

REPORTABLE (40)

SELEX ES p.A
v
(1) STATE PROCUREMENT BOARD
(2) INDRA SISTEMAS SA (PRIVATE) LIMITED
(3) CIVIL AVIATION AUTHORITY ZIMBABWE

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, PATEL JA & BHUNU JA.
HARARE, JANUARY 28, & OCTOBER 28, 2016

F. Mahere with *T. Mugabe*, for the appellant.

M. Chimombe, for the first respondent.

L. Mazonde, for the second respondent.

O.T. Gasva, for the third respondent

BHUNU JA: This is an appeal against the entire judgment of the Administrative Court in which it dismissed the appellant’s appeal against the award of a tender to the second respondent, Indra Sistemas SA PL by the first respondent, the State Procurement board.

The first respondent was however wrongly cited, both in the court *a quo* and in this court as the “Principal Officer State Procurement Board” The correct citation ought to have been the “State Procurement Board” duly incorporated as such in terms of the Procurement Act [*Chapter 22:14*]. The record of proceedings has since been amended by

consent to reflect the correct party. Despite the wrong citation, the first respondent was properly represented at every stage of the case. The amendment is therefore proper as it does not cause any prejudice to anyone.

The third respondent did not file heads of argument opting to abide by the court's decision as a neutral party. At the close of argument we allowed the appeal in terms of the appellant's amended prayer with reasons to follow. The court's order was couched in the following terms:

“WHEREUPON after reading documents filed of record and hearing counsel,

IT IS ORDERED THAT:

1. The appeal be and is hereby allowed with costs against 1st and 2nd respondents jointly and severally the one paying the other to be absolved.
2. The judgment of the court *a quo* be and is hereby set aside and substituted with the following:
 - (i) It is hereby declared that the 2nd respondent failed to comply with the mandatory requirements of tender No. CAAZ/DANTS/1/13 for the supply and installation of an air Traffic Control Radar Surveillance System.
 - (ii) Accordingly, the award of tender No. CAAZ/DANTS/1/13 for the supply and installation of an Air traffic Control Radar Surveillance System to the 2nd respondent be and is hereby set aside.
 - (iii) Any contracts entered between the 2nd and 3rd respondents pursuant to the award of tender No. CAAZ/DANTS/1/13 to the 2nd respondent be and is hereby declared invalid and is hereby set aside.
 - (iv) The certificate issued in terms of section 44(2) (b) of the Procurement Act [Chapter 22:14] by the 3rd respondent pursuant to the award of tender No. CAAZ/DANTS/1/13 to the 2nd respondent be and is hereby set aside.
 - (v) The matter is hereby remitted to the State Procurement Board for the invitation of a fresh tender.
 - (vi) The 1st and 2nd respondents shall pay costs of this appeal, jointly and severally, the one paying and the other to be absolved.”

I now proceed to provide the reasons for judgment. The factual background to this appeal is by and large common cause, raising no material dispute of facts.

The State Procurement board hereinafter referred to as the SPB, is an administrative body established in terms of s 4 of the Procurement Act [*Chapter 22:14*]. Its functions are set out in s 5 of the Act as follows:

- “(1) Subject to this Act, the functions of the State Procurement Board shall be—
- (a) to conduct procurement on behalf of procuring entities, where the procurement is of a class prescribed in procurement regulations; and
 - (b) to supervise procurement proceedings conducted by procuring entities, in order to ensure proper compliance with this Act; and
 - (c) to initiate investigations in terms of section *forty-six* and take action pursuant thereon in terms of section *forty-seven*; and
 - (d) to perform any other function that is conferred or imposed on the State Procurement Board by or in terms of this Act or any other law.
- (2) Except as otherwise provided in this Act, the State Procurement Board shall not be subject to the direction or control of any person or authority in the exercise of its functions under this Act.”

Any person aggrieved by the decision of the State procurement Board or any procurement entity in the exercise of its functions has the right of appeal to the Administrative Court in terms s 43 of the Act. Appeals from the Administrative Court in turn lie to this court in terms of s 20 of the Administrative Court Act [*Chapter 7:01*].

On 13 December 2013 the SPB in the course of duty invited tenders for the supply and installation of primary and secondary surveillance air traffic control radar systems for purchase by the third respondent. The radar systems were to be installed at various strategic positions covering the entire Zimbabwean airspace.

Both the appellant and the second respondent participated in the tender proceedings. The tender was won by the second respondent much to the chagrin of the appellant, hence the appeals to the Administrative Court and ultimately to this court. .

