and registered safari operators for the lease of Beitbridge West Consession area. According to the advertisement, the closing date was the 27th day of July 2017. It was a stipulation that "Tender opening shall be done on the same day at 14:30 hours in the Council boardroom, the tenders and the public are invited to witness the tender opening."

Applicant and respondent submitted their bids. When the tenders closed, applicant alleged that notwithstanding the advertisement all that was done was to open the receptacle in which the tenders had been deposited. The tenders themselves were not opened to allow their inspection by tenderers and members of the public as transparency and fair administration would have necessitated.

Aggrieved, applicant's legal practitioners wrote to the 1st respondent pointing out that the 1st respondent had committed an irregularity when it did not open the tender bids in the presence of the tenderers and members of the public. Applicant called on the 1st respondent to start the process anew. The 1st respondent responded by letter in which it denied conducting itself in the manner alleged. Unfortunately, the letter was lost as it was addressed to an incomplete address.

Applicant then filed this application wherein he prays that 1st respondent be interdicted from tabling for discussion the award of the tender and from awarding the tender either to applicant or 2nd respondent. Applicant believes that a full Council meeting will be held on or before the 26th October 2017 to decide on the tender.

As regards urgency, applicant contended that it arises from the fact that soon the 1st respondent will sit to further a flawed process. Also, the tender is meant to raise funds for rural communities and any delay that litigation would entail will be prejudicial not only to applicant but also to the respondents and the public at large and impact negatively on service delivery by the 1st respondent. Lastly, it was submitted that applicant cannot be granted substantive relief in the normal cause given that the award is imminent and proceedings in the normal cause will not have been concluded.

Both respondents opposed the application by firstly raising a point *in limine* that the urgency is self created in that applicant only acted after almost 2 months when they addressed a letter of complaint to the 1st respondent.

Secondly, it was respondent's contention that applicant was afforded an opportunity by the 1st respondent to air its comments during the initial stage of the tender process. Despite being aware of such opportunity, the applicant made no comments in relation to the tender process. Finally, it was argued that applicant has no *prima facie* right against the 1st respondent that it reasonably seeks to protect by bringing this application under the seal of urgency. Respondents prayed for the matter to be struck off the roll with costs.

In *Kuvarega* v *Registrar-General & Anor* 1998 (1) ZLR 188 (H) CHATIKOBO J held that:

> "What constitutes urgency is not only the imminent arrival of the day of reckoning; a matter is also urgent if at the time the need to act arises, the matter cannot wait. Urgency which stems from deliberate or careless abstention from action until the deadline draws near is not the type of urgency contemplated by the rules. If there has been any delay, the certificate of urgency or the supporting affidavit must contain an explanation of the non-timeous action."

In casu, the applicant did not act when the need to act arose i.e. on or shortly after the 27th July 2017. It carelessly abstained from acting for approximately 2 months and only woke up from its slumber on 19 September 2017. This delay cannot be explained by the need or desire to avoid litigation because before the 19th September 2017 no efforts were made to engage the respondent with a view to resolve the matter out of court. It is only the delay between 19 September and 17 October 2017 that has been explained in applicant's founding affidavit. That delay amounts to 19 days and the reason for that delay is that applicant was awaiting a reply to its earlier letter of complaint to the 1st respondent. It turned out that the 1st respondent replied that letter on 9 October 2017 but mistakenly sent it to a wrong box number. Consequently, it was never received by the applicant until the day of the hearing. The applicant was galvanized into action after learning that the decision on the tender was likely to be made by full council on 26 October 2017. He then filed this application on 17 October 2017.

I take the view that the latter explanation for the delay *in casu* is reasonable. In the result, I find that the application is urgent.

On the merits, applicant argued that since the tender documents were not "opened", the whole process is flawed in that the contents of the documents were not announced to the tenderers and the public in keeping with rules of fairness and transparency. It was also contended that the process adopted by the 1st respondent which is a public and administrative authority within the meaning of the Administrative Justice Act, is opaque and falls below the very standard the 1st respondent committed itself to and which applicant legitimately believed 1st respondent would follow.

Applicant prayed for an interim order in the following terms:

"1. Pending final determination of this application, the respondent is interdicted from tabling for discussion or determining the tender for the Beitbridge West Concession Area which closed on the 27th July 2017.
2. In the event that at the time this order is made the 1st respondent has made an award in respect of the tender, the tender shall not be implemented until final determination of this application."

The respondents opposed the application on the following grounds;

(a) The tender process was conducted in terms of the Beitbridge Rural District Council Systems of Accounting and Internal Controls relating to procurement procedures. These procedures were drawn in line with the provisions of the Accounting Handbook for Rural District Councils as read with section 31 of the Procurement Act Chapter 22:14.
(b) The tender process was conducted in a transparent, lawful and procedurally sound manner in that the tender box was opened in the presence of the tenderers, applicant included. However, it is not a requirement that the tender documents be opened and contents thereof read out. What 1st respondent did complies with s79 (5) of the Rural District Council Act, Chapter 29:13.
(c) Consequently, the contents of the tenderer's bids were not read other than mentioning the names of the bidders and the contents thereto remains confidential information until after the adjudication committee has made a decision.
(d) The adjudication is the sole responsibility of the 1st respondent as alluded to by the tender advertisement. This has been done, what is awaited is the pronouncement of the results.
(e) The applicant has not satisfied the pre-requisites for an interdict to be granted in that applicant has an alternative satisfactory remedy, namely an application for review of the 1st respondent's proceedings and decision in the event that it is aggrieved by it.
(f) There is no *prima facie* right that has been violated ad there is no proof that a violation is about to be committed that has to be stopped.
(g) The balance of convenience favours the dismissal of the application in that the granting of the relief will prejudice the 1st respondent more than the applicant. The 1st respondent will suffer costs of repeating the process plus the cost of the unavailability of a hunter to hunt and protect the animals until one is found.

The sole issue for determination is whether or not applicant has established the requirements for an interdict. In *L. F Boshoff Investments (Pty) Ltd* v *Cape Town Municipality*

1969 (2) SA 256 (c) at 267A –F, CORBETT J (as he then was) said an applicant for such temporary relief must show:

> "(a) that the right which is the subject matter of the main action and which he seeks to protect by means of interim relief is clear or is not clear is *prima facie* established though open to some doubt;
> (b) that if the right is only *prima facie* established, there is a well grounded apprehension of irreparable harm to the applicant if their interim relief is not granted and he ultimately succeeds in establishing his right;
> (c) that the balance of convenience favours the granting of interim relief; and
> (d) that the applicant has no other satisfactory remedy."

See also *Airfield Investments (Pvt) Ltd* v *Minister of Lands & Ors* 2004 (1) ZLR 511 (S) were MALABA J (as he then was) held that an interim interdict is an extra-ordinary remedy, the granting of which is at the discretion of the court hearing the application for the relief.

In casu, it is clear that the applicant has an adequate alternative remedy in the form of an application for review against the decision of the 1st respondent should it be adverse to his interests. It is trite that where there is an existing remedy with the same result for the protection of the applicant, an interdict will not be granted. However, the range and nature of such existing remedies is of course, infinite and varied. An application for review if prosecuted successfully can be a satisfactory remedy to the applicant.

For these reasons, the application has no merit and it is hereby dismissed with costs.

Majoko & Majoko, applicant's legal practitioners
Webb Low & Barry, respondents' legal practitioners