Judgment No. HB 21/2003
Case No. HC 233/2003

**ANABAS SERVICES (PVT) LTD**

**Versus**

**THE MINISTRY OF HEALTH**

**And**

**NYEKILE ONE PENNY HALF PENNY (PVT) LTD**

**And**

**STATE PROCUREMENT BOARD**

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 7 AND 27 FEBRUARY 2003

*Ms H M Moyo* for applicant
*S Mazibisa* for 1st and 3rd respondent
*N Mazibuko* for 2nd respondent

Urgent Chamber Applicant

**NDOU J:** The applicant seeks a provisional order in the following terms:

**"Terms of final order sought**

(1) That the contract between the applicant and the 1st respondent for rendering of cleaning services at Mpilo Hospital be and is hereby deemed valid and operational until its expiry on 23 July 2003.

(2) That 1st respondent be and is hereby ordered and directed to forthwith reinstate the applicant's cleaning services contract at Mpilo Hospital with effect from 1st February 2003 until such time the said contract is terminated lawfully.

(3) The 1st respondent be and is hereby interdicted and barred from entering into a cleaning services contract with 2nd respondent or any other supplier of such services at Mpilo Hospital during the duration of the applicant's contract with the 1st respondent and if the parties have already entered a contract, that such contract be declared null and void and of no force and effect.

(4) The 2nd respondent be and is hereby barred and interdicted from rendering any cleaning services at Mpilo Hospital or from interfering with the applicant's operations during the duration of the applicant's contract with the 1st respondent.

(5) That the 3rd respondent be and is hereby ordered to comply with the provisions of section 22(3) of the Procurement Regulations Statutory Instrument 171/2002 in relation to the applicant.
(6) That the respondents pay the costs of the application.

**Interim Relief**

(a) That the contract between the applicant and the 1st respondent for the rendering of cleaning services at Mpilo Hospital be and is is (sic) hereby deemed valid and operational until its expiry on 23 July 2003.
(b) That the 1st respondent be and is hereby ordered and directed to forthwith reinstate the applicant's cleaning services contract at Mpilo Hospital with effect from 1 February 2003 until such time the said contract is terminated lawfully.
(c) The 1st respondent be and is hereby interdicted and barred from entering into a cleaning services contract with the 2nd respondent or any other supplier of such services at Mpilo Hospital during the duration of the applicant's contract with the 1st respondent, that such contract be declared null and void and of no force and effect.
(d) The 2nd respondent be and is hereby barred and interdicted from rendering any cleaning services at Mpilo Hospital or from interfering with the applicant's operations during the duration of the applicant's contract with the 1st respondent.

**Service of order**

That this order be served and on all the 1st respondent at c/o The medical Superintendent, Mpilo Hospital and on the 2nd respondent at No. 3 Main Street, Bulawayo and on the 3rd respondent at Harare."

The salient facts of this matter are that the applicant company was formed in 1999 by former employees of the Ministry of Health who were based at Mpilo Hospital. At that stage the Ministry of Health had decided to retrench general workers who were mainly employed to clean the hospital. Government policy at the time was that the retrenchees would form their own company and then tender their services to this erstwhile employers. It was also government policy that the applicant company would be given preference

when awarding the tenders. This affirmative action operated in favour of the applicant as it was awarded the cleaning services tender at Mpilo Hospital. The resultant written agreement was for a period of 12 months. This written agreement terminated pursuant to of clause 3 on 1 August 2000. This is so because this clause specifically states:

> "3. **Period of the agreement**
>
> Subject to the provisions of clauses 15 and 16 hereunder, this agreement shall be for a period of 12 months (sic) commencing on 1 August 199 (sic) and upon the expiration of the said period shall terminate unless it is extended by written agreement of the parties."

