DENALLARE TECHNOLOGIES (PVT) LTD

versus

PROCUREMENT REGULATORY AUTHORITY OF ZIMBABWE

and

ZIMBABWE ELECTRICITY TRANSMISSION AND DISTRIBUTION COMPANY

HIGH COURT OF ZIMBABWE

CHIRAWU-MUGOMBA J

Harare 16, 29, 31 May, 24, 25, 26 and 28 July 2023.

T. Mpofu with *A.S Ndlovu*, for the Applicant

S. Bhebhe, for the 1st Respondent

N.M Phiri, for the 2nd Respondent

OPPOSED APPLICATION

CHIRAWU-MUGOMBA J: The applicant seeks an order that the 1st respondent be ordered to conduct an investigation on the tender proceedings ZETDC/INTER/07/2021, " the tender" ostensibly in terms of s96 of the Public Procurement and Disposal of Assets Act [Chapter *22:23*], "hereinafter the PPDAA", a stay of the tender proceedings and any acts taken pursuant to the same, pending the investigation, and costs of suit against the 1st and 2nd respondents jointly and severally one paying the other to be absolved. The applicant describes itself as Denallare Technologies (P rivate) Limited, T/A REMVA Zimbabwe.

The facts of this matter can be summarised as follows. In 2012, the applicant was awarded a tender by the 2nd respondent for the design, configuration and commissioning of a pre-payment, vending and management system. This system is the one used in Zimbabwe for the electricity tokens for prepaid meters. The system was upgraded in April 2022. It came as a surprise to the applicant that the 2nd respondent decided to embark on a competitive bidding process to procure a similar platform as the current one in view of the upgrade. Such procurement is in breach of the PPDAA, which prefers direct procurement method in terms

of s33. The costs associated with the second procurement is an unnecessary one to the nation. The applicant is concerned about how the 2nd respondent with the blessing of the 1st respondent can assist in the signing of a contract that requires specialized software with an entity that is relatively unknown. In keeping with this concern, the applicant addressed a letter to the Chief Executive Officer of the 1st respondent dated the 18th of March 2022. The applicant sought that the 1st respondent exercise its powers in terms of s96 of the PPDAA in order for an investigation of this conduct as well as to exercise its powers in terms of section 54(10) (c) in suspending the ongoing process while such investigation was being undertaken.

In support for the granting of a *mandamus*, the applicant contends that it has a clear and definite right in terms of s68 of the Constitution of Zimbabwe, that the 1st respondent has duty to perform the act as requested and that there is an absence of protection by other ordinary remedy.

In HC 817/23, the applicant obtained leave to file a fourth affidavit and the 1st and 2nd respondents also obtained leave to respond. In this affidavit, the applicant attached what it averred was a letter from a whistle-blower delivered anonymously to it. The contents of this letter dated the 28th of December 2022, suggests the defence that the 1st and 2nd respondents must mount and invites the 2nd respondent to consider the issues raised by the applicant. In the applicant's view the letter is evidence of collusion between the respondents but more poignantly its an acceptance by the regulator that the issues raised by applicant have merit and require sensitive consideration.

The 1st and 2nd respondents strenuously oppose the application. The 1st respondent starts by giving a contextual back. That sometime in October 2021, the 2nd respondent as a procuring entity invited bids for the tender, which was for supply and delivery of prepayment meters vending system. Among the unsuccessful bidders is an entity called Electricity Management Services Limited (EMS) which the applicant claims to represent. The winner of the bid was some other entity. EMS, being aggrieved by the outcome of the tender process filed two court applications under HC2389/22 and HC 2404/22 and the 1st respondent was cited. The deponent to the applications is the same deponent in *casu*. These applications are pending. The applicant also tried in its own name to challenge the tender proceedings by writing letters to the 1st respondent. The applicant was advised that the challenge was not

