CHARTERED SYSTEMS INTEGRATION (PVT) LTD
versus
ZIMBABWE REVENUE AUTHORITY

HIGH COURT OF ZIMBABWE
KWENDA J
HARARE, 28 May 2018, 2 July 2018, 3 July 2018; 24, 26 July 2018 & 14 February 2019.

**Civil Trial**

*F Girach*, for the plaintiff
*A Moyo*, for the defendant

KWENDA J: This is an application by defendant for absolution from the instance at the close of plaintiff's case. I will deal with it by way of giving a background to the matter, summarising the pleadings, the issues, the evidence and the applicable law. In summarising the evidence I will promptly comment on probabilities wherever necessary.

Plaintiff issued summons out of this Court claiming from the defendant payment of a sum of $ 5 348 087.75 for 'the development, implementation and integration of a Zimbabwe Revenue Authority Online Payment System (ZOPS) in various banks at defendant's request and instance', interest thereon at 15% per annum calculated from 2011 to the date of payment in full as well as costs on the legal practitioner client scale. Plaintiff averred that it rendered the services pursuant to a 'tacit contract' concluded and implemented starting from 2011.

The defendant resisted the claim. It filed a special plea of prescription together with a plea on the merits. As regards the prescription it averred that since plaintiff alleged that the provision of services commenced in the year 2011, all claims based arising before 6 December 2013 had prescribed. On the merits it disputed the alleged tacit contract. It pleaded, further, that, in any event, the alleged contract was illegal and unenforceable by virtue of non-compliance with the Revenue Authority Act [*Chapter 23:11*] and Procurement Act [*Chapter 22:14*].

Plaintiff explained how the tacit contract came about in a response to defendant's request for further particulars:-

2. " Ad paragraph 1.2

In January 2011 Mr Tjiyapo Velempini, Defendant's Director of Information Technology verbally instructed plaintiff to embark on a proof of concept for ZIMRA Online Payments (ZOP) with Commercial Bank of Zimbabwe, Kingdom bank and NMB and said that upon success a written contract would be signed. Plaintiff was successful in the development and implementation of the proof of concept and submitted all the documentation required for defendant to give a contract to plaintiff as had been verbally agreed. The proposal was presented and was verbally accepted by Mr Velempani. In good faith, the plaintiff embarked on full implementation of ZOP with fourteen additional banks on the understanding that defendant would formalize a written contract. The process of issuing the contract was stopped by Mr Velempani after plaintiff refused to give him 25% equity in plaintiff, which he demanded. When the p laintiff advised that it was going to terminate ZOPS and discontinue any further related work. Mr Charlton Chihuri the then director of Loss Control and Mr Saruchera threatened that defendant would sue for sabotage of a National infrastructure. Defendant advised plaintiff not to terminate the system because the system had already successfully processed over one billion Zimbabwe dollars.

……

4. Ad paragraph 2.1

The tabulated charges are for defendant's amount and constitute licence fee and fees for support and maintenance of the system on the defendant's server which is ninety five percent (95%) of the system. The banks paid plaintiff for maintenance and support for their end of the system. The purpose of the ZOP system is to record all ZIMRA tax payments made, and reconcile them with ASYCUDA and SAP tax and Revenue management systems integrated. ……

5. Ad para 2.2

Invoices with dates for services provided by plaintiff in 2011, 2012, 2013, 2014, 2015 and 2016 are attached.

6. Ad para 3.1

As a creditor, plaintiff reserves the right to penalize an uncooperative debtor. It is plaintiff's internal policy that all bills not serviced within ninety (90) days attract penalty interest charges at the prevailing average prime rate of interest in the banking sector. Fifteen percent (15%) per annum represents the minimum opportunity cost suffered by plaintiff as a result of defendant's non- payment of the amounts due.

7. Ad para 3.2

The core principle of finance holds that provided money can earn interest, any amount of money is worth more the sooner it is received. …. This action does not require any prior agreement because plaintiff has already been prejudiced by not receiving the income when it is due.

8. Ad para 4.1-4.2

Demand for payment was directed to Defendant's Commissioner General Mr G Pasi, the Procurement department, Mr Velempini, The Director for Information, Mr Chiradza, The Head of Procurement and the Ministry of Finance and Economic Development.

9.

