NHAKA TRANSPORT AND LOGISTICS (PRIVATE) LIMITED
versus
THE HEADMASTER OF NJUBE HIGH SCHOOL N.O (1)
and
THE MINISTER OF PRIMARY AND SECONDARY EDUCATION N.O (2)
and
PROCUREMENT AND REGULATORY AUTHORITY OF ZIMBABWE (3)
and
THE VICE PRESIDENT OF ZIMBABWE N.O (4)
and
THE MINISTER OF FINANCE, ECONOMIC DEVELOPMENT AND INVESTMENT PROMOTION N.O (5)
and
VORDIM TRADING (PRIVATE) LIMITED (6)

HIGH COURT OF ZIMBABWE
DEMBURE J
HARARE: 18 & 22 November 2024

Opposed Application

K. Hanyani-Mlambo, for the applicant
A. Magunde, for the 1st – 5th respondents

[1] DEMBURE J: This is an application for the confirmation of a provisional order issued by this court, *per* CHIVAYO J on 2 August 2024. The terms of the provisional order granted were as follows:

> "INTERIM RELIEF GRANTED
> Pending determination of this matter, the applicant is granted the following relief –
> 2.1 The tender proceedings under the reference no. MOPSE/NJUHS/01/2024 – SUPPLY OF A BRAND NEW 72-SEATER BUS be and [are] hereby stayed until a final determination concerning the validity of the 1st Respondent's decision to award the tender to the 6th Respondent as contained in this application is made on the return date.
> 2.2 Pending the full ventilation on the merits by this court on the return date, the 1st Respondent shall not conclude or execute any contract with the 6th Respondent or any other person in respect of the tender with reference no. MOPSE/NJUHS/0l/2024. Provided that if by the date of the granting of the provisional order, the contract under tender with reference no.

> MOPSE/NJUHS/0l/2024 has already been won and executed, the Applicant shall not persist with this application."

FACTUAL BACKGROUND

[2] The applicant is Nhaka Transport and Logistics (Private) Limited, a company registered in terms of the laws of Zimbabwe. It is in the business of transport logistics such as the supply of automobiles, inventory management, transportation and distribution.

[3] The first respondent is The Headmaster of Njube High School cited in his official capacity as the public official responsible for the overall management of the affairs of Njube High School, which is the procuring entity. The second to fifth respondents were also cited in their official capacities as the relevant parties to the public procurement dispute in question. However, the dispute is essentially centred on the conduct of the first respondent or his decision representing the procuring entity, the school. The sixth respondent is Vordim Trading (Private) Limited, a company registered in terms of the laws of Zimbabwe.

[4] It is common cause that on 10 May 2024, the first respondent invited bids through a bidding document with specifications and requirements set out therein, for the supply and delivery of a new 72-seater bus to the school. The applicant responded to the bid and submitted its bid of a total cost of US$164 700 on 7 June 2024, the closing date for the tender.

[5] On 27 June 2024, the first respondent notified the applicant that its bid had been unsuccessful and that the tender had been won by the sixth respondent at a cost of US$210 000. The applicant averred that it went on to advise the first respondent of its intention to challenge the award of the tender to the sixth respondent on 1 July 2024. It further alleged that it drafted its notice of objection in terms of s 73 of the Public Procurement and Disposal of Public Assets Act [*Chapter 22:23*] (*"the Act"*) and s 44 of the Public Procurement and Disposal of Public Assets (General) Regulations, 2018 (*"the Regulations*").

[6] On 10 July 2024, the first respondent supplied the reasons why the applicant's bid was unsuccessful. The applicant stated that it persisted with its challenge and on 16 July 2024 sent a representative to file an objection and pay the security for costs. It was also averred that the first respondent claimed he was unsure of the procedure for handling procurement challenges. The applicant also alleged that the first respondent advised of his intention to seek guidance from the district offices and that the applicant's representative should come back the next day, which was the last day of the fourteen days provided by the Act for the

applicant to lodge its objection. It was further alleged that the first respondent indicated that the school had no trust account to deposit the security for costs and that he was still waiting for guidance from his superiors and his day would only end at 16:45 hours.

