PMA REAL ESTATE AGENCY (PRIVATE) LIMITED
versus
AGRICULTURAL AND RURAL DEVELOPMENT AUTHORITY

HIGH COURT OF ZIMBABWE
PATEL J

Civil Trial

HARARE, 14 June 2011 and 1 November 2011

A.R. Chizikani, for the plaintiff
C.M. Jakachira, for the defendant

PATEL J: The plaintiff operates a real estate business, including the valuation of assets and auctioning. The defendant is a statutory body established under the Agricultural and Rural Development Authority Act [*Chapter 18:01*]. The plaintiff issued summons in March 2010, claiming from the defendant the sum of US$17,309.86 as valuation fees, together with interest at the rate of 5% per month, 10% collection commission and costs of suit.

The issues for determination that were identified at the pre-trial conference were materially altered during the course of the trial. The first issue concerns the impact of the Procurement Act [*Chapter 22:14*] on the contract concluded between the parties. The second issue relates to the percentage of the valuation fees payable to the plaintiff and the price upon which such fees are claimable.

The Evidence

Simon Lennox Mkondo is the Managing Director of the plaintiff company and is registered with the Estate Agents Council. His evidence was that the parties have been in business together since 1997 when the plaintiff first began valuating the defendant's assets. The arrangement was that the defendant would pay 2.5% of the value as valuation fees and that those fees would be paid out of the proceeds of sale by auction. This arrangement came to an end in 2009 when the defendant told the plaintiff to stop further auctions

as the plaintiff was not registered with the Tender Board. By the time that the plaintiff was duly registered, the defendant had appointed other auctioneers. The plaintiff's claim herein arises from a specific contract concluded by correspondence between December 2007 and January 2008. The defendant invited the plaintiff to set out its current terms and conditions. The plaintiff responded and a few weeks later the defendant wrote back accepting the terms stated by the plaintiff. The valuation fee was based on the valuation amount or reserve value and not on the auction amount. The documents furnished by the defendant show that the plaintiff's valuations were generally accurate and that it carried out its work professionally. The plaintiff's claim for interest at the rate of 5% per month was based on the prevailing bank rate for loans. However, the witness withdrew the claim for 10% collection commission as it was not part of the contract with the defendant. Under cross-examination, he conceded that, according to the plaintiff's letter of 28 December 2007, the 2.5% valuation fee under the contract with the defendant was based and chargeable on the auction value and not on the reserve value. The plaintiff's claim is based on the reserve value because the defendant decided to stop further auctions by the plaintiff. It would have sued on the auction values realised by other auctioneers for the assets already valuated by it, but the defendant did not avail these figures. The witness admitted, as per the plaintiff's letter of 7 May 2009, that the reserve values were too high and needed to be adjusted. Consequently, as appears from the relevant invoices and auction returns, the sale figures from auctions conducted by others were generally lower than the original reserve values computed by the plaintiff. He further accepted that there was nothing in the contract to preclude the defendant from dealing with other auctioneers. However, this term was implied because the valuation fees were to be collected at the end of every auction. At this juncture, even if the

auction values were to be compiled, the plaintiff was still not prepared to accept valuation fees based on the auction figures.