The Commissioner General Gersham Pasi, shortly before being sent on leave contacted Justice Leslie George Smith (RTD) and asked him to attend a meeting so that the parties could try to resolve the dispute between Defendant and plaintiff. Justice Smith and Doctor

> Chris Hokonya attended the meeting and subsequently had a number of meetings at Defendant's offices. ……..**"**

After receiving plaintiff's further particulars, defendant pleaded as follows on the merits:

> **"**Defendant avers that following tender procedures in terms of the Procurement Act it entered into an agreement with an entity known as Microsoft Namibia (Pty) Ltd (Microsoft)
>
> According to the defendant's records and knowledge, plaintiff was subcontracted by the said Microsoft.
>
> In terms of the contract extant between defendant and Microsoft, defendant paid for any and all such services directly to the approved contractor namely Microsoft.
>
> At no time did defendant undertake or contract to pay the plaintiff herein. To the defendant's knowledge plaintiff was paid for any and such services directly by Microsoft.
>
> Defendant denies being liable to the plaintiff as alleged or at all and prays that plaintiff's claim be dismissed with costs on the higher scale ……**"**

Defendant's plea therefore put in issue the entire basis of the plaintiff's claim that is

a) the agreement
b) the terms thereof
c) its legality
d) its performance
e) the relief sought.

In replication, plaintiff averred as follows:-

(a) It is still attending to the maintenance and support of ZOPS.
(b) In 2014 an employee of the defendant, one Mr Matthew Mtimbiri was tasked to conduct an investigation and, out of it, he recommended that the plaintiff be paid.
(c) Negotiations concerning payment and settlement of its invoices were going on as late as September 2016 and plaintiff believed in the *bona fides* thereof.
(d) The cause of action only arose in 2016 when it became clear that the defendant had no intention to pay.
(e) It is true that it was subcontracted by Microsoft (Pty) Ltd as alleged by defendant but the contract was performed between 2008 and 2010. Upon the expiry of that contract, defendant enlisted the services of the plaintiff on the recommendation of Microsoft. The contract was new and independent of Microsoft.

(f) The regularity or otherwise of processes within the defendant did not affect the validity of the contract. Plaintiff genuinely believed that all the internal requirements had been complied with. The defendant is estopped from denying the existence of a tacit contract.

Plaintiff amended its replication at pre-trial conference stage to add the following:-

"Further and in any event Defendant on various occasions acknowledged its indebtedness to Plaintiff and made promises to pay.

……, in any event, Defendant has been unjustly enriched to the extent of the claim as set out in the declaration in that it continues to utilise a system installed and maintained by Plaintiff and in respect of which defendant has made no payment."

Defendant filed a rejoinder in the following terms:-

"Defendant avers that it is currently operating the online banking services in accordance with the contracts between it and the individual banks.

In terms of such contracts, the Defendant is not legally obliged to make payment to either the banks or the plaintiff herein.

To the defendant's knowledge, plaintiff is being paid by the individual banks for its services.

Consequently, defendant denies being unjustly enriched as alleged or at all and puts plaintiff to the strict proof thereof."

The Plaintiff's approach to pleadings presents problems. It is trite that a claim may not be founded on estoppel. Further the plaintiff raised estoppel in replication. In any event estoppel was raised in replication. Plaintiff also introduced an alternative claim based on unjust enrichment in replication. The plaintiff's summons and declaration were not amended. A claim is ordinarily grounded in the summons and declaration and not replication. Accordingly, adding a claim in replication is very unusual indeed and not contemplated in the rules. In this case , however the amendment was by consent and defendant had an opportunity to respond by way of rejoinder. The parties filed a joint pre-trial minute wherein they identified unjust enrichment as an issue to be referred to trial but no further reference to estoppel.

At the trial, plaintiff closed its case after calling two witnesses namely Mr Panashe Panji Chiurunge and Retired Justice Leslie George Smith. Mr Panashe Panji Chiurunge is plaintiff's director ans *alter ego*. He was plaintiff's key witness. Retired Justice Leslie George Smith is the chairperson of Vumba Capital (Pvt) Ltd, a company hired by the plaintiff to recover the money now claimed by the plaintiff. In my view not much turns on his evidence.

Mr Panashe Panji Chiurunge's evidence was largely a regurgitation of the plaintiff's averments in its papers. He never directly dealt with the Board or any of its members He had no knowledge of the defendant's board sitting and deliberating on the need to procure plaintiff's services.