compliant with s73 of the PPDAA. After failing to mount a challenge, the applicant has now approached this court purportedly in terms of s4(2) of the Administration of Justice Act [Chapter *10:28*], " AJA". That section does not provide for such applications. Accordingly, the application is a nullity. The pending matters of EMS as cited above make the matter either *lis pendens* or *sub judice.* If, applicant distances itself from the two matters, this court should withhold its jurisdiction pending the resolution of the disputes cited above. The applicant has failed to exhaust the administrative or other remedies as provided for in s7 of the 'AJA'. The applicant falls in the realm of a potential bidder and should have utilised the provisions of s73 of the Act which provides a clear process for the mounting of a lawful challenge. The applicant has no cause of action against the 1st respondent, as the latter clearly followed the law.

It is pertinent to note that in its answering affidavit, the applicant challenged the authority of the deponent to the 1st respondent's opposing affidavit. In response, the 1st respondent averred that at the time the application was served on them, the Chief Executive Officer was on his annual leave and out of the country. The board thus appointed the deponent to be position of acting Chief Executive Officer and as a result, he was clothed with the requisite capacity to depose to the affidavit. The 1st respondent attacked the letter that the applicant introduced in its supplementary affidavit on the following grounds. That it was improperly and illegally obtained; that it falls into the realm of legally privileged communication between the regulator and the entity and that the conclusions sought to be drawn from the letter by the applicant are erroneous.

The 2nd respondent also strenuously opposes the application. The grounds are summarised as follows. *In limine* that there is no cause of action against the respondents. The 1st respondent made a decision after having invited the 2nd respondent to respond to the allegations. In terms of s96 of the PPDAA, the 1st respondent has discretion to conduct investigations should it deem necessary. The relief sought by the applicant is incompetent especially in view of the fact that the tender proceedings have already been concluded. The matter has therefore been overtaken by events. On the merits, the 2nd respondent contends as follows. The system for which the applicant and 2nd respondent entered into a tender agreement in 2012 is no longer viable and that is why a new tender was flighted. The deponent to the applicant's founding affidavit attended the debriefing meetings for the tender

though as a director of another entity. The applicant was aware as far back as early March 2022 about the internal remedies for challenging the tender award. As a potential bidder, the applicant did not exhaust the internal remedies but chose to write letters to the 1st respondent. The 2nd respondent is not bound or obliged to heed the recommendations of the applicant. The applicant is covered as a potential bidder in s73 of the Act. With respect to the applicant's supplementary affidavit, the 2nd respondent averred that the deponent to its opposing affidavit had authority to act. This was after the applicant in its answering affidavit had challenged this aspect. Further that the relief sought was incompetent as it had been overtaken by events. With respect to the whistle blower letter, the contents do not in any way suggest the defences to be mounted as alleged. There is no evidence at all of collusion between the respondents as suggested by the applicant.

From the affidavits and annexures filed of record, barring the preliminary issues, a clear picture emerges. EMS submitted a bid for the tender ZETDC/INTER/07/2021. It was unsuccessful. There are proceedings under HC 2389/22 in which EMS is seeking an order against the 1st and 2nd respondents *in casu*, as well as against the Vice President of the Republic of Zimbabwe N.O, the Minister of Finance and Economic Development N.O and the winning bidder Inhemeter Co. LTD. The order sought by the EMS (represented by the same deponent as in *casu*) is that s73(4)(b) of the PPDAA as read with s44 of the General Regulations, 2018 and the 3rd schedule to the general (amendment) regulations of 2020 (found in SI 219/219 are unconstitutional on the basis of violating s 68(1) (3) and 56(1) and 71(3) of the Constitution and that should the Constitutional Court find in applicant's favour, it be granted leave to lodge a challenge to the procurement proceedings on the tender in question. In HC 2404/22, EMS (represented by the same deponent as in *casu*) filed an urgent application seeking an interim order that the tender be stayed and should not be executed by the conclusion and consummation of a procurement contract between the 2nd respondent *in casu*, and Inhemeter Co. ltd and that if any contract has been concluded, its execution should be stayed. The court, under HH-287-22, disposed of the matter on the basis that it is not urgent and accordingly is struck off the roll of urgent chamber applications. The record does not indicate whether or not EMS pursued the matter as it is entitled to as an ordinary court application – see R60(19) of the High Court Rules, 2021. What also emerges is that the applicant holds a strong view that there were some underhand dealings in the tender process especially from the view point that it was not necessary. We therefore have a curious