Willard Tendai Mbona is the Acting General Manager of the defendant. He testified as follows. As per the plaintiff's letter of 28 December 2007, which formed the terms of the agreement, the 2.5% valuation fee was to be paid at the end of each auction on the proceeds of the auction sale. Valuation was not conclusive proof of income received from auction sales, the proceeds of which were the only source for paying auction and valuation fees. The agreement between the parties was in respect of the whole process, *i.e.* valuation, setting up the auction, selling at the auction, and gathering the proceeds of sale for payment to the defendant, after deducting valuation and auction fees. There was no auction where all the valuated assets were sold by the plaintiff. It was never agreed that the 2.5% fee be paid on the reserve value. It was only payable on assets that were actually bid and paid for. Before February 2009, although valuations were in United States Dollars, all transactions were carried out in Zimbabwe Dollars. In May 2009, the plaintiff advised that all previous valuations needed to be reduced because of changed economic circumstances. The defendant terminated the contract with the plaintiff in June 2009 after receiving an internal audit report on the Middle Sabi auction. The ARDA Board then resolved to open up the auctions to wider competition. On 1 October 2009, the plaintiff was specifically invited to participate and regularise its position, but it applied too late for inclusion on the ARDA tender list. By November 2009, the Tender Board had already approved the tenders of LM Auctioneers (Pvt) Ltd and KM Auctions (Pvt) Ltd to carry out all ARDA auctions at 1% commission on gross proceeds. This 1% commission related to the entire process of valuation, auctioning and reconciliation of proceeds. It was the charge that was then applied by the two auctioneers who carried out their own independent valuations. Because of the volatile state of the defendant's assets, the plaintiff's

valuations of 2007 and 2008 had become outdated and obsolete by 2009. Moreover, its invoices were only generated from October 2009 to March 2010, based on estimated reserve values. In any event, the Procurement Regulations expressly required a tender process in respect of the disposal of assets above certain values. The defendant was not prepared to pay the plaintiff's invoices because it did not complete the entire valuation-cum-auctioning process. At some stage, there was an offer of 1.5% fees on actual proceeds from the auctions conducted by the other auctioneers, but no agreement was ever reached. Finally, the plaintiff's claim for interest at the rate of 5% per month was never contemplated or agreed upon by the parties.

My overall assessment of the plaintiff's Managing Director is that he was a very poor witness on almost every material aspect. His evidence was fraught with contradictions and inconsistencies and was frequently at variance with the documentary evidence before the Court. In contrast, the testimony of the defendant's Acting General Manager was very clear and generally consistent with the probabilities in this case. Consequently, his evidence on the facts and probabilities is to be preferred where it conflicts with that of the plaintiff's witness.

<u>Procurement Act and Regulations</u>

During the course of the trial, it became necessary to consider the validity of the contract between the parties in the context of the prevailing legislation on procurement. This was an aspect that was not canvassed in the pleadings but one that was raised by the Court *mero motu* as an important matter of law impinging on the legality and enforceability of the contract.

By virtue of section 3(1) of the Procurement Act [*Chapter 22:14*] the provisions of the Act apply to procurement by all procuring entities as defined in section 2(1), including every statutory body such as the defendant *in casu*. See also the list of

public enterprises itemised in the Second Schedule to the Procurement Regulations 2002 (S.I. 171 of 2002).

Part IV of the Act governs procurement proceedings generally. In terms of section 30:

> "(1) Except as otherwise provided in this Act, the procurement of–
> (*a*) goods or construction work by a procuring entity shall be done by means of tendering proceedings in accordance with section *thirty-one*;
> (*b*) services by a procuring entity shall be done by a method which complies with section *thirty-two*.
> (2) Where in accordance with this Act a procuring entity adopts a method of procurement other than one specified in subsection (1), the procuring entity shall include in the record of its proceedings a statement of the grounds and circumstances on which it relied to justify the adoption of that method."

Section 32(1) sets out the general procedures to be followed in the procurement of services. These relate to, *inter alia*, the publication of notices, tender documentation, criteria for qualification, the submission and evaluation of proposals, and other tender formalities. In terms of section 32(2):

> "Subject to subsection (1), a procuring entity shall conduct all proceedings for the procurement of a service in accordance with procurement regulations or, in regard to any matter that is not prescribed in such regulations or this Act, in accordance with such procedure as the procuring entity may fix:
> Provided that any procedure so fixed shall be such as to ensure that all suppliers are treated fairly and impartially and shall be communicated without delay to all suppliers concerned."