I am mindful of the fact that the plaintiff does not purport to have dealt with the Board or its members in concluding the tacit agreement. By way of reminder, Plaintiff's version in the pleadings is that the witness was invited by one Mr Tjiyapo Velampini (Defendant's IT director) to develop and implement the Zimra Online Payment System (ZOPS) for trial as a proposal. The proposal would then be presented to the defendant. Once accepted by defendant, a contract would be drawn and signed. Plaintiff pleaded Mr Tjiyapo Velempini communicated that the proposal had been accepted whereupon plaintiff implemented the online system, without fully negotiating the terms of the contemplated contract of service. Its director plaintiff acted in good faith No contractual terms were agreed on. No contract was signed.

In evidence plaintiff's key witness said while he dealt with Mr Velempini and the defendant's Commissioner General, Mr Gershem Pasi. Both invited him to their office and told him that the defendant was having challenges with its system. It had cash offices where taxpayers were going to pay taxes. The system had challenges arising from pilfering of cash, reconciliation, long queues, handling of large sums of cash, mis-posting to wrong clients (resulting in clients being erroneously penalised) and mixing tax heads like VAT, PAYE. The two officials of the defendant requested him to come up with proposal of how to overcome the problems. He said he had experience having been involved in systems upgrade for many years in several jurisdictions. The witness said he put up proposal as requested. He produced a printout of the proposal in evidence. He said the proposal was going to completely revolutionalise the defendant's tax collection system. He said all tax payments were going to be done at the bank. Instead of taxpayers queuing with proof of payment the system was going to connect defendant with the banks and reconciliation was going to be done on line automatically. Payments would be automatically credited to the Commissioner General's account as soon as the taxpayer paid at the bank and the payment would be posted to the correct account straight away at the defendant and reconciliation would be automatic. The tax payer would get a receipt via the system. He said that is the system working right now.

The witness said he forwarded the proposal to both Mr Velempini and Mr Pasi and ran a demonstration for both of them. They both said they would need Board approval. Mr Velempini came back to him and asked him to start with a medium sized bank as a pilot project.

He said Mr Velempini said the Board had approved but instead of the NMB bank they were going to start with CBZ bank because defendant had an account with CBZ. He said Mr Pasi was present when Mr Velempini communicated the Board approval.

The witness said plaintiff implemented an online system which linked the CBZ bank with the defendant. The plaintiff's initial charge was $438 725.00 but Mr Velempini asked him to reduce the charge because there was no guarantee that the system would succeed. He said they settled on 20 % of the initial charge. He said all the negotiations took place in the presence of Mr Pasi. A meeting was held at the CBZ bank where all stakeholders including the CBZ bank, Defendant and plaintiff were fully represented and assigned roles for the successful implementation of the project. By end of 2011 the project had been implemented at CBZ and up to 2012 various tests were done to see how the system was functioning. Plaintiff had unfettered access to defendant's system and records. He said plaintiff was actually based on the second floor at defendant's offices at Kurima House where defendant was represented by Mr Saruchera. Occasionally they would meet Mr Pasi. The system was a major success whereupon defendant decided to bring in other banks on board. ZOPS was gradually introduced to other banks synchronising it with their different operating systems. Accordingly, ZOPS was introduced to the Kingdom and NMB banks, still as a pilot project and by 2014 plaintiff was invoicing for connecting three banks. He said Mr Velempini assured him that defendant was going to pay just the defendant needed to see the system running for a longer period. Eventually the following banks were added: - Stanbic, MBCA, Ecobank, Agribank, Metbank, Agribank and Banc ABC whereupon Plaintiff added the banks to its invoiced charges.

The witness took the Court through the invoices and how the figure claimed by plaintiff was arrived at. He said he chased up payment on various occasions. Both Mr Velempini and Mr Pasi never denied liability. Mr Velempini never mentioned Board resistance. However, Plaintiff has not received payment to date. He explained how plaintiff roped in officials from the parent government ministry and the meetings he had with the defendant's Head of Procurement, Mr Chiradza, and Mr Pasi in a follow up to payment. He said at some stage he told Mr Pasi that plaintiff was going to stop due to the non-payment. The Court notes that, somehow, instead of stopping, the witness said the system was expanded to link Econet, Telecel and Net one. Suffice it to say defendant never paid and the various correspondence and memorandums produced by plaintiff reveal that defendant never accepted that it had an obligation towards plaintiff. Several correspondences between defendant and retired Justice Smith representing Vumba Capital (Pvt) Ltd were produced by consent. The defendant's

attitude remained that it had no obligation to pay plaintiff. The witness said somehow defendant raised tax on the invoices and garnished plaintiff's and witness' bank accounts. He paid the VAT because he had become incapacitated by the garnishee.

