Judgment No. HB 88/2003
Case No. HC 429/2003

ANABAS SERVICES (PVT) LTD

Versus

THE MINISTER OF HEALTH N.O.

And

THE SUPERINTENDENT – MPILO HOSPITAL

And

NYEKILE ONE PENNY HALF PENNY (PVT) LTD

And

STATE PROCUREMENT BOARD

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 7 & 25 MARCH AND 7 AUGUST 2003

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

Judgement

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

"TERMS OF THE FINAL ORDER SOUGHT

That you show cause to this honourable court why a final order should not be made in the following terms:

1. That the contract between the applicant and the 1st respondent for the rendering of cleaning services at Mpilo Hospital be and is hereby deemed valid and operational until its expiry on 23 July 2003.
2. That the 1st respondent and 2nd respondent be and are hereby ordered and directed to forthwith re-instate 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 and 2nd respondents be and are hereby interdicted and barred from entering into a cleaning services contract with the 3rd 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 3rd 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 4th respondent be and is hereby ordered to comply with the provisions of section 22(3) of the Procurement Regulations Statutory 171/02 in relations to the applicant.
6. That the respondents pay the costs of this application jointly and severally, the one paying the other to be absolved.

INTERIM RELIEF GRANTED

Pending the determination of this matter, applicant is hereby granted the following relief –

(a) That the 1st respondent be and is hereby ordered and directed to forthwith re-instate the applicant's cleaning services at Mpilo Hospital with effect from 1 February 2003 and are hereby ordered and directed to allow the applicant to commence such cleaning services forthwith;
(b) That the 3rd respondent be and is hereby ordered to cease rendering cleaning operations at the same hospital with immediate effect."

It is worth noting that the applicant company was formed in 1999 by former employees of the Ministry of Health 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 premises. Government policy at the time was that the retrenchees would form their own company and then tender their services to their erstwhile employers. It was also Government policy that the applicant company would be given preference when awarding the tenders. This affirmative action initiative operated in applicant's favour and the latter was awarded the cleaning services tender at Mpilo Hospital. The resultant written agreement was an initial period of twelve (12) months. The written agreement terminated pursuant of clause 3 on 1 August 2000. This is so because this clause specifically states:

"Period of the agreement

Subject to the provisions of clauses 15 and 16 hereunder, this agreement shall be for a period of 12 months 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 maybe terminated by either party giving to the other not less than three calendar month's notice in writing. From these provisions 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 the agreement went on "business-as-usual" as if the agreement had been extended or renewed. This went on until January 2003. This seems strange as large sums of public funds were involved. This involved payment from the fiscus without a valid agreement. Be that as it may, in May 2002 the first respondent decided to go the tender route. The cleaning services hitherto provided by the applicant was opened to tender. This resulted in the tenders being advertised in the media. The applicant, expectedly, participated in the tender process. By letter dated 27 January 2003, the second respondent advised the applicant of the outcome of the tender process as determined by the fourth respondent. The third respondent was adjudged to be the winning tenderer. For the record, the applicant comprise of 180 employees. I agree that by giving the applicant three days notice to cease operations, the first respondent placed an onerous task on the applicant. The applicant's case is that the agreement had been tacitly renewed or extended every twelve months since August 2000 by allowing the applicant to continue to provide cleaning services and the first respondent paying for the said services. It is submitted by the applicant that the tacit agreement should be construed according to the terms embodied in the original written agreement. The applicant submits that the 1st respondent is estopped from evicting it in the circumstances.

The application is opposed by the 1st, 3rd and 4th respondents.