Section 33, in its relevant portions, enables the framing of procurement regulations as follows:

> "(1) Subject to this Act, the Minister, after consultation with the Minister responsible for finance and the State Procurement Board, may make regulations providing for all matters relating to procurement by procuring entities.
> (2) Procurement regulations may provide for–
> (a) methods of procurement that may be adopted by procuring entities instead of or in addition to the methods specified in section *thirty*;

> (b) classes of procurement in which any of the provisions of sections *thirty-one* and *thirty-two* may be dispensed with or applied subject to modification;
>
> (d) the procedure to be adopted by procuring entities and suppliers, and the manner in which they shall conduct themselves, in procurement proceedings;
>
> (l) circumstances in which the provisions of the regulations may be departed from or waived."

Part II of the Procurement Regulations 2002 details the procedures governing the invitation of tenders generally. Section 4(1) stipulates that where a procuring entity requires the supply of goods, construction works or services the value of which exceeds the prescribed amount, the State Procurement Board shall invite tenders for such supply in accordance with the procedure for formal tenders set out in section 8 or approved list tenders set out in section 25. The prescribed amount at the present time (as amended by S.I. 161 of 2008) is US$50,000. In terms of section 4(2), where the supply value exceeds US$10,000 but does not exceed US$50,000, the procuring entity shall seek tenders in accordance with the procedure for informal tenders set out in section 6. [Between December 2007 and January 2008, the prescribed figures were ZW$5 billion under section 4(1) and ZW$1 billion to ZW$5 billion under section 4(2)]. Section 8 delineates the procedures to be adopted in the case of supplies subject to formal tender, as required by section 4(1), through notices to be published in the *Gazette* and in such national newspapers as the Board may deem expedient.

Section 5 enumerates those supplies that are not required to be tendered for by the State Procurement Board. In terms of section 5(1), where the supply value is less than US$10,000 [ZW$1 billion in 2007-2008], the procuring entity may dispense with the requirement of seeking tenders, if it considers that the public interest will not benefit from tender procedure. In any such case, the procuring entity must obtain at least 3 competitive quotations from suppliers. Section 5(2) permits the purchase of second-hand goods by private treaty or at public auction sales, as may be

authorised by the accounting officer of the procuring entity, where the estimated value of the goods does not exceed US$50,000 [ZW$5 billion in 2007-2008]. By virtue of section 5(3), where a procuring entity considers that it would not be in the public interest to call for tenders for a particular supply of goods, construction works or services in terms of section 4, such supply may be purchased without calling for tenders. In any such case, section 5(4) requires the procuring entity to obtain the prior approval of the State Procurement Board, where the estimated value of the supply exceeds US$50,000 [ZW$5 billion in 2007-2008], or the approval of the Chairman in consultation with at least three members of the Board, where the estimated value of the supply exceeds US$10,000 but does not exceed US$50,000 [ZW$1 billion to ZW$5 billion in 2007-2008]. Additionally, the procuring entity must clearly and fully state in writing to the Board or the Chairman, as the case may be, the reasons why it would not be in the public interest to call for tenders for the supply in question. Where approval to procure supplies in terms of section 5(4) is denied, section 5(5) enjoins the procuring entity to follow normal tender procedures.

Section 6 sets out the procedures to be followed and records to be kept in relation to informal tenders, as permitted by section 4(2). Section 7(1) authorises procuring entities to adopt what are called special-formal tenders, subject to prior approval by the Board or its Chairman, in accordance with such instructions as may be issued by the Board from time to time. Special-formal tenders may be invited only in the cases specified under section 7(2), *i.e.* urgent requirements, supplies and services of local interest, requirements of a proprietary nature, formal tenders to which there has been no response, services of a specialist nature, and services which concern national security.

Section 25(1) authorises the Board to compile a list of approved tenderers in respect of specific articles and services, which must be published in the *Gazette*, for the purpose of

approved list tenders under section 4(1). Before framing this list, the Board is required by section 25(2) to publish a notice in the *Gazette* inviting tenderers to submit applications for inclusion on the list. Section 25(4) empowers the Board to invite all tenderers on the approved list to submit special-formal tenders or informal tenders instead of calling for formal tenders. In terms of section 25(5), all tenders submitted in terms of section 25(4) must be processed in accordance with the Regulations.