[7] The applicant averred that the first respondent failed to accept the objection thereby breaching his duties imposed by s 73 of the Act and s 44 of the Regulations. The actions by the first respondent, it was averred, had disabled the applicant from exercising its rights in terms of the challenge procedure leaving the applicant with no option but to approach this court. It was further alleged that the first respondent failed to specify the methodology to be used for the evaluation of bids and the selection of the successful bidder in the bidding document; that it breached its duty to award the tender to the lowest bidder who met the price and non-price criteria specified in the bidding document and that it violated the bidding document specifications that the tender will be awarded to the most favourable evaluated bid. It was also averred that the decision to award the tender was in breach of the respondent's duties to ensure fairness, honesty, transparency, cost-effectiveness and competitiveness in the tender process and was motivated by fraud or corruption.

[8] The applicant filed an urgent chamber application on 22 July 2024 seeking a stay of the tender proceedings pending the determination of the dispute. The interim relief was granted on 2 August 2024 before CHIVAYO J. The terms of the said provisional order granted are as highlighted above. The applicant now seeks a final order in the following terms:

> "TERMS OF FINAL ORDER SOUGHT
> That you show cause to this Honourable Court why a final order should not be made in the following terms –
> 1. The Provisional Order is hereby confirmed.
> 2. The 1st Respondent's decision and consequently, the decision by Njube High School ("the procuring entity") to award a tender with reference no. MOPSE/NJUHS/01/2024 – SUPPLY OF A BRAND NEW 72-SEATER BUS to the 6th Respondent be and is hereby set aside. Consequently, the matter is hereby remitted back to the procuring entity to begin fresh proceedings which are to be commenced by a fresh invitation for bids for the supply of a brand new 72-seater bus.
> 3. The costs of this Application shall be costs in the cause."

[9] The first and second respondents opposed the confirmation of the provisional order. They raised a preliminary objection that the applicant had not exhausted its internal remedies set out in s 75 of the Act. This point in *limine* was, however, abandoned

at the hearing. On the merits, the respondents contended that the applicant's bid was not responsive to the tender mandatory requirements as the applicant failed to submit some of the mandatory documents which were listed in the bid document. The applicant's bid was disqualified and was not considered in subsequent stages of the evaluation of the bids.

[10] The first respondent contended that it acted lawfully and supplied reasons for its decision. It was further stated that the applicant's representative did not return on 17 July by 4:45 pm as advised to allow the school to consult on the matter. The respondent denied that there was any breach of his duties or non-compliance with the provisions of the Act and the Regulations. There were no opposing papers filed in respect of the second to fifth respondents but Ms *Magunde* submitted that she was appearing for these respondents as well. The sixth respondent did not also file any opposing papers.

PRELIMINARY

[11] At the hearing, I first directed the parties to address me on whether or not the first respondent was properly cited as a party to these proceedings. Following submissions from counsels for both the applicant and the respondents, I agreed that in terms of s 4 of the State Liabilities Act [*Chapter 8:14*] a public official may be cited in any action or other proceedings in his official capacity and that he shall be cited by his official title and not by name. This settled the issue I had raised without any further ado. The first respondent was, therefore, properly cited in these proceedings.

[12] Another issue that arose was whether the point in *limine* about the exhaustion of internal remedies was still being pursued given the submissions in the respondents' heads of argument which did not address the court on that point. Ms *Magunde*, counsel for the 1st and second respondents, confirmed that she was abandoning the said preliminary point. Accordingly, it was no longer part of the issues for determination.

[13] I further questioned the way the respondents' heads of argument pleaded a new issue that the final order being sought is a *brutum fulmen*. The respondents had argued in the heads of argument and the letters exchanged between the parties that given para 2.2 of the provisional order, this application cannot be sustained as the first and sixth respondents

signed the awarded contract on 18 July 2024. The said *proviso* to para 2.2 of the interim order states that: "Provided that if by the date of the granting of the provisional order, the contract under tender with reference no. MOPSE/NJUHS/0l/2024 has already been won and executed, the applicant shall not persist with this application." The argument from the respondents was that this application could not be pursued as the contract was signed on 18 July 2024 before the order was granted. This was contested by the applicant's letter dated 16 August 2024.

[14] I observed that it is trite law that litigants do not plead their cases through letters. In application proceedings, litigants plead their cases and lead their evidence through affidavits. There were no averments or evidence in the opposing affidavit to support the argument in the respondents' heads of argument that there was a contract that was signed or that the contract awarded in the tender was signed on 18 July 2024 to render the final order sought a *brutum fulmen* as alleged. Further, it is also a settled principle of the law that litigants cannot plead in the heads of argument. See *Van Brooker v Mudhanda and Pierce v Mudhanda & Anor* SC 5/18. Ms *Magunde* rightly conceded on this point and the impropriety of pleading a new case in the heads of argument. She then hinted at applying for condonation to file a supplementary affidavit. Counsel also indicated that the court can allow the leading of oral evidence on the issue of the execution of the contract.