Section 4 of the invitation to tender documents provided for mandatory requirements to be fulfilled by tenderers on pain of disqualification for noncompliance under s 5 as read with s 9 thereof. The three sections provided that:

“SECTION 4: MANDATORY REQUIREMENTS.

Bidders are required to submit the following requirements, which are mandatory. Failure to submit shall lead to disqualification.

...

- (g) The manufacturer of the PSR/MSSR systems to be supplied must have a track record of at least five years in supplying Radar systems at International Civilian airports and used for ATC operations. The details of the reference sites shall be given in the bid.

...

- (l) The tenderer shall provide option/s for Financial Funding Proposal and Outright purchase systems being offered in this tender. This funding proposal shall indicate the total cost of providing financing and shall include a five year repayment plan; and the financial proposal shall indicate the monthly repayment.

SECTION 5: CAUSES FOR DISQUALIFICATION

The following are reasons for tender disqualification:

- (a) Prima facie evidence of collusion among tenderers.
- (b) Incomplete submission of tender requirements.
- (c) Non-compliance to tender specifications.
- (d) Lack of trade references.
- (e) Misrepresentation of facts in the submission.

SECTION 9: CRITERIA FOR TENDER VALUATION

The following criteria shall be used for the evaluation of this tender. Tenderers who fail to fulfil the stated criteria shall be disqualified:

1. Compliance to Mandatory Requirements in s 4.

...

- 9 Lowest price to specification.”

Upon assessing the various bids received the first respondent produced an evaluation report to assess the credibility of each bidder. In respect of the second respondent it made the following findings at page 51 of the record of proceedings:

“FINDINGS ON MANDATORY REQUIREMENTS
OPTION TO BIDDER PROVIDING FINANCING

1 Indra Sistemas SA P/L

- The Bidder did not provide a bank guarantee from a registered commercial bank for the funding proposal.
- The Bidder gave the following funding proposals:

(a) Option 1

A letter of a non-binding Letter of credit confirmation from Barclays bank in the sum of 20, 000, 0000 Euro with a 12 months deferred payment as opposed to the required 5 year and 10 year proposals.

(b) Option 2

A letter of intention to participate in the tender from Ecobank which does not state any amount being offered under this funding proposal option.

(c) Option 3

A letter from Tamuka Group expressing interest to provide insurance in support of the tenderer’s bid. There is however no amount which is being proposed under this option.

The bidder did not comply with all the mandatory requirements of the tender under this option.”

The SPB having concluded that the second respondent did not comply with all the mandatory requirements of the tender under the above option went on to dubiously find at page 83 of the record of proceedings that it nevertheless qualified to win the tender under the outright purchase option when its bids did not comply with the minimum mandatory tender requirements. That fake evaluation reads:

“FINDINGS ON EVALUATION OF BIDS AGAINST CRITERIA

2. Indra Sistemas SA P/L

- **The bidder did not provide a bank guarantee from a registered commercial bank for the funding proposal.**
- The bidder offered a 12 months funding proposal which is against the required 5 year and 10 year funding proposals.
- The bidder qualifies for recommendation for award of tender on outright purchase option.
- **The bidder does not qualify for recommendation for award of tender on the 5 year and 10 year funding proposals. Although the Bidder met all technical specifications of the tender, the Bidder did not provide the 5 and 10 year funding proposals as required in the tender.**
- The Bidder qualifies for recommendation for award of the tender on outright purchase option”

It is needless to say that once the SPB had made the valid finding that the second respondent had failed to comply with the mandatory requirements of the tender, it was not within its power to change goal posts and award the tender on other spurious grounds in breach of the mandatory requirements.

The learned judge of the Administrative Court therefore, misdirected himself and fell into grave error when he held that the record of proceedings shows that the second respondent complied with all tender requirements. There is no truth or validity in that finding as it goes against the grain of evidence on record as amply demonstrated above. It appears that the judge in the court *a quo* was also misled by the fact that the second respondent’s bid was the lowest. That consideration was of no consequence in circumstances where the basic minimum mandatory requirements were not met.

Confronted with the stark reality that that the second respondent was invalidly awarded the tender in circumstances where it had failed to comply with the minimum mandatory tender requirements, Mr *Chimombe* counsel for the first respondent quite rightly and professionally recanted saying:

“We are not supporting the judgment. We have noted the anomalies in the record. The Board will abide by the order of this court. We abandon our heads of argument.”

But not so for Mr Mazonde, counsel for the second respondent. Despite overwhelming evidence staring him in the face, he steadfastly held onto his guns firing blanks.

Although he had no meaningful legal argument to proffer he fastened onto his puerile appeal saying:

“I stand by my heads of argument. Second respondent was the best bidder.”