For the purposes of enforcement, section 35 declares that any person who contravenes any provision of the Regulations shall be guilty of an offence. However, the Regulations are silent as to the penalty to be imposed in the case of any such offence. The Act is equally silent in this regard in section 33 which enables the framing of procurement regulations, and in section 48 which only penalises misrepresentations and collusive agreements or arrangements relating to procurement.

Legality of Contract

In the instant case, Mr. *Chizikani* for the plaintiff submits that the contract between the parties was not tainted with any breach of the Procurement Act or Regulations. Because section 30(2) of the Act allows procuring entities to adopt alternative methods of procurement, the legality of the transaction *in casu* cannot be impeached. On the other hand, Mr. *Jakachira* for the defendant contends that the contract should have gone to tender because its value was in excess of the prescribed minimum under section 5(4) of the Regulations. He further submits that the peremptory provisions of section 30 of the Act obliged the parties to conclude their contract through the State Procurement Board and that their failure to do so renders the contract null and void *ab initio*. That being so, the plaintiff’s claim ought to be dismissed on this basis alone, without any need for the Court to delve into the merits or

demerits of the claim. For the reasons set out below, I am unable to accept either of the positions propounded by counsel.

For present purposes, what is relevant is not the value of the assets that were appraised by the plaintiff, as is contended by Mr. *Jakachira*, but the valuation fees that were payable to the plaintiff for the services rendered by it to the defendant. At the time when the contract was concluded, between December 2007 and January 2008, the relevant thresholds for the purposes of section 5 of the Regulations were between ZW1 billion and ZW$5 billion. However, there is nothing in the evidence before me, whether by way of currency conversion rates or otherwise, to indicate that the value of the services to be provided by the plaintiff exceeded the prescribed thresholds. It is highly probable that it did but, without any clear evidence on the point, I am unable to make any definitive finding based on pure conjecture.

The more pertinent enquiry, in my view, is not whether the relevant threshold was exceeded, but whether the contract was concluded in compliance with other procedures enjoined by the Procurement Act and Regulations. Section 30(1) of the Act stipulates that a procuring entity must procure services by a method which complies with section 32, <u>except as is otherwise provided in the Act</u>. Section 30(2) envisages the adoption of a method of procurement otherwise than one specified by section 30(1), but only where this is done <u>in accordance with the Act</u>. Section 32(1) sets out the procedures to be followed in the procurement of services generally. Additionally, section 32(2) enjoins the procuring entity to conduct all proceedings for the procurement of a service in accordance with procurement regulations. Section 33(2) enables the framing of regulations providing for: the methods of procurement that may be adopted by procuring entities instead of or in addition to the methods specified in section 30; the classes of procurement in which any of the provisions of sections 31 and 32 may be dispensed with or applied subject to modification; and the circumstances in

which the provisions of the regulations may be departed from or waived.

Taking all of these provisions together, what is contemplated by the Act in relation to the procurement of services is that every procurement entity must adopt a method that complies with the general procedures set out in section 32(1), as read with the detailed procedures elaborated in the Procurement Regulations. Any departure from the prescribed procedures must be sanctioned under the Act or the Regulations. In particular, section 5 of the Regulations spells out the instances in which formal tender procedures need not be followed, in relation to supplies of values below the specified thresholds, subject to the requisite approvals having been obtained. Additionally, the provisions of section 6 govern informal tenders, while section 7 deals with special-formal tenders in specific circumstances, subject again to the relevant approvals and prevailing instructions. Finally, section 25 details the procedures to be followed in the case of approved list tenders.