The witness said when he presented plaintiff's invoices in 2011 Mr Velempini demanded transfer of 25 % equity in the plaintiff as a bribe but he refused. He said he reported the demand for a bribe to Mr Pasi who said he would look into it. Apparently Mr Pasi did not do anything. The witness said he raised the issue again with the new Board chairperson in 2016 who asked him to submit an affidavit which he did. He said Mr Pasi, Mr Velempini and Board members were present when plaintiff received an award for ZOPS which was at all times described as 'ZIMRA online payment system'. He said that he was taken aback when it was suggested that defendant's board had no knowledge of the project.

At the close of plaintiff's case there was no evidence (documentary or otherwise) that defendant's board deliberated and resolved to procure plaintiff's services. There was no evidence of compliance with sections 30 and 32 of the Procurement Act. If anything, plaintiff says it unilaterally embarked on full implementation of ZOP with fourteen banks 'in good faith'.

It is either the plaintiff was intent on snatching a contract without following an open competitive bidding process or the banks paid in full for the online system. Otherwise it is boggles the mind how and why plaintiff would persist with implementation of ZOPS from 2011 faced with such adversity.

The witness could not justify why, if ZOPS was implemented at the instance of defendant why he would have persisted with a deal predicated on corruption. The Court also notes that the numerous references by the witness' testimony to dealings with Mr Pasi do not feature in its pleadings despite a request by defendant to specifically mention who it dealt with. The alleged active involvement of Mr Pasi was clearly an afterthought which does not find support in the pleadings and documentary evidence produced by it at the trial. The several correspondences and emails produced by the plaintiff in evidence reveal that defendant never conceded that it had a contract. Defendant's employees were steadfast and throughout the period extending from 2011 to 2016 there was no written communication acknowledging liability. Defendant did not pay even a penny.

ABSOLUTION FROM THE INSTANCE

I have been called upon to decide on three issues which are firstly the existence of a valid contract, the claim based on unjust enrichment and the prescription specially pleaded by the defendant.

Ordinarily, the court would start with the special plea of prescription since a finding in favour of the defendant would destroy the plaintiffs claim to the extent that prescription applies. However, in this case, I am disinclined to grant absolution from the instance based on the special plea of prescription without hearing the defendant in evidence. A special plea is established by the introduction of fresh facts from outside the circumference of the pleadings and such facts are established by evidence in the usual way. See Herbstein & Van Winsen. The *Civil Practice of the High Courts of South Africa* 5th ed page 600 and the cases cited thereat. See also *Amlers Precedents of Pleadings* 4th ed at page 263. Accordingly the party relying on prescription as a defence must allege and prove the date of the inception of the period of prescription.

The recent judgment of the Supreme Court in the matter of *Jennifer Nan Brooker* v *Richard Mudhanda and others* SC 5/18 is also instructive. See page 4 of the cyclostyled judgment.

> "At issue before the court a quo was whether or not the claims mounted against the appellants by the respondent had prescribed. The party who alleges prescription must allege and prove the date of inception of the prescription period. Generally, prescription starts to run as soon as the debt becomes due."

See also at page 11 of the cyclostyled judgment

> "In a plea of prescription the onus is on the defendant to show that the claim is prescribed but if in reply the plaintiff alleges that the prescription was interrupted or waived, the onus would be on the plaintiff to show that it was so interrupted or waived."

And at page 17 in the last paragraph

> "The failure by the court *a quo*, to call evidence was akin to a court which determines a matter through application procedure in the face of material disputes of fact. The learned judge in the court *a quo* failed to appreciate that prescription is a defence and therefore a matter of substance. Essentially what had to be disposed of was a plea. Its nature did not change by virtue of having the adjective 'special' placed before it. It remained a plea which is a defence and which the court could only determine after hearing evidence unless the facts surrounding the plea were common cause or admitted."