case of EMS, represented by the same deponent in HC 2389/22 and the matter in *casu* essentially seeking to 'stop' the tender process. The contention by the respondents is basically that the applicant is a potential bidder and ought to have exhausted the domestic remedies. In other words, the applicant in HC 2389/22 is in a manner of speaking , one and the same with the one in *casu.*

The 1st respondent raised several preliminary issues including the *locus standi* of the applicant. I note that the applicant also challenged the authority to the deponents to the 1st and 2nd respondents affidavit. No oral submissions were made in respect of the authority to act by the applicant's counsel save that they stand by the papers filed of record. In my view, the 1st respondent in its heads of argument correctly outlines the law regarding someone appointed in an acting capacity. The 2nd respondent also outlines the law correctly with reference to the challenging of a deponent's authority to act- See *Dube vs PSMAS and anor,* SC 73/19. Having disposed of that preliminary issue, I now turn to *locus standi.*

The 1st respondent contends that the applicant lacks *locus standi* to challenge the procurement proceedings. Whatever form the application takes, it is a challenge to procurement proceedings. Applicant seeks to challenge procurement proceedings and also a stay. It seeks to argue that it is challenging the need or necessity of procurement. This does not take its case any further because what procurement proceedings mean is defined in the Act. This commences at the time that an entity sits to decide whether or not it should flight a tender. The applicant made several submissions in its pleadings that it is not a bidder as contemplated in the Act specifically in paragraph 36 of the founding affidavit. Once that submission is made, that is the end of the matter. When one is not a bidder, they have no direct or substantial interest in a matter. The applicant argues that it made the application as a concerned citizen. The law on *locus standi* is such that it does not allow anyone and everyone who alleges to be a citizen to approach the court in a matter in which they have no direct or substantial interest. Reference to the *Mudzuru* judgment should be put in context. That case is distinguishable for the simple reason that the Constitution has a specific provision that allows anyone to approach the Constitutional Court for constitutional relief based on public interest. In *casu, locus standi* does not arise from public interest. The law ascribes to direct and substantial interest and not legal interest.

The 2nd respondent although alluding to s96 of the Act, did not raise a preliminary issue related to *locus standi.*

With regard to *locus standi*, counsel for the applicant made the following submissions. The question to be asked is whether or not the applicant has a legal interest that ought to be considered. The applicant has a legal interest on the basis of it being a citizen, one based on legality and observance of law as per the *Mudzuru* case. There is no difference as suggested by counsel for the 1st respondent between legal interest and real and substantial interest. Consideration of *locus standi* is different under public law. In matters of public law where the principle of legality is being enforced, every subject of the state has *locus standi.* The applicant being the current holder of the current contract has intimate knowledge of the process. On the issue of not challenging the procurement process, whether something must be done, whether money should be expended and whether people should be enriched, are processes outside the ambit of the procurement process.

A reading of the application reveals that the applicant fundamentally avers that it has approached the court on the basis of s68 of the Constitution alleging that its right to administrative justice has been infringed. This is borne from paragraph 52 of the founding affidavit wherein the applicant states, '*In terms of section 68 of the Constitution of the Republic of Zimbabwe, the applicant has a right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantially and procedurally fair'*. It proceeds in paragraph 53 by proclaiming unequivocally that the 1st respondent is an administrative body from whom certain conduct is expected. The applicant having made that averment however does not seek relief in terms of s85(1) of the Constitution. Instead, the applicant delves into the AJA and the PPDAA. It outlines what it views are the administrative infringements. In my view, these infringements, are but support for the cause of action, which as stated above is an alleged infringement of the right to administrative justice. The dilemma as I see it is whether or not the court should make a finding that a constitutional infringement has occurred without the applicant having specifically pleaded such. See *Minister of Justice, Legal and Parliamentary Affairs and ors, vs. Chinanzvavana and anor,* SC-119-21. The immediate question is whether or not that does not amount to creating a constitutional issue or dispute on behalf of the parties? As is trite, courts must not be overly burdened by the state of pleadings but from what is apparent from

