REPORTABLE (24)

DENALLARE TECHNOLOGIES PRIVATE LIMITED
v
(1) PROCUREMENT REGULATION AUTHORITY OF ZIMBABWE
(2) ZIMBABWE ELECTRICITY TRANSMISSION AND DEVELOPMENT COMPANY

SUPREME COURT OF ZIMBABWE
HARARE: 19 OCTOBER 2023 & 6 MARCH 2024

A.S Ndlovu and G. Ndlovu, for the applicant

G. Sithole, for the first respondent

N.B Munyuru, for the second respondent

IN CHAMBERS

KUDYA JA:

[1] The applicant seeks condonation and extension of time within which to file an appeal in terms of r 43 of the Supreme Court Rules, 2018. The respondents contest the application.

[2] The applicant is a company duly registered in Zimbabwe. It is a vendor for the design, configuration and commissioning of pre-payment metering technology (PMT) used in the buying and selling of electricity tokens in 13 Southern African countries. The first

respondent is a body corporate established in terms of s 5 of the Public Procurement and Disposal of Public Assets Act *[Chapter 22:23]* (the Act). It is mandated by s 54 (10) (c) as read with s 96 of the Act to, *inter alia,* investigate anomalies that may arise in public procurement in Zimbabwe. The second respondent is a company duly registered in terms of the laws of Zimbabwe. It has the statutory responsibility of developing and distributing electricity in Zimbabwe.

[3] The applicant won a public tender to configure and install PMT software used by the second respondent. Thereafter the two concluded a contract under which the software was commissioned in April 2013 and upgraded in April 2022. The contract was set to expire on 31 May 2023.

[4] In October 2021 the first respondent, as a procuring entity, floated tender number ZETDC/INTER/07/2021 for the delivery and supply of new PMT software to replace the applicant's software. It did so for three reasons. The first was that the 2013 system only had a life span of 18 months left. The second was that the applicant's software was outdated and too restrictive in that it did not cater for the use of multi-currencies. The final one was that it had become too expensive to operate and maintain the system.

[5] The applicant did not participate in the tender. Its director and deponent to its founding affidavit, Nick Bakaris (Bakaris), however, represented one of the losing bidders, Electricity Management Services Ltd (EMS), in the tender process. The tender was won by and awarded to Inhemeter Co. Ltd.

[6] Aggrieved by the loss, EMS (with Bakaris as its deponent to the founding affidavit) filed two applications, case numbers HC 2389/22 and HC 2404/22, in the High Court challenging the award of the tender to the winner. The applicant, represented by Bakaris, also sought to stop the award of the tender to the winner in a court application in case number HC 8954/22, the adverse result of which birthed the present application. In a further bid to stop the consummation of the contract between the second respondent and Inhemeter, the applicant also filed an urgent chamber application in case number HC 2937/23, which it subsequently withdrew.

[7] By letter dated 18 March 2022, the applicant, acting as an agent of EMS, invoked the provisions of s 54 (10) (c) as read with s 96 of the Act and requested the first respondent to investigate the conduct of the second respondent in initiating the tender in question. The first respondent commenced the investigation by writing to the second respondent. It, however, abandoned the investigation after receiving the second respondent's response. It concluded that going to tender was both a policy and technical decision best left to the procuring entity.

[8] Irked by the conduct of the first respondent, the applicant filed case number HC 8954/22, in the court *a quo*. It approached the court *a quo* ostensibly as a whistleblower for a *mandamus* to compel the first respondent to investigate the second respondent for what it purported to be a corrupt double procurement. It also sought for the stay of any resultant acts emanating from the tendering process, pending the investigation, and costs of suit. It was ostensibly motivated by a civic duty to prevent the second respondent from engaging

in "corruption". It alleged that the purported corruption arose from the floating of a costly new PMT tender in the face of the applicant's own extant and proficient system.

[9] At the hearing of the application *a quo*, the respondents raised, between them, four preliminary points. The first was that the applicant lacked the *locus standi* to institute the *mandamus* proceedings because, during the tender proceedings, it acted as an agent of EMS. In addition, that as the challenges to the tender proceedings by its principal were pending in case numbers HC 2389/22 and HC 2404/2, the *mandamus* application was either *lis pendens* or *sub judice*. The second was that it did not have a cause of action to seek a *mandamus*. The third was that it had not exhausted the domestic remedies prescribed in the Act before adverting to the Administrative Justice Act *[Chapter 10:28]* (AJA). The final one was that, as the tender had been concluded and implemented, the relief sought was incompetent and the matter was moot. The court *a quo* found the preliminary issue on *locus standi* dispositive of the matter. It held that as the applicant, by its own admission, was not a bidder, it lacked the legal standing to challenge the tender proceedings under the Act, the AJA and the 2013 Constitution. At p 9 of its judgment the court *a quo* reasoned that:

> "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. The 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 the applicant approaching the court under s 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."