[15] Ms *Hanyani-Mlambo* strenuously opposed this approach. She argued that the alleged contract was never placed before the court in any pleadings. There were simply bare allegations that there was such a contract. In any case, the raising of the issue in the letter was improper as it was tantamount to giving evidence from the bar. Counsel referred me to the case of *Home of Angels Housing Cooperative Society Ltd & Ors v City of Harare* HH 800/22. I noted that the parties exchanged letters on this issue in August 2024 and the respondents' legal practitioners even went on to file their heads of argument in September 2024 but no attempt was made to seek leave to file a supplementary affidavit to place such averments and the related evidence thereof before this court. In the circumstances, I found the request for the leading of oral evidence to be without any legal basis.

[16] Further, I also found the approach by the respondents' counsel to seek to apply for condonation to file any further affidavit to be greatly prejudicial to the applicant. The

respondents cannot seek to remodel their case as the case progresses simply because the court has made some observations on the impropriety of their argument on *brutum fulmen*. To permit such an approach would also go against the trite policy of the law that there should be finality in litigation. See *Ndebele v Ncube* 1992 (1) ZLR 288 (S) at 290 C-E. The respondents, if they ever, had such information, had ample time to place it before this court well before this hearing. They did not. The court only help the vigilant but not the sluggard. See *Ndebele supra*. I could not, therefore, allow the hearing to be delayed by the respondents' belated attempts to seek the chance to apply for any condonation or leave to file supplementary affidavits. I, therefore, decided that since the respondents have abandoned their point in *limine* the parties should proceed to address the court on the merits of the application for confirmation of the provisional order.

ISSUE FOR DETERMINATION ON THE MERITS

WHETHER OR NOT THE TENDER PROCEEDINGS WERE INFLICTED WITH IRREGULARITIES

APPLICANT'S SUBMISSIONS

[17] Ms *Hanyani-Mlambo,* counsel for the applicant, submitted that the applicant seeks a final order for the first respondent's decision to award the tender to the sixth respondent to be set aside and the matter remitted to the procuring entity for the tender proceedings to start afresh. The applicant seeks a review of the conduct of the first respondent. It was argued that the tender proceedings were irregular, unlawful and invalid at law. Counsel also submitted that the call for review is the desire by the applicant to be afforded the right to be heard and to be accorded its rights to constitutional administrative justice which were breached by the first respondent. She argued that the applicant was denied the opportunity to file an objection and pay for security for costs.

[18] Counsel further argued that for an application for review to succeed a litigant must show that the decision was so irrational in the sense of being outrageous in its defiance of logic that no sensible person who applied his mind to the question could have arrived at it. The applicant tended proof in the founding and answering affidavits that the first respondent had a series of bad decisions right to the period it awarded the tender. It was submitted that it was irrational for the first respondent to award the contract to the sixth respondent despite

that the applicant's bid was the lowest. That was in breach of s 55(1) of the Act. Counsel further referred me to the submissions in the applicant's heads of argument on the other grounds upon which the first respondent's decision must be set aside.

[19] On the point that the applicant's bid failed to comply with the bid documents required, counsel submitted that the indication that the cash inflow in the bank should show purchases for buses was not one of the requirements in the bid documents. The cumulative cash inflow required for the period in question was only up to US$100 000. I hasten to say, however, that Ms *Hunyani-Mlambo* conceded that there was no response given to dispute that the cash inflow did not amount to US$100 000. The issue of the dealership certificate from a bus manufacturer was also not covered in the applicant's affidavits and counsel conceded she could not lead evidence from the bar on that issue as well.

[20] Counsel further argued that the *proviso* to s 73(2) of the Act was not applicable as the impropriety of the bid document was not apparent when bids were opened and, therefore, it was proper to raise the issue at this stage. Counsel referred me to the cases of *Twenty Third Century (Pvt) Ltd v Minister of Higher and Tertiary Education, Innovation Science and Technology & Anor* HH 795/22 and *Twenty Third Century (Pvt) Ltd v Zimbabwe Manpower Development Fund & Ors* HH 506/22. It was submitted that in *Twenty Third Century (Pvt) Ltd v ZIMDEF* the applicant was challenging clause 10 of the bid document and the court heard the case despite that bids had been opened. The impropriety was not apparent before the opening of the bid documents. It was argued that it was competent for the court to entertain the complaint about the validity of the tender document.