I propose to highlight some of the relevant aspects of evidence contained in the applicant's founding affidavit as deposed to by its Managing Director, a Mr Ignatius Sibanda,-

> "… It was understood that at all times the former workers would be given preference when awarding tenders as this was the very reason why the workers were retrenched in the first place. …
> 8. We have been to date providing the cleaning services at the hospital in accordance with this contract which has been verbally renewed yearly.
> 9. In May 2002, the Ministry decided to re-tender the cleaning services and accordingly placed an advertisement in the press for that purpose. … We duly responded and submitted our tender in accordance with the laid down requirements. …
> 10. …On 27 January 2003 we were surprised to receive a letter from the Medical Superintendent advising us that the tender had been awarded to another cleaning company namely the 3rd respondent and that we were to terminate our services with effect from 31 January 2003. …
> 12. … Furthermore, the contract was automatically renewed for 12 months on 23 July of each year. This renewal took place again on 23 July 2002 and the contract is therefore supposed to expire on 23 July 2003. The 1st respondent had therefore no lawful right to violate the terms of the existing contract. I am advised that notwithstanding the fact the original contract expired on 23 July 2000, the 1st respondent renewed the contract verbally on the same terms and conditions on a yearly basis in view of the fact that we were allowed to continue rendering cleaning services at the hospital until the purported unlawful termination of 27 January 2003.
> 13. … The 4th respondent has also not acted in accordance with the provisions of the Procurement Regulations Statutory Instrument 171/02 in its handling of this particular tender. We were not advised of the results of the tender as should have happened in terms of the regulations. As it is we have only heard about it from 2nd respondent and this does not constitute proper notification in terms of the regulations.
> 15. … The fact that we were unaware all along of the results of the tender means that we have not been given an opportunity to note an appeal to the Administrative Court against the decision of the 3rd respondent …
> 18. The fact that the tender was awarded to a company not comprising of former workers appears to be a shift by the 4th respondent from Government stated and laid down policy that such tenders should be awarded to former Government employees. … If this policy and understanding is discarded, it means that we have been formally abandoned by the Ministry, which was not the initial understanding.

19. … The State Procurement Board is an organ of Government and therefore cannot be seen to be making decisions which are contrary to laid down policy.
20. The applicant company employs 180 people at Mpilo Hospital and it is not possible for us to terminate their services on 3 days' notice. Furthermore, our financial commitments do not allow us to suddenly cease operations as we have cleaning materials and other such items to account for …
22. … the applicant company will suffer irreparable harm if we were to cease operations now. The balance of convenience certainly favours that we continue with the contract. …"

The first issue is whether the contract was varied or extended. In light of what I have already highlighted above I find that the agreement was not varied and extended to the extent that is stated by the applicant. Second, the agreement cannot be said to have been extended by estoppel. Third, there is nothing to show that the agreement was "automatically" renewed. There is no legal basis for such an assertion. Fourth, the affirmative policy referred to as Government policy on empowering former employees has already benefited the applicant. Assuming that such policy creates legal right the applicant would be unreasonable to expect such policy to benefit only the applicant perpetually.

From the respondent's opposition it became apparent that the applicant was not candid with the court. The applicant tried to obtain urgent remedy on incomplete information. The applicant sought to mislead the court on the plight of the 180 workers. The 4th respondent has produced documentary proof that shows that the applicant is deliberating withholding material facts. There is non-disclosure of material facts which tend to weaken the applicant's cause. According to the 4th respondent they dispatched two letters to the applicant on the same date, 5 September 2002. Both were addressed to the Managing Director of the applicant using the same address. Part of the first letter reads:-

"SUB CLE 01/2002: CLEANING SERVICES MPILO CENTRAL HOSPITAL
After deliberating and considering the recommendations relating to the above tender, the State procurement Board, in terms of section 21 of the Procurement Regulations 2002, has awarded the tender through PBR 0913 of September 5, 2002 to Nyekile One penny Half Penny at a price of Z$40 635 600,00 per month.

Accordingly, in terms of section 22(3) of the Procurement Regulations as read with the Procurement Act, I wish to advise you that your tender relating to the above has been unsuccessful. …"

The second letter read:-

"TENDER SUB-GRO 01/2002: GROUNDS MAINTENANCE SERVICES AT MPILO CENTRAL HOSPITAL
In terms of section 22(2) of the Procurement Regulations 2002, as read with the Procurement Act [Cap 22:14], the State Procurement Board, has pleasure to advise that your tender with respect to the above has been successful and accepted through PDR 0907 of September 5, 2002, in the sum of $6 694 800,00. …"

