CRUSH SECURITY (PRIVATE) LIMITED
versus
THE GROUP CHIEF EXECUTIVE OFFICER
(PARIRENYATWA GROUP OF HOSPITALS)
and
PARIRENYATWA GROUP OF HOSPITALS

HIGH COURT OF ZIMBABWE
CHINAMORA J
HARARE, 19 May 2021 & 27 January 2023

Opposed application

Mr *S Mushonga*, for the plaintiff
Mr *T Andi*, for the defendants

CHINAMORA J:

The plaintiff in this case issued summons out of this court seeking to recover a sum of US$261,430.28, which it alleges is the outstanding balance of fees for security services it rendered to the defendants. In addition, the plaintiff sought to recover interest at the prescribed rate of 5% calculated from 1 October 2011 to date of full payment collection commission and costs of suit. The defendant denied liability. To understand the issues in this case, let me refer to the Statement of Agreed Facts jointly crafted by the parties as the parties opted to deal with this matter as a stated case. I reproduce the statement of agreed facts here under:

> "Statement of agreed facts:
>
> 1. In September 2010, there was a contract between the plaintiff and the defendant for the Provision of Security Services at a fee of $23 554.30 per month in terms of the Private Investigators and Security (Control) Act [*Chapter 27:10*] as read with S.I. 156 of 2007.
>
> 2. The contract was entered into pursuant to a tender process, that was done in accordance with the Procurement Act [*Chapter 22:14*].
>
> 3. Sometime in November 2010 when parties were performing their obligations in accordance with the contract there was the promulgation of Private Investigators & Security Guards (General) Amendment Regulations, 2010 (No. 1) S.I. 180/2010 which increased the tariffs for Security Guards which were in S.I. 156 of 2007.

4. As a result of the increase in tariffs, the fees for the services rendered by the plaintiff increased form $23 554.30 to $50 551.70 per month.

5. Defendant was notified of the variations in tariffs which led to a series of meeting between parties.

6. Defendant sought the approval of the Procurement Board on whether or not to terminate the contract or to vary it. The Procurement Board did not authorize the defendant to terminate the contract or to vary the contract.

7. During that period the plaintiff kept on offering services and being paid $23 554.30 and kept on debating the defendant for the outstanding amount to make it $50 551.70 as per the new tariffs and legislation.

8. Termination was then done in September 2011. At the time of termination, the Procurement Board had not authorized the defendant to vary the contract.

9. What is being claimed by the plaintiff is the difference between the amount paid (in terms of the contract) and the then gazette fee in terms of S.I. 180/2010 which totals to $261 430.28 which is due to plaintiff as a result of the increase in tariffs by government in the middle of the contract of services."

Before I proceed to deal with this matter, I make one critical and perhaps decisive observation. I note that the parties entered into a fairly detailed written agreement to regulate their contract. The agreement contains a condition which required parties to resort to arbitration in the event of a dispute flowing from the contract. In this respect, clause 18 of the agreement reads:

> "Both parties to this Agreement shall aim to resolve all disputes, differences and change by means of co-operation and consultation. If there is failure to reach an agreement the Ministry of Health and Child Welfare shall appoint a final arbitrator whose decision shall be final and conclusive"

I will not dwell on this clause, since none of the parties invoked it, nor did they object to the jurisdiction of this court based on that contractual term. The question of this court's jurisdiction only arises if a party to the dispute engages Article 8 of the Model Law, which provides that:

> "A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed".

Consequently, I have to deal with the merits of the case before me. The agreement between the parties regulated contains an elaborate a non-variation clause 21, which is couched as follows:

> "Any variation to the terms of this Agreement shall be agreed to in writing by the parties. Each variation shall be clearly identified as such and shall be numbered sequentially and shall be signed by the Representatives of the parties. The client subject to Clause 4.1 shall determine an increase or decrease in the cost of the service resulting from a variation order"

Clause 4.1 alluded to above, merely dealt with the duration of the agreement. It was a one year agreement commencing on 10 September 2010. As is evident from the various letters written by the defendant's representatives objecting to a proposed upward variation of the cost of security services by the plaintiff, it was within the contemplation of both parties at the time of contracting that the defendant was dealing with budgeted expenditure. The proposed midstream change was clearly unsustainable, because the plaintiff was trying to seduce the defendant to provide it with money which was not part of the contract agreement. In my view, it gets worse when one considers that the proposed changes were never reduced to writing as directed by parties' agreement. The plaintiff cannot unilaterally change the contract.

I can be forgiven for saying that, it seems the height of recklessness or a monumental assumption of risk by the plaintiff to continue to provide services to the defendant despite the latter having persistently made it clear that it was not in a position to make any payment outside that provided in the contract. My view is that the mandate of the State Procurement Board ended once it declared the plaintiff the winner of the tender process. It was not expected to meddle itself in the execution of the contract after the conclusion of the agreement. In other words, that Board became *functus officio.* To seek for its guidance in the implementation of this contract appears disingenuous. The answer lay squarely in the contract itself. In the circumstances, the relief sought cannot be afforded.

Accordingly, the plaintiff's claim is dismissed with costs.

Mushonga, Mutsvairo & Associates, plaintiff's legal practitioners
Kantor & Immerman, defendants' legal practitioners