them. This has found expression in the adage that, *" Courts have emphasized as well that pleadings are made for the court and not the court for pleadings…."* See, *Agricultural Bank of Zimbabwe Ltd T/A Agribank vs. Nickstate Investments (pvt) Ltd and ors,* HH-231-10 , per GOWORA J (as she then was). In reading the applicant's affidavits, it is clear that it views itself as acting for the common good of Zimbabwe, to ensure that conduct that possibly borders on corruption and underhand dealings is brought to the fore with appropriate consequences. Reliance is placed on an alleged letter from a whistle blower and the constant assertion by the applicant that it is not a bidder but is a concerned citizen. That in my view, places the applicant within the purview of s85(1).

Taking a cue from *Minister of Justice, Legal and Parliamentary Affairs (supra),* a court is behoved to take the following approach,

> "A proper interpretation of the above provision is that once a person approaches a court on the basis of s 85 (1) (a) of the Constitution, the court must make a determination on the following issues:
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> (i) That the person approaching the court has an interest in the matter, and
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> (ii) That the person is alleging that a fundamental right in Chapter 4 has been, is being or is likely to be violated in respect to her.
>
> See *Meda v Sibanda & Anor* 2016 (2) ZLR 232 (CC) at 263."

In buttressing the issue of legal interest, the court went on to state,

> 'This point was emphasized in *Loveness Mudzuru & Anor v Minister of Justice, Legal & Parliamentary Affairs N.O. & 2 Ors* CCZ 12/2015 where MALABA DCJ (as he then was) stated at p 9 of the cyclostyled judgment that:
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> "The person claiming the right to approach the court must show on the facts that he or she seeks to vindicate his or her own interest adversely affected by an infringement of a fundamental right or freedom. The infringement must be in relation to himself or herself as the victim or there must be harm or injury to his or her own interests arising directly from the infringement of a fundamental right or freedom of another person'.

This is where I find convergence between the above and the assertion by the 1st respondent that the applicant has no *locus standi*. As I posed to *T.Mpofu* for the applicant, what really is the applicant's interest? The answer in my view lies in an analysis of annexures NB1 to 19. In NB1, the applicant addresses a letter to the 2nd respondent. Paragraph one reads, *"We are Denallare Technologies (pvt) Ltd trading as REMVA Zimbabwe (REMVA) and* ***representatives of Electricity Management Systems Limited, EMS***(my emphasis). In the background, the letter states that REMVA was awarded a tender by the 1st respondent in 2012. The letter then goes on to complain about the flighting of a new tender which REMVA views