[21] On references, counsel argued that the fact that certain reference details were similar is not a basis to disqualify the applicant as the bid document never expressly stated so. The first respondent cannot disqualify the applicant on an issue which it never expressly denounced in its bidding documents. Ms *Hanyani-Mlambo* also submitted that the important cause of action was that the applicant was not even allowed to submit its objection and pay the security for costs. Its right to be heard was breached. The right to conduct that is fair and lawful was breached. Due process was essential. It was also argued that because of the failure to allow the applicant the chance to file an objection, the proceedings were a nullity

and must be set aside. Counsel finally submitted that the applicant abides by the papers filed of record and prayed for an order in terms of the draft.

RESPONDENT'S SUBMISSIONS

[22] On the other hand, Ms *Magunde*, counsel for the respondents, submitted that the bidding process was done in terms of the law and the reasons why the applicant was unsuccessful were given. There is an allegation in para 9 of the applicant's answering affidavit at p. 155 of the record that the first respondent did not specify the documents which it was alleged the applicant did not file and the criteria for the evaluation of bids. Counsel, to answer this averment, referred this court to p.123 of the record and argued that the criteria for how the bidding would be evaluated were stated in the invitation for bids and that if one does not comply, he will be disqualified. The applicant did not meet the criteria on the bidding documents. It was argued that the tender process was lawful and the proceedings cannot be started afresh. The applicant was guided by the Circular from PRAZ on references (Circular 123). Counsel finally submitted that the opposing affidavit fully replied to the allegation that the applicant was denied the right to file an objection.

THE APPLICABLE LAW

[23] The law relating to reviews is settled. The relevant provisions of ss 26 and 27 of the High Court Act [*Chapter 7:06*] read as follows:

> "**26 Power to review proceedings and decisions**
> Subject to this Act and any other law, the High Court shall have power, jurisdiction and authority to review all proceedings and decisions of all inferior courts of justice, tribunals and administrative authorities within Zimbabwe.
> **27 Grounds for review**
> (1) Subject to this Act and any other law, the grounds on which any proceedings or decision may be brought on review before the High Court shall be—
> (a) absence of jurisdiction on the part of the court, tribunal or authority concerned;
> (b) interest in the cause, bias, malice or corruption on the part of the person presiding over the court or tribunal concerned or on the part of the authority concerned, as the case may be;
> (c) gross irregularity in the proceedings or the decision.
> (2) Nothing in subsection (1) shall affect any other law relating to the review of proceedings or decisions of inferior courts, tribunals or authorities." [My emphasis]

[24] The other law which provides the remedy of review of proceedings or decisions of administrative authorities is s 4 of the Administrative Justice Act [*Chapter 10:28*]. Thus,

in *Gwaradzimba N.O v Gurta* A.G. SC 10/15, the court held that reviews may be done in terms of another statute, for instance, the Administrative Justice Act and that is contemplated by the provisions of s 27(2) of the High Court Act.

APPLICATION OF THE LAW TO THE FACTS

[25] There is no dispute that the first respondent is an administrative authority whose decision on behalf of the procuring entity was being challenged. As stated above, in particular, the provisions of ss 27 and 28 of the High Court Act, it is trite that in an application for review the court "must confine itself to establishing whether or not the proceedings were afflicted with irregularities." See *Police Service Commission & Anor v Manyoni* SC 7/22.

[26] In *casu*, the applicant, in its argument advanced by Ms *Hanyani-Mlambo*, firstly raised a ground of review that the decision by the first respondent to award the tender to the sixth respondent was irrational. The law in relation to this ground of review was fully set out in *Telecel Zimbabwe (Pvt) Ltd v Attorney-General of Zimbabwe* SC1/14. At pp 20-21, PATEL JA (as he then was) stated as follows:

> "The *locus classicus* on judicial review in England is the decision of the House of Lords in *Council for Civil Service Unions* v *Minister for the Civil Service* [1984] 3 All ER 935 (HL). Lord Diplock, at 950-951, described the grounds of review as follows:
>
> > "The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'. That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of 'proportionality' which is recognised in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice.
> >
> > By 'illegality' as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.
> >
> > By 'irrationality' I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness' (see *Associated Provincial Picture Houses Ltd* v *Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in *Edwards (Inspector of Taxes)* v *Bairstow* [1955] 3 All ER 48, [1956] AC 14 of irrationality as a ground for a court's reversal of a decision by

> ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. 'Irrationality' by now can stand on its own feet as an accepted ground on which a decision may be attacked by judicial review.
> I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. But the instant case is not concerned with the proceedings of an administrative tribunal at all." [My emphasis]

[27] While the applicant's counsel correctly captured the law on irrationality as a ground of review, there was no evidence that established that the decision by the first respondent was irrational. The *onus* was on the applicant to establish the irrationality of the decision. It is a trite principle of the law that he who alleges must prove. See *Circle Tracking v Mahachi* SC 4/07. The applicant argued that the decision that the applicant's bid documents were not responsive to the mandatory documents listed in the bid documents was irrational. In its argument on the mandatory requirement in para 2(m) about the cumulative cash inflow in the bank of a minimum of US$100 000, the applicant simply ran with the fact that there was no reference to the transaction being for purchases of buses. It ignored an important requirement that the cumulative cash inflow from the bank statement for the relevant period it submitted did not amount to US$100 000. The mandatory requirements for the tender as shown from the invitation for bids at pp 25-26 of the record read:

> "2. Preparation of Bids (Mandatory Requirements).
> You are requested to bid for the supply of the goods specified in the Statement of Requirements below, by completing and returning the following documentation:
> a) The Bid Submission Sheet signed.
> b) The Statement of Requirements in Part 2;
> c) A copy of every document necessary to demonstrate eligibility in terms of section 28 (1) of the Regulations;
> d) Current proof of Registration with the Procurement Regulatory Authority of Zimbabwe (PRAZ) in the category of (GN002 New Heavy –duty vehicles and buses),
> e) A fully and accurately completed bid securing declaration in the format specified.
> f) A copy of current (2024) valid Tax Clearance certificate;
> g) Proof of paid up subscriptions with NSSA valid within the bidding period. FAILURE TO PROVIDE THIS WILL LEAD TO DISQUALIFICATION;
> h) Dealership Certificate Issued by the Manufacturer.

i) A company profile with a copy of certificate of Incorporation, CR14 or CR 6 forms showing Directors particulars copy of Certificate of Incorporation;
j) Government Vendor Number,
k) A brief Company Profile indicating line of Business.
l) A MINIMUM OF 6 TRACEABLE REFERENCES AS PER THE SCHOOL SPECIFICATIONS
m) 3 months' bank statements for the period beginning February 2024 to end of April 2024 with a minimum cumulative cash inflow of US$100 000.00 as proof of financial capacity. Any bank statement which does not meet the stated criteria will lead to disqualification." [My emphasis]

[28] The first respondent submitted that the applicant's bid documents did not comply with some of the above mandatory requirements, particularly the submission of a three-month bank statement with a cumulative cash inflow of a minimum of US$100 000, six traceable references as per the school specifications and the dealership certificate from a bus manufacturer. I agree with Ms *Hanyani-Mlambo* that the requirement for the cash inflow in the bid document did not mention that the bank statement to be attached for the period beginning February to the end of April 2024 should show transactions for the purchases of a bus. However, it explicitly stated that the cumulative amount must be a minimum of US$100 000 for the relevant period. The bank statement submitted by the applicant with its tender documents at pp 80-81 of the record showed that the cumulative amount of cash inflow in its account was only US$81 250. The applicant did not challenge that it failed to meet the minimum amount required to prove financial capacity in its papers. Counsel for the applicant conceded at the hearing that the applicant failed to comment on this non-compliance and that she could not lead evidence from the bar. Para 2(m) provided the consequence for the non-compliance as disqualification.

[29] In addition to the requirement for submission of a bank statement with a cumulative cash inflow of a minimum of US$100 000, the applicant also failed to submit a dealership certificate from a bus manufacturer. The first respondent in its letter dated 10 July 2024 containing the reasons at p 70 of the record stated that the dealership letter submitted was not from a bus manufacturer but from Transfarm Africa, a local company that does not manufacture buses. Again, the applicant did not deal with this in its answering or founding affidavit. This fact was, therefore, unchallenged. Counsel for the applicant conceded that there was no answer from the applicant to challenge the first respondent's statement. She also accepted that she could not lead evidence from the bar to respond to the said averment.

The failure by the applicant to comply with the mandatory bid requirements meant that the applicant's bid documents were not responsive to the bid requirements. Its bid was rightly disqualified. The first respondent's decision cannot, therefore, be faulted.