Accordingly, if l had the parties set down the special plea alone in the usual way, I would have required the defendant to begin in order to establish the date of the inception of prescription. Granting defendant absolution from the instance would be tantamount to accepting that the defendant has discharged the burden of establishing the date of inception without leading evidence. Plaintiff's replication put the date in issue. It replicated to the special plea as follows

> "The plaintiff's cause of action arose in 2016 upon realisation that the defendant was unwilling to pay. Prescription begins to take effect when a cause of action arises."

The plaintiff's replication therefore disagrees that any part of the debt fell due in 2011. Accordingly, the issue of prescription will not receive further consideration at this stage.

I will now turn to the other issues. The onus is on the plaintiff to prove a legally enforceable tacit contract alleged by it. At this stage, the plaintiff is required to prove no more than a *prima facie* case which if not rebutted might result in the court finding in its favour. In the absence of a *prima facie* case there would be no need to put the defendant on its defence.

The defendant is creature of statute, existing by virtue of section 3 of the Revenue Authority Act [*Chapter 23:11*] A creature of statute can only validly do what the enabling statutory framework gives it the capacity to do. It is unlike a natural person who can exercise discretion, waive rights, be creative or use initiative. Defendant is a fictional person which exists only in the eyes of the law. Persons acting for an entity created by statute are limited in the exercise of powers and discretion by the enabling law. In other words the law prescribes the natural persons who may act for a body corporate and prescribes the parameters within which they can act.

THE LAW

The Constitution (Constitution of Zimbabwe Amendment (No. 20) Act 2013) is the Supreme Law on the land:

See section 2 (1) of the Constitution

> "This constitution is the Supreme Law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency."

The following provisions are pertinent:-

(a) State must legislate in the interests of "…. efficiency, competence, accountability, transparency, personal integrity and financial probity in all institutions and agencies of government at every level and in every public institution---" (section 9).

(b) The Constitutional, Supreme and High Courts ' …have inherent power to protect and regulate their own processes and develop the common law taking into account the interest of justice and the provisions of this Constitution." (Section 176).

(c) Section 195 of the Constitution

> "1. Companies and other commercial entities owned or wholly controlled by the State must in addition to complying with the principles set one in section 194 (1) conduct their operations as to maintain commercial viability and abide by generally accepted standards of good corporate governance.
>
> 2. Companies and other commercial entities referred to in subsection (1) must establish transparent open and competitive procurement systems."

This court, thus, has the obligation to interpret the law in a manner that advances the objectives of the Constitution. Legislation put in place to give effect to constitutional values and objectives should be given due weight in assessing the legality of conduct by citizens. The law must be applied in a manner which promotes and protects the transparency, accountability and probity entrenched in the constitution.

I will now look at the legal legislation that governed the procurement of services at the time of the alleged contract. The defendant has the power to make contracts (see 2nd Schedule as read with section 4 of the Act). In so doing, its operations are controlled and managed by a Board whose composition is defined in section 5 of the Act. Section 22 of the Revenue Authority Act stipulated that all contracts/agreements needed prior approval of the Board in order to be valid. The section was repealed by Act 5 of 2010. However the repeal of section 22 does not weaken the position that it is only the Defendant's Board acting by resolution which is empowered to make contracts on behalf of the defendant. The repeal of section 22 actually raised the bar. Prior to the repeal of section 22 in the year 2010, a contract required prior approval of the board to be valid but now contracting with the defendant must be an act of the Board.

During the period in question, procurement of services by the defendant was regulated by the Procurement Act [*Chapter 22:14*] (now repealed and replaced). The defendant being a procuring entity, as defined in the Act, had to comply with the mandatory provisions of s 30 and 32 of the Act. Section 32 contained detailed mandatory provisions covering two pages of the Act governing procurement of services. The procedure involved the following:-