It therefore held that, as the applicant was not a bidder but an agent of a bidder, none of its rights had been breached. Hence the finding that it did not have the *locus standi* to challenge the tender proceedings. The court *a quo* did not therefore determine the other preliminary points raised by the respondents.

[10] The judgment was issued on 28 July 2023. The applicant had until 22 August 2023 to note an appeal. It failed to do so. It, however, filed its first application for condonation and extension of time within which to note an appeal on 5 September 2023. As that application was fatally defective it was struck of the roll. The applicant proceeded to file the present application on 25 September 2023.

[11] In *casu*, Mr *Sithole* for the first respondent took the preliminary point that the application was moot. He submitted that as the contract with the applicant expired on 31 May 2023 and a new contract was concluded and implemented with the winner, the application to investigate and stay its effects was no longer tenable. He contended that the nation is now utilizing the new system. The applicant's projected appeal would constitute an exercise in futility. Staying the new system would leave the nation without a pre-paid vending system. This is because the second respondent had, as at the filing of the present application, migrated from the applicant's obsolete system to the new system on the expiration of its contract with the second respondent on 31 May 2023. He strongly argued that it was incompetent to seek to stay a contract that had been perfected with the winner. He prayed for the dismissal of the application with costs.

[12] Mr *Munyuru*, for the second respondent took two preliminary points. The first was that the sole ground of appeal in the proposed notice of appeal was incomplete, inexact and vague in breach of r 44, which decrees that the grounds of appeal should be "clearly set out and concise". He argued that the applicant did not indicate why the finding was wrong. The second was that the prospective relief sought on appeal would be incompetent and defective. This was because it sought the remittal of the matter *a quo* for a determination on the merits when it was apparent that the court *a quo* had disposed of the application on a single preliminary point without adverting to the other preliminary points. He submitted that the prospective relief sought on appeal would be inexact, in breach of r 37 (1) (e) of the Supreme Court Rules, 2018. He therefore prayed for the application to be struck off the roll with costs.

[13] Ms *Ndlovu* for the applicant contended that an investigation brought in terms of s 96 of the Act could be held even in the face of concluded and effected tender proceedings. This was on the basis that one of the remedies contemplated by s 98 of the Act would be the cancellation of any contract concluded from tainted tender proceedings. She therefore submitted that such a statutory investigation could not be afflicted by mootness. She also submitted that the proposed ground of appeal raised a clear and concise point of law, which did not require further elaboration. She further submitted that seeking a remittal on the merits would not preclude the court *a quo* from determining the other preliminary points that were left in abeyance. She therefore contended that the relief sought was in compliance with r 37 (1) (e) of the Supreme Court Rules, 2018.

[14] In reply Mr *Sithole* and Mr *Munyuru*, in turn, maintained their respective preliminary points.

[15] I rolled over argument to the merits on the understanding that I would not determine the merits if any one of the preliminary points was dispositive of the matter.

[16] On the merits, Ms *Ndlovu* contended that the delay of twenty-two days was not inordinate. The cause of the delay was due to the miscalculation of the *dies induciae* by the instructing legal practitioner, which resulted in the further delay in drawing up the notice of appeal by the applicant's advocate of choice. The delay was further compounded by the inability of the instructing attorney to obtain instructions to appeal from the applicant due to the unavailability of its directors when the judgment of the court *a quo* became available. She contended that the explanation for the delay was therefore reasonable. Lastly, she vehemently argued that there were strong prospects of success on appeal. Ms *Ndlovu* submitted that the applicant, contrary to the finding *a quo*, had the legal standing to seek a *mandamus* to compel the first respondent to carry out its statutory investigative function that it had inexplicably abandoned. She argued that the applicant had a civic duty to request the first respondent to exercise its investigative powers and prevent the second respondent from procuring a system that the applicant was already contractually supplying to it. She also argued that the new tender would financially prejudice the taxpayers, who ultimately funded the second respondent's activities.