The applicant accepts that it received this letter. The applicant's attitude, after the production of these two letter, is that it received the latter and not the former. Another letter was dispatched by the 4th respondent to the applicant via the same route. It was dated 28 October 2002 and read in part:-

"SUB CLEA 02/2002: PROVISIONS OF CLEANING SERVICES: PARIRENYATWA HOSPITALS
In terms of section (22) 2 (sic) of the Procurement Regulations 2002, as read with the Procurement Act [Cap 22:14], the State Procurement Board, has pleasure to advise that your tender with respect to the above has been successful and accepted through PBR 1107B of October 28, 2002, in the sum of Z$68 191 619,00. …"

The applicant does not dispute receiving only those letters where its tenders were successful. It could obviously not deny these because as a result thereof its representative went on to sign the requisite contract. The applicant was also awarded another tender in Harare. By concealing all these material facts the applicant was misleading me by giving the impressing that it was in desperate situation. The

applicant's greed would have been exposed by such disclosure. The applicant deliberately painted a gloomy picture of its operations in order to justify an *ex parte* or urgent remedy.

It is trite that in urgent applications of this kind, utmost good faith must be shown by the applicant. It is the duty of the applicant to lay all relevant facts before the court, so that it may have full knowledge of all the circumstances of the case before making its order. In *The Civil Practice of the Supreme Court of South Africa* (4th Ed) the learned authors L van Winsen, A C Cilliers and C Loots on p 367 said –

> "Although, generally, an applicant is entitled to embody in his supporting affidavits only allegations relevant to the establishment of his right, when he is bringing an *ex parte* application in which relief is claimed against another party he must make full disclosure of all the material facts that might affect the granting or otherwise of an order *ex parte*. The utmost good faith must be observed by litigants making *ex parte* applications in placing material facts before the court, so much so that if an order has been made upon an *ex parte* application and is appears that material facts have been kept back, whether wilfully and *mala fide* or negligently, which might have influenced the decision of the court whether to make an order or not, the court has a discretion to set the order aside with costs on the ground of non-disclosure." See also *In re Leydsdorp and Pietersburg (Transvaal) Estates Ltd in Liquidation*, 1903 TS 254; *Barclays Bank* v *Giles* 1931 TPD 9; *Hillman Bros (West Rand) (Pty) Ltd* v *Van den Heuvel* 1937 WLD; *Estate Logie* v *Priest* 1926 AD 312 at 323; *Hall and Ano* v H*eyns and ors* 1991 (1) SA 381 (C); *Ex parte Madikiza et uxor* 1995(4) SA 433 (TK) at 436I-J; and *Becker* v *Noel* [1971] I WLR 803.

Although I directed that the application be served on the respondents the fact remains that because of the nature of the application the service was at a very short notice. I dispensed with forms and service generally provided for in the rules of this court. Such a short notice given to a respondent in an urgent application is a major constrain in the preparation of opposition. The respondent is denied sufficient time to be heard from an informed position. An urgent application is an exception to the general rule and as such the applicant is expected to disclose fully and fairly all

material facts known to him. I have a discretion, even if the non-disclosure in material to grant or dismiss the application – *Venter* v *Van Graan* 1929 TPD 435. In *casu*, the applicant has blown hot and cold on the type of clear right that it seeks to enforce. Is it *ex contractu* i.e. the written contract? Or is it terms of verbal agreement? Or is it in terms of the principles of estoppel? Or is it being alleged that the 4th respondent acted ultra *vires* its statutory powers? The way I understand it, the applicant seeks an interdict but it is not clear what legally enforceable right it seeks to protect. The applicant has made a bland statement in this regard.

The courts should, in my view, always frown on an order, whether *ex parte* or not, sought on incomplete information. It should discourage material non disclosures, *mala fides* or dishonesty. They may, depending on the circumstances of the case, make adverse or punitive orders as a seal of disapproval of *mala fides* or dishonesty on the part of litigants. This is one of the cases where, in exercise of my discretion, I should dismiss the application on account of the material non-disclosure. It is for these reasons that I dismissed the application with costs on 25 March 2003.

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 2nd respondent's legal practitioners