When the court pointed out that the issue was not whether his client was the best bidder but whether it met the basic minimum mandatory requirements for the tender he retorted:

“It is difficult for me to say that all parties met the tender requirements. I admit that some of the tender requirements were not met. On the question of costs the 2nd respondent should be excused as it was just a party which won a tender.”

“PATEL JA: But you still persist with your opposition
Mr Mazonde: Yes.”

While parties and lawyers are entitled to have their day in court, they must exercise that right responsibly with due care and diligence not to abuse court process. It is rather unethical and an abuse of court process for litigants and particularly lawyers to waste the court’s valuable time presenting dead unarguable cases in the vain hope that flogging a dead horse will somehow resurrect it to life.

B.D. Crozier in his Legal Ethics, 2009 handbook cautions against such subtle unbecoming behaviour at page 16 where he says:

“It is impossible to define comprehensively what is meant by an abuse of court process, **but in general terms it would take place when the court’s procedure is used by a litigant for a purpose for which it was neither intended nor designed,**

to the prejudice or potential prejudice of another party to the proceedings. **It may also take place when a litigant institutes proceedings that are obviously unsustainable.**

A legal practitioner must not abuse court process e.g. he must not enter an appearance to defend when there is no defence, and must not use court procedures to intimidate the other side or delay matters. He should not file bogus pleadings. Needless to say he must not deliberately alter court process for that usually amounts to forgery or fraud.” (My emphasis)

On that score, it is axiomatic that appeal proceedings were never intended or designed to facilitate a hopeless fishing expedition in this court in the futile hope of catching something in an empty pool. This is for the simple but good reason that the appeal court has no remedy to offer in frivolous and vexatious appeals. Thus, appeals of this nature are simply a waste of time and money for everyone concerned.

The courts frown upon that despicable type of conduct which is punishable by an award of costs at the punitive scale. Thus where a legal practitioner institutes or defends appeals with full knowledge that there are absolutely no reasonable prospects of success, he or she might expect to bear the wasted costs occasioned by his or her wrongful conduct *de bonis propriis*.

Although lawyers have a duty to their clients, their duty to the court is paramount as propounded by MANGOTA J in *Sergeant Mutasa C. 0477442S v The Board President (Chief Superintendent Dube N) and Another* HH – 9- 15 at p 6 where he says:

“The applicant’s legal practitioner is an officer of the court. His duty is first and foremost to no one else but the court. The oaths which he took when he was admitted into the profession beckon him to always remain truthful with himself, with the court, with fellow legal practitioners and with those whom he represents in, and out of, court.”

Mr *Mazonde*'s duty to court obliged him not to abuse court process by defending the indefensible in a court of law. He also had a duty to advise his client properly as per MAKONI J's observation in *Base Minerals Zimbabwe (Pvt) Ltd and Another v Chiroswa Minerals (Pvt) Ltd and Ors* HH - 21 – 16 where the learned judge said:

“It cannot be over emphasised that a lawyer has a duty to advise his clients properly regarding the law as well as procedure. A lawyer owes a duty to the court not to be complicit in instituting proceedings which amount to an abuse of court process. See *Ndlovu v Murandu* 1999 (2) ZLR 341 (H) at pages 350 – 351.”

Lawyers should take heed of that free legal advice. There is no conflict between a lawyer's duty to court and to his client as the two duties are complementary and geared towards achieving justice which is the primary aim and object of all judicial proceedings. Had counsel correctly discharged his obligation in this respect, a lot of time and expense could have been saved to the benefit of all concerned.

We are convinced that Mr *Mazonde* appears to have negated his duty to give correct legal advice to his client and simply pandered to the whims and dictates of his client's wishes. This is because when asked whether he was not worried that failure to follow the correct tender procedures in acquiring radar systems would endanger members of the public, he retorted that he was, as he also travels by air.

It is disturbing if not horrifying that counsel was prepared to sacrifice not only his own safety but that of the entire traveling public and the nation at large at the altar of expedience to pacify his client. Lawyers should not succumb to pressure from their clients at the expense of justice and public interest. It is for these reasons that we allowed the appeal and issued the order at the beginning of this judgment. The second respondent and its counsel

were fortunate that the appellant did not seek costs at the punitive scale. They must however take heed. Counsel for the applicant is warned not to repeat this type of deplorable conduct.

ZIYAMBI JA: I agree

PATEL JA: I agree

Nyatombwa Mugabe Legal Counsel, appellant's legal practitioners.

Civil Division of the Attorney General's Office, the 1st respondent's legal practitioners.

Scanlen & Holderness, 2nd respondent's legal practitioners.

Chirimuuta & Associates, 3rd respondent's legal practitioners.