Clause 15 requires that any variation to the agreement 'shall be agreed to by the parties and reduced to in writing." Clause 16 provides that the agreement may be terminated by either party giving to the other not less than three calendar month's notice in writing. From these terms it is apparent that the written agreement expired on 1 August 2000. The applicant did not, however, stop rendering the cleaning services. In fact the parties to written agreement went on as if the agreement had been extended or renewed until 27 January 2003. This is strange bearing in mind that huge sums of public funds were involved. Payment was being made for the fiscus without a written agreement. Be that as it may, in May 2002 the Ministry of Health decided to go the proper tender route. The cleaning services that the applicant was providing at Mpilo were advertised in the media. The applicant naturally submitted its tender. The applicant was advised by the Superintendent, Mpilo Hospital, by letter dated 27 January 2003, of the outcome of the State Procurement Board. I think it necessary to quote this letter in some detail.

The letter was addressed to the applicant in the following words:

> "This procuring entity is advised by the Board that PBR 0913 of September 5, 2002 awarded the above tender to Nyekile One Penny Half Penny at a price of $40 635 600,00. To date Mpilo Central Hospital and the said Nyekile One Penny Half Penny have not entered into a formal contract and that formality has to be implemented without further delay, failing which, continued service from you would be in breach of the procurement regulations.
>
> It is against this background that I have to advise that you cease operations with effect from after duty on 31st January 2003 for Nyekile One Penny Half Penny to assume cleaning services on 1st February 2003."

The letter emanated from the office of the Medical Superintendent, Mpilo Hospital. It seems that the latter was aware of the award of the tender to the 2nd respondent because on 23 September 2002 she had "appealed" against the award of the tender. The main thrust of her appeal or objection was based on the fact that their local Mpilo Hospital Procurement Tender Committee had recommended the applicant. This being a mere recommendation it obviously did not bind the State Procurement Board. In exercise of its powers the latter did not go along with the recommendations of Mpilo Hospital Procurement Tender Committee and instead awarded the second best recommended company. If this is done in accordance with the regulations in exercise of the State Procurement Board's powers there is nothing wrong with that. Most of the details in the appeal are characterised by the discrediting of the 2nd respondent and vigorous campaigning for the applicant.

For the record, the applicant comprise 180 employees. I agree that it was expecting too much of the applicant by giving it three days notice to cease operations.

The applicant's case is that the agreement has been tacitly renewed or extended every twelve months since August 2000 by allowing the applicant to continue to provide cleaning services and paying for the said services. It is submitted by the applicant that the tacit agreement should be construed according to of the terms embodied in the original written agreement. The applicant submits that the 1st respondent is estopped from evicting it in such circumstances. The 1st and 3rd respondents submit that the application is defective on account of failure to comply with the provisions of the State Liabilities Act [Chapter 8.14] and Order 5(A) of the rules which deal with the institution of proceedings against the state. They further took issue with citation of the Ministry as opposed to the Minister of Health, and State Procurement Board as opposed to the responsible Minister i.e. of Finance. The State Procurement Board, the submission, goes is not a legal entity outside the parent Ministry. They also submit that the matter is not urgent as the applicant can always sue for damages as an alternative. The 2nd respondent challenges the basis of the alleged renewal of the contract in light of express provisions against tacit extension.

Before dealing with the merits of the application I think it is important and necessary to first resolve the point *in limine* raised by the respondents. The preliminary issues centre around citation and joinder of parties. From the facts it is clear that the initial contract was signed by Mpilo Hospital

Superintendent and the applicant. The purported tacit renewal were also through the same Superintendent. Although the latter was acting as an agent of the Minister of Health, all the acts in respect of the contract were carried out through her office. It is the Superintendent's office that wrote the letter of the purported termination. The circumstances of this case are such that it is essential to join the Mpilo Hospital Superintendent as party because of the interest she has in the matter. Further, her interest in the matter is evinced by the appeal that I have alluded to above. When such an interest becomes apparent this court has no discretion and cannot allow the matter to proceed without joinder or judicial notice of the proceedings to that party – see Herbstein and Van Winsen *"The Civil Practice of the Supreme Court of South Africa"* 4th Ed by Van Winsen, Cilliers and Loots chapter 6 at page 165. The Mpilo Hospital Superitendent must be joined as a necessary party because she has a direct and substantial interest in the order that this court might make in these proceedings see *Amalgamated Engineering Union* v *Minister of Labour* 1949 (3) SA 637(A) (A); *Toekies Butchery (Edms) Bpk en Andere* v *Stassen* 1974 (4) SA 771(T); *Erasmus* v *Fourwill Motors (Edms) Bpk* 1975(4) SA 57 (T); *Harding* v *Basson & Ano* 1995 (4) SA 499 (C).