(a) a notice requesting suppliers to submit proposals for the provision of the service shall be published— (i) in the Gazette, where the procuring entity is the State; and (ii) in a newspaper circulating in the area in which the procuring entity has jurisdiction or carries on business, where the procuring entity is not the State; and (iii) in a newspaper of wide international circulation or in a relevant trade or technical or professional journal of wide international circulation, where proposals are invited from suppliers who are not nationals or residents of Zimbabwe; (b) the notice referred to in paragraph (a) shall contain at least the following information— (i) the procuring entity's name and address; and (ii) a brief description of the service to be procured; and (iii) how to obtain documents giving details of the service to be procured and the manner in which the successful supplier is to be selected; (c) the documents referred to in subparagraph (iii) of paragraph (b) shall contain the following information— (i) a comprehensive description of the service to be supplied and, where applicable, the time when

it is to be provided; and (ii) the criteria and procedures by which, subject to section thirty-four, the qualifications of suppliers will be evaluated; and (iii) the information or evidence, if any, which suppliers must provide to prove their qualifications; and (iv) the deadline for the submission of proposals and the place where they are to be submitted; and (v) the criteria and procedures by which the successful proposal will be ascertained; and (vi) any right on the part of the procuring entity to reject all proposals received; and (vii) the terms and conditions of the procurement contract, to the extent that they are known to the procuring entity; and (viii) such other information as may be prescribed in procurement regulations; (d) an invitation to prequalify shall be published in the manner prescribed in regulations.

Where the necessities of the situation demanded a departure from the laid down procedure, defendant was required to record the grounds and circumstances for such a departure. Failure to comply with the above provisions could easily constitute corruption by Board members and a criminal offence under section of the Criminal Law (Codification and Reform Act) [*Chapter 9:23*].

A tacit contract can be inferred it is a reasonable inference that can be drawn from proven facts. Further all facts must be consistent with the inference and no other reasonable inference should be possible from the facts. The defendant does not have the faculties of a natural person from whose behaviour, inferences can be drawn. Its disposition is only decipherable from the conduct of the natural persons authorised at law to act on its behalf. Surely the State controlled defendant which is a product of statute cannot suddenly find itself bound by whims of Mr Velempini (if the plaintiff's assertion is to be accepted) who had no authority to act for it in the first place and what is worse, who was on a frolic of his own demanding a bribe. From his own evidence, plaintiff's director knew that a valid contract can only be concluded by the Board. If indeed Mr Tjiyabo Velampini had stopped the 'issuing of the contract' in 2011 because he had not received a bribe it is unconvincing for the witness to say he believed the same Mr Velampini had negotiated with the Board on plaintiff's behalf.

Plaintiff would like this court to believe that a need for an online payment solution to deal with problems besetting defendant's tax collection was identified. For reasons not documented Mr Tjiyapo Velempini considered plaintiff the only qualified service provider to develop the solution. Mr Velempini invited plaintiff to develop the solution without inviting competitive bids. Plaintiff managed to develop the solution which the witness presented to the defendant on the understanding that a written contract would be signed once the solution was accepted. When the solution was run in 2011 at CBZ and initially accepted Mr Velempini

demanded to be paid a bribe and made it clear that for a contract to be signed his demand for a bribe was met. Somehow, in good faith, Plaintiff did not wait for the contract to be concluded but implemented the project in full notwithstanding that the full extent of the services to be rendered, the cost and interest chargeable had not been discussed and agreed upon. One wonders where the good faith was emanating from in the face of Mr Velempini's demand. Recognition of such a shawdy arrangement is tantamount to rendering the whole legal framework discussed above nugatory. It would not only amount to complicity by this court in corruption but also develop our jurisprudence and common law in the direction not envisioned in the Constitution. The judiciary and all its judges and courts are the custodians of the Constitution. If the services claimed by the plaintiff were rendered at all, then that was in collusion with the said Mr Velempini in a corrupt scheme. The procurement procedure to be followed by defendant was governed by a clear Constitutional and legislative framework and this Court has no discretion to condone a blatant subversion of the law. Allowing the plaintiff's director and Mr Velempini to bind such a large and strategic State agency as the defendant to a contract worth millions of United States dollars in flagrant and corrupt disregard of clear legislative provisions would be serious dereliction of duty by this court. It is tantamount to turning the law on its head. It will open floodgates and this country will not know the end to such corrupt services. A person will only need to identify a need in a State agency with the help of an insider and render the required service without submitting to a competitive bidding process, present a bill for payment based on a rate never discussed and then demand payment on the grounds that a service has in any event been rendered and the state entity acquiesced and stands to be unjustly enriched if it does not pay for the services. That is ludicrous to say the least. A fictitious person does not have mental faculties and cannot acquiesce.