In the instant case, it is common cause that the defendant, *qua* procuring entity, did not follow the general procedures set out in section 32(1) of the Act or the formal tender procedures stipulated by sections 4 and 8 of the Regulations. And there is nothing before the Court to indicate that it adopted any other method of procurement allowed by the Regulations in its contract with the plaintiff. In particular, there is no evidence of the quotations or approvals enjoined by section 5. In short, the defendant's departure from the prescribed procurement regime was neither otherwise provided by the Act nor in accordance with the Act, and was clearly unsanctioned by the State Procurement Board or its Chairman. It follows that the contract *in casu* was concluded in contravention of the Procurement Act and Regulations.

Consequences of Illegality

There can be no doubt that the provisions of sections 30, 31 and 32 of the Act are couched in peremptory terms and that compliance with them, as well as the Regulations, is intended to be mandatory rather than merely directory. However, the Act does not explicate the legal consequences of any failure to so comply. Generally speaking, the validity of contracts in breach of statute depends upon the expressed or implied intention of the Legislature as manifested in the statute in question. Where nullity is not explicitly declared, it may inferred from other features of the statute. These may include the express prohibition of conduct in breach of the statute and/or the criminalisation of such conduct. As I have explained above, the Procurement Act and Regulations are imperfectly drafted in this respect. In any event, the position of contracts involving the State is somewhat special. The scope of a State servant's authority is more often than not determined by statutory provisions and the requirements of the statute or regulations concerned must be complied with. If such requirements are mandatory, any contract made in breach of them is invalid and unenforceable. This follows from the proposition that no State servant has the authority to circumvent or dispense with the requirements of a statute. To recognise or enforce any such contract would operate to render the applicable enactment nugatory. See Hogg: *Liability of the Crown*, at p. 125, and the authorities cited by Smith J in *Foroma* v *Minister of Public Construction and National Housing & Another* 1997 (1) ZLR 447 (H) at 460-463.

It might of course be argued, by analogy with company law, that private individuals and entities dealing with the State are entitled to assume that the functionaries in question have duly complied with the prescribed formalities. As against this, however, is the crucial consideration that any hardship which might befall persons contracting with the State is outweighed by the public interest in safeguarding State property and public moneys. See

Collector of Customs v *Cape Central Railways Ltd* (1888) 6 SC 402, cited with approval in *Foroma's* case, at 461-463. Indeed, it may even be justified in this context to invoke the argument that contracts in breach of statute, being inimical to the interests of the State as well as the community at large, should be declared contrary to public policy and therefore unenforceable. See *Foroma's* case, at 465-466. If contracts made in material breach of statute were to be recognised and enforced, the unavoidable result would be to frustrate and defeat an explicit injunction of the Legislature. Apart from repudiating such contracts, the only other remedy available to the State would be to discipline and/or surcharge the culpable official or officials concerned. But this would be wholly ineffective and futile where financially sizeable contracts are involved. I would also add that a contract in breach of statute cannot be retrospectively ratified or otherwise validated. This is so for two very cogent reasons. Firstly, the law does not countenance the ratification of a contract or transaction which, being contrary to statute, is null and void *ab initio*. See *Cape Dairy and General Livestock Auctioneers* v *Sim* 1924 AD 167, at 170. Secondly, the Executive is not at liberty to waive or renounce a peremptory statutory obligation imposed by the Legislature for the protection of State property and public moneys. See *Ritch and Bhyat* v *Union Government (Minister of Justice)* 1912 AD 719, at 735, and *SAR&H* v *Transvaal Consolidated Land and Exploration Co. Ltd*. 1961 (2) SA 467, at 481, followed in *Foroma's* case, at 464-465.

In the premises, I am of the view that the contract under consideration, inasmuch as it was concluded in breach of the prescribed requirements, is invalid and unenforceable for contravention of sections 30 and 32 of the Procurement Act. As a general rule, it is trite that a contract which is null and void *ab initio* is illegal and therefore unenforceable. See *Foroma's* case, at 467; *Mega Pak Zimbabwe (Pvt) Ltd* v *Global Technologies Central Africa*

(Pvt) Ltd HH 84-2008; *Gambiza* v *Taziva* HH 109-2008. The same conclusion must follow in the present case. Notwithstanding this conclusion, I deem it necessary, for the sake of completeness, to consider and determine the plaintiff's claim on its merits.