This court has inherent or common law jurisdiction to order joinder in such a case and may exercise such a power *mero motu* – see *SA Steel Equipment Co (Pty) Ltd & Ors* v *Lurelk* 1951 (4) SA 167 (T); *Ngcwase & Ano* v *Terblanche NO & Ors* 1977(3) SA 796 (A) at 806H, *Harding* v *Basson* – case *(supra)* at 501D-E, *Toekies*

*Butchery* case *(supra)* and Amalgamated *Engineering Union* v *Minister of Labour* case *(supra)*. *In casu*, I am satisfied that the Mpilo Hospital Superintendent is a necessary party and therefore, must be joined.

The next issue is one of citation. Order 5A Rule 43A and 43B and of the State Liabilities Act *(supra)* are relevant in respect of the citation of 1st and 3rd respondents. In respect of the 1st respondent, the proceedings should have been taken against the Minister of Health as opposed to the Ministry – see sections 3 and 4 of the State Liabilities Act (supra). The applicant did not comply with the requirements of section 6 of the State Liabilities Act as it did not notify the Minister of Health of its intention to bring the proceedings. As this is an urgent application, section 6 will not apply if I determine that application is indeed urgent – see the exemption provided for in section 7(c). As regards the citation of the State Procurement Board, I do not agree with the respondents that the Board should not have cited. First, the administration of the Procurement Act [chapter 21:14] has been assigned to the Vice-President, and not the Minister of Finance. Second, in terms of section 4 of the Procurement Act, the State Procurement Board is a body corporate capable of suing and being sued in its own name. In the circumstances, there is nothing wrong in citing the State Procurement Board in its own name.

From my foregoing findings, it is clear that there is a non-joinder of the Superintendent of Mpilo Hospital who is a necessary party. Further the Minister of Health should be cited as opposed to the Ministry. As this is an urgent application there is no need to notify the said Minister in terms of section 6 of the State Liabilities Act. The applicant is exempted from such notice by the provisions of section 7(c).

For the Superintendent of Mpilo Hospital to apply to be added as a party, she can only do so by way of a court application. In this case, however, she has not applied to be joined. I have already alluded to the fact that this court has inherent or common law jurisdiction to do so. This court, however, further has this wide power in

terms of order 13 rule 87 2(b) which provides:

> "(2) At any stage of the proceedings in any cause or matter the court may on such terms as it thinks just and either of its own motion or on application –
>
> (a) order any person who has been improperly or unnecessarily made a party or who has for any reason ceased to be a proper or necessary party, to cease to be a party;
> (b) order any person who ought to have been joined as a party or whose presence before the court is necessary to ensure that all matters in dispute in the course or matter may be effectually and completely determined and adjudicated upon, to be added as a party'
>
> but no person shall be added as a plaintiff without his consent signified in writing or in such other manner as may be authorised."

The issue of non-joinder is merely dilatory and as such must be taken in *initio litis* before issue is joined – see *Bekker* v *Meyring, Bekker's Executors* (1844) 2 Menz 436 and *Gibson & Ano* v *Sanders* 1915 EDL 174. I think that the question of citing the Ministry instead of the Minister should be dealt with in a similar way.

In my view of the justices of the case demand that I do not dismiss the application, but instead stay the proceedings until the questions of the non-joinder of the Superintendent of Mpilo Hospital and the citation of the Minister of Health are properly attended to. This will also afford the applicant an opportunity to think through the relief sought and the parties from whom such relief is sought – see

*Peacock* v *Marley* 1934 AD II and *Langa Union Co* v *Luderitz Boy Camey* 1944 SWA 6.

I accordingly, set aside the summons and stay the proceedings for the applicant to take remedial steps as outlined in the preceding paragraph. Costs shall be costs in the cause.

*Joel Pincus, Konson & Wolhuter* applicant's legal practitioners
*Civil Division of the Attorney-General's Office* 1st and 3rd respondents' legal practitioners
*Calderwood, Bryce Hendrie & Partners* second respondent's legal practitioners