Plaintiff averred that it genuinely believed that defendant's internal processes had been done. The suggestion is that plaintiff would not be privy to the occurrences in board meetings. The plaintiff however does not explain what it genuinely thought about the procurement procedure provided for in the Procurement Act which is invariably overt and very loud in the public domain. It is therefore reasonable to infer that plaintiff's director was intent on cutting corners.

Plaintiff's testimony was that it was prevented from terminating ZOPS because it had been threatened with litigation. I do not see how the threat of litigation would concern the plaintiff in the circumstances of this case.

It is pertinent to note that defendant had a contract with Microsoft for the provision of Information Technology (IT) services. The contract was reduced to writing and forms part of the record. The plaintiff was subcontracted by Microsoft in the implementation of that contract. The sub-contractor agreement was also reduced to writing. Further, it is common cause that plaintiff entered into written contracts with the various banks which implemented the online payment system. It is therefore curious that the plaintiff would implement such a huge project as claimed by it without a written agreement in the face of stiff resistance by the defendant. It is reasonable to infer from that the dealings between plaintiff's director and certain persons at Zimra were not intended to be transparent.

The subject matter of the various contracts was the development and implementation by the parties (the banks and the plaintiff) of a Zimra online payment system. The defendant is as much a client of the banks as the tax payers. The implementation of the online system by the banks benefited not only one client (the defendant) but the tax payers too. The defendant is that users of the system just like the tax payer. Apart from a misconception that defendant is big and therefore a bigger beneficiary of the system there is no conceivable reason why defendant and not the other several users should be expected to pay the person who developed the system. If anything the online payment system benefited the tax payer more because it eliminated queues and made payment of tax easier. The non-implementation of the system was not going to deprive the defendant of revenue nor excuse the taxpayer from paying tax. All that the banks have done is to facilitate the funds of funds from the tax payer's bank accounts to the defendant's bank account and the receipting thereof with greater convenience. ZOPS is therefore just one of numerous solutions offered by the banks to its clients for ease of doing business by its clients. Banks' clients do not pay the developer for online solutions implemented by the bank. It is reasonable to infer that plaintiff intended to engage in double dipping by claiming payment from defendant for a service already paid for by the banks. That can only explain why plaintiff closed its case without calling anyone from the banks to prove the true nature and extent of plaintiff's contracts with the bank. Both Velempini and Pasi are now former employees of the defendant. Plaintiff could have called them as witnesses. Indeed, initially plaintiff sought a postponement of the trial; ostensibly, in order to call Mr Velempini failed to call the witness without giving reasons.

The facts of this case do not point to an agreement between the parties. To the contrary there is direct evidence on the various correspondence placed before me by the plaintiff which tends to show that the defendant was unrelenting in denying the existence of the contract

throughout the period covered by the claim. Further in the plaintiff's own words, a contract was not signed. Mr Velempini was only going to facilitate a written contract after receiving a bribe. There bribe was never paid and so he declined to assist. If the plaintiff proceeded in the face of resistance, it was foolhardy for its director to do so. Plaintiff has not established a *prima facie* case.

CONCLUSION

This judgment has not discussed, in detail, the principles that apply to an application for absolution from the instance at the close of the plaintiff's case because the parties are in agreement on the law. I have been favoured with plethora of case law on the subject. Suffice it to say in an application of this nature the test can be formulated in the form of a question, *Is there sufficient evidence on which a court might make a reasonable mistake and give judgment for the plaintiff?* In this case there is no likelihood that this court will make a mistake and give effect to an illegal contract tainted by corruption. A contract which is concluded between a State agency and another person, even if shown to exist, without following relevant procurement legislation is *void ab initio* and unenforceable. See *PMA Real Estate Agency Pvt Ltd* v *Arda* HH 236-11. This court's finding on the illegality of the contract claimed by the plaintiff will not change even if the defendant testifies.

This application must succeed. Be that as it may this matter has raised very important legal issues beneficial to our jurisprudence. For that reason I am disinclined to award costs on the punitive scale.

Accordingly I order as follows:

The defendant's application for absolution from the instance at the close of the Plaintiff's case be and is hereby granted with costs.

*Venturas and Samkange*, plaintiff's legal practitioners
*Kantor and Immerman*, defendant's legal practitioners