as unnecessary and the reasons are advanced. Nothing turns on NB2 as it a response from the 2nd respondent. Nothing also turns on NB3, 4,5,6,7 and 8. In NB9, the 2nd respondent addressed a letter dated the 4th of July 2022 to the applicant in which they state that that have engaged the 1st respondent whose response is to the effect that the challenge to the procurement proceedings is spelt out in the relevant act and that the issues raised are more of policy and should be directed to the procuring entity. More poignantly, the letter states that although being the representative of EMS, the issues raised pertain to the applicant. It goes on to state that the relevant act provides a challenge to procurement proceedings. Further that if the representative is challenging the procurement proceedings as EMS, they should use the appropriate channel. Nothing turns on NB10. On the 12th of July 2022, the 2nd respondent addressed a letter to the 1st respondent informing it that a challenge to the procurement proceedings had been received from the applicant, T/A as REMVA Zimbabwe. This is annexure NB11. In annexure NB 12, REMVA addressed a letter dated the 18th of July 2022 to the 1st respondent's legal practitioners captioned as breach of duty by ZETDC in attempting to procure a prepayment platform and signing a contract without cause. The letter also requests, an amount and banking details for payment of security of costs to mount the challenge. In a response, annexure NB 13 dated the 19th of July 2022, attention of the applicant is drawn to provisions of section 73(3) (4)(a) and (b) of the relevant act. NB14 is a letter dated the 20th of July 2022, addressed by the 1st respondent's legal practitioners to the 2nd respondent. The salient point is that attention is drawn to the fact that a challenge to an award of a contract must be made within 14 days and that the applicant is out of time. The letter is copied to the applicant. In NB 15, REMVA responded to the effect that it was within time in lodging its challenge. On the same day, REMVA addressed a letter to the 2nd respondent announcing its formal challenge to the signing of a new contract with a third party, i.e annexure 16. Nothing turns on NB17. On the 25th of November 2022, REMVA addressed a letter to the 2nd respondent outlining what it perceived are the time lines. In NB 19, a letter dated the 28th of November 2022 was addressed to the applicant by the 2nd respondent. In that letter, the 2nd respondent emphasized the fact that applicant had previously been advised to engage the 1st respondent and that position still stood. On the 8th of April 2022, under HC 2389/22, EMS filed an application against the 1st and 2nd respondents and three other parties seeking as I have already observed, constitutional relief in respect of the same tender under challenge in *casu.*

It is clear that the applicant is, as it rightly claimed, representing EMS, an entity that is already before the courts seeking relief for the same tender. A clear reading of the application and the annexures reveals that the applicant is actually pleading a case for EMS. Applicant who is not a bidder is complaining about the cost of the new tender process and expressing concern about the signing of a contract with what it terms '*a supplier with no known history in the region for this specialized software'*. In paragraph 27 of its founding affidavit, the applicant lays bare its feelings towards the tender process by averring,

> *"At a loss for options, the applicant then decided to write directly to the 2nd respondent to highlight the same concerns. In particular, this was the apprehension about a new untried and untested system with no track history in the African region compared to the applicants which is the dominant platform in the whole of Africa and especially the SADC Region and for an excessive purchase amount of $3.9 million United States of America dollars after just recently upgrading its software to the latest in the prepayment sector on new and recently purchased hardware by the 2nd respondent."*

Applicant has no interest on its own. It is fronting the interests of EMS. Its perceived rights given its true identity, are not in danger of being violated given that in HC 2389/22 EMS limited is seeking if successful, confirmation of the proceedings by the Constitutional Court **AND** condonation to lodge a challenge to the tender proceedings No. ZETDC/INTER/07/2021. In my view, the applicant cannot claim that its rights to administrative justice were violated. It did not participate in the tender process in its own name. Applicant cannot hide behind the AJA when in fact it is fronting the interests of EMS. It is trying to string together allegations against the tender process. I agree with the respondents that this matter is a disguised challenge to the procurement proceedings in question. This is borne by applicant approaching the court under section 4(2) of the AJA. The relief provided for in that section is tantamount to asking the court to give an order impacting on the tender proceedings and processes. Applicant, cannot claim to be acting under the guise of a concerned citizen. It is speaking on behalf of EMS.

Costs are always at the discretion of the court. Despite being pointed to the right direction as shown by annexures NB1-19, the applicant did not take heed. Accordingly, it must bear the costs.

DISPOSITION

1. The application be and is hereby dismissed.
2. The applicant shall pay costs

Gill, Godlonton and Gerrans, Applicant's Legal Practitioners
Kantor and Immerman, 1st Respondent's Legal Practitioners
Muvingi and Mugadza, 2nd Respondent's Legal Practitioners