Percentage and Price

The dispute *in casu*, in essence, is whether or not the terms of the contract between the parties were duly fulfilled. The plaintiff contends that valuation ended with the submission of its report to the defendant indicating the reserve values ascertained. In keeping with the usual trade practice, professional fees for valuation became due upon presentation of the valuation report. As regards the percentage claimable, the plaintiff asserts the freedom and sanctity of contract and insists that it is entitled to 2.5% of the reserve value. The fact that the other auctioneers levied only 1% of the auction value is irrelevant as are the principles of equity and *quantum meruit*. It is further submitted that it was an implied term of the contract, in the event of the exercise ending with valuation, that the reserve price would be determinative in calculating valuation fees. This is consistent with the principle, articulated in *RB Ranchers (Pvt) Ltd* v *EstateLate McLean & Another* 1985 (2) ZLR 24 (H), that a term will be implied into a contract in order to give it efficiency. Moreover, as was held in *Maceys Consolidated (Pvt) Ltd & Another* v *T.A. Holdings Ltd* 1987 (1) SA 173 (ZS), in the absence of fraud, collusion or caprice, the parties are usually bound by the figures presented in the valuation report.

The defendant maintains that the contract encompassed all the activities to be undertaken by the plaintiff, including auctioning and the payment of auction proceeds. Having regard to the terms of the contract, as captured in the relevant correspondence between the parties, I see no reason to disagree with the defendant's position. To be more specific, the defendant wrote on 24 December 2007 asking the plaintiff to valuate and auction its assets and to

spell out its “current terms and conditions”. The plaintiff responded on 28 December 2007, stating that “the fees for the exercise would then remain at 2.5% of the auction value deducted at the end of the sale”. On 24 January 2008, the defendant replied to accept the stated “terms and conditions of valuation and auctioning” and to request a meeting “to draw a schedule of valuation and auctioning dates and sites”.

It is abundantly clear from the foregoing that the parties expressly and unequivocally agreed that payment to the plaintiff was to be calculated at 2.5% of the auction value at the end of each auction sale. There was no agreement for the payment of any percentage based on the reserve value upon submission of the valuation report. Nor can any such term be implied from the written stipulations of the contract or the prior or subsequent conduct of the parties. Indeed, in its letter of 7 May 2009, the plaintiff openly conceded that its “original reserve values [had become] too high” and proposed that “we adjust all reserved values on estates which were assessed last year basing on the current prices”. In this regard, no documentary evidence was furnished to show that the plaintiff did in fact submit adjusted valuations to the defendant before the contract was terminated in June 2009. Moreover, as was stated by the defendant’s witness, which evidence was not challenged, the plaintiff’s claim is calculated on invoices which were generated from October 2009 to March 2010 and based on estimated valuations, well after the actual valuations were carried out. In short, the plaintiff’s claim is wholly misconceived in its reliance upon the reserve value as the basis for computing its fees under the contract.

What the plaintiff should have done in this case was to compel the defendant to disclose the auction values realised by the other two auctioneers and then found a claim for a lower percentage on those auction values, *ad quantum meruit*, in respect of the assets already valuated by it. It did not do so but chose instead to lodge a

claim premised on the reserve values, entirely outside the contractual terms agreed between the parties. Indeed, when it became apparent at the trial that its claim was ill-founded, the plaintiff was still not prepared to accept valuation fees based on the auction figures. It also claimed an interest rate of 5% per month on the capital amount, without any legal foundation whatsoever, as well as 10% collection commission, which claim was only withdrawn at the trial.

Taking all of these factors together, there appears to be ample justification for a punitive award of costs. In the result, the plaintiff's claim is dismissed with costs on a legal practitioner and scale.

Chizikani Legal Practitioners, plaintiff's legal practitioners
Jakachira & Company, defendant's legal practitioners