[17] *Per contra*, Mr *Sithole* contended that the delay of twenty-two days was in the circumstances of the case inordinate. He also argued that the conceded sins of the applicant's legal practitioners were, in the light of the prevailing jurisprudence emanating from this Court in the cases such as *Lunat v Patel* SC 121/21 at pp 6-7, highly unreasonable. In regards to the prospects of success he strongly argued that, as the applicant had not motivated its prospects in the founding affidavit, it could not now do so in argument. He therefore submitted that the application ought to be dismissed with costs. Mr *Munyuru* associated himself with all the submissions made by Mr *Sithole.*

[18] It seems to me that the preliminary points raised by Mr *Munyuru* are dispositive of the matter. This is because *locus standi* is a question of fact. In *Madza & Others v The Reformed Church in Zimbabwe Daisyfield Trust & Others* SC 71/14 at p 9 this Court stated that:

> "The issue of *locus standi* raises a dispute of fact which is capable of resolution by the production of further evidence by the parties, if so minded. It falls to be resolved upon consideration of the merits after all the evidence which the appellant is entitled, and wishes, to produce has been placed on record. The insufficiency of evidence contained in the founding affidavit is not in itself fatal to the establishment of *locus standi* since that deficiency can, in given circumstances, be remedied by further evidence. Because of the confused manner in which this application was dealt with by the court *a quo*, the appellant was deprived of an opportunity to adduce, if it so wished, evidence which would establish its *locus standi* to bring the application."

The same position is confirmed in *Sibanda & Others v The Apostolic Mission of Port Oregon (Southern African Headquarters*) SC 49/18 at p 9 in the following manner.

> "In other words, the respondent as a legal person needs to have *locus standi* in order to be afforded audience in a court of law. It is trite that *locus standi* is the capacity of a party to bring a matter before a court of law. The law is clear on the point that to establish *locus standi*, a party must show a direct and substantial interest in the

matter. See *United Watch & Diamond Company (Pty) Ltd & Ors v Disa Hotels Ltd & Another* 1972 (4) SA 409 (C) at 415 A-C and *Matambanadzo v Goven* SC 23-04."

[19] The requirements for valid grounds of appeal were set out by GARWE JA, as he then was, in *Zimbabwe Open University v Ndekwere* SC 52/19 at para [38] thus:

> "A ground of appeal which attacks findings of fact must, therefore, not only allege that the lower court misdirected itself on the facts but must go further and show how that misdirection came about. Merely alleging a misdirection without further substantiation would not be enough as the attack would remain one against a factual finding. In other words, in alleging a misdirection on the facts, the ground of appeal must also show in what way those findings of fact are irrational."

Again, in the words of LEACH J in *Sonyongo v Minister of Law and Order* 1996 (4) SA 384 at 385F:

> "…it has been held that grounds of appeal are bad if they are so widely expressed that it leaves the appellant free to canvass every finding of fact and every ruling of the law made by the court *a quo*, or if they specify the findings of fact or rulings of law appealed against so vaguely as to be of no value either to the court or to the respondent, or if they, in general, fail to specify clearly and in unambiguous terms exactly what case the respondent must be prepared to meet."

[20] The impugned intended ground of appeal and relief sought are worded as follows:

> "The court *a quo* erred in finding that the applicant had *no locus standi* to apply for a *mandamus* against the first respondent.
>
> RELIEF SOUGHT
>
> TAKE FURTHER NOTICE THAT the appellant seeks the following relief:
>
> 1. That the appeal be and is hereby allowed with costs.
> 2. That the judgment of the court *a quo* is set aside and substituted with the following:
>
> "The point *in limine* is dismissed with costs"
>
> 3. That the matter is remitted to the court *a quo* for a hearing and determination on the merits."

[20] I agree with Mr *Munyuru* that the sole prospective ground of appeal is incomplete in that it will not inform the court and the respondents how the court *a quo* erred in arriving at that finding. The ground of appeal is therefore vague and embarrassing. I also agree with him that the third paragraph of the relief sought will be incompetent as, in the event that the prospective appeal succeeds, the court *a quo* would be obliged to determine the other preliminary points that were raised by the respondents before it can consider the merits.

[21] In view of the above findings, it is not necessary for me to determine whether the application is moot or to delve into the merits of the matter.

[22] There is no conceivable reason why costs on the ordinary scale should not follow the result.

[23] In the circumstances, it is ordered that:

1. The matter be and is hereby struck off the roll.
2. The applicant shall pay the respondents' costs on the ordinary scale.

Gill Godlonton & Gerrans, applicant's legal practitioners.

Kantor & Immerman, first respondent's legal practitioners.

Muvingi & Mugadza, second respondent's legal practitioners.