[30] The procedure for the evaluation of bids was also outlined in the invitation to bids. See p 29 of the record which stated as follows:

> "16. Evaluation of Bids
> Bids will be evaluated using the following methodology:
> 1. Preliminary examination to confirm that all documents required have been provided, to confirm the eligibility of Bidders in terms of section 28 (1) of the Regulations and to confirm that the Bid is administratively compliant in terms of section 28 (2) of the Regulations.
> 2. Technical evaluation to determine substantial responsiveness to the specifications in the Statement of Requirements;
> 3. Financial evaluation and comparison to determine the evaluated price of bids and to determine the most favorable evaluated bid.
> 4. Other support services will also be considered in the evaluation process."

From the above evaluation process, it is clear that the applicant's bid documents were disqualified upon technical evaluation for being unresponsive to the tender specifications. I do not, therefore, see any basis for the applicant to argue that the first respondent's decision to disqualify its bid documents was irrational. The applicant dismally failed to substantiate the allegation of irrationality in the circumstances. In my view, the decision of the first respondent was in accordance with the evidence placed before him.

[31] Once the applicant failed to pass the technical evaluation hurdle, the bid document itself in para 16 at p 29 of the record clearly stated the consequences in the following words: "Bids failing any stage will be eliminated and not considered in subsequent stages." This means that the applicant's bid could not participate in the next stage relating to the financial evaluation where comparison with the sixth respondent's bid would arise. The applicant's grounds of complaint that there was a failure to comply with s 55(1) of the Act and para 24 of the bidding document which relates to the consideration of the price of the tender or that its tender was the lowest and most economically favourable are not legally sustainable. These issues could not arise since its bid failed on the technical hurdle for being non-responsive to the tender or bid document.

[32] Although the applicant's bid was the lowest bid at US$164 700 it could not be evaluated at the appropriate stage comparable to the sixth respondent's US$210 000 after the

disqualification. The sixth respondent's bid remained the only one judged to have complied with the mandatory requirements of the tender. The award of the tender to the remaining bidder, the sixth respondent, in these circumstances, cannot be said to be unlawful, irrational or unfair either procedurally or substantively. The applicant's allegations are completely baseless and not backed by any iota of evidence.

[33] The applicant also attacked the bid document for what it alleged was its non-compliance with s 20(1)(h) of the Act for not stating the methodology which the first respondent intended to use to evaluate the submitted bid. The methodology or evaluation criteria were, however, set out clearly in the bid document. See para 18 of the tender document at pp 29 and 123 of the record. In any event, this challenge raised a ground of impropriety in the bid document. The relevant provisions of the Act state as follows:

> "**73 Challenge to procurement proceedings**
> (1) …
> (2) Where notice of the award of a contract has not yet been issued, a challenge may be lodged at any stage of the procurement proceedings up to the date on which such notice is issued:
> Provided that, where the grounds of a challenge concern alleged improprieties in the invitations to bid or to pre-qualify which have become apparent before bids were opened, the challenge shall be lodged prior to bid opening." [My emphasis]

[34] In terms of the *proviso* to s 73(2) of the Act, a challenge raising a ground attacking the impropriety in the bid document or invitation to bid must be lodged prior to bid opening if that becomes apparent before bids were opened. In *casu*, the alleged impropriety must have been apparent to the applicant. It should have challenged this impropriety at the appropriate time and not waited until it had lost the tender to start to impugn the validity of the bid document where the methodology to be used was clearly stated. I do not agree that this case is in any way similar to the cases of *Twenty Third Century supra* cited by the counsel for the applicant. Those cases did not establish any legal principle which supports the applicant's cause.

[35] Further, in the *Twenty Third Century v ZIMDEF* case *supra*, the court upheld a point in *limine* that the decision of the review panel was a nullity on the ground of lack of jurisdiction by reason of its improper constitution. In the other *Twenty Third Century v Minister of Higher & Tertiary Education* case *supra* the court found it incompetent and unlawful, for the first respondent in that case to start a new process which overrides a lawful

statutory process. The decisions do not create binding judicial precedents as those matters are clearly distinguishable from this matter. In my view, the applicant was seeking to desperately cling to something to justify this court action. Its efforts must be in vain since there is nothing to warrant the intervention of this court as called for.

[36] The applicant also argued that it was denied its right to file an objection in terms of s 73 of the Act. It was argued that this breach tainted the decision or made the decision a nullity or unlawful and, therefore, liable to be set aside. The applicant failed to prove these allegations. In its founding affidavit at para 20, the applicant accepted that from 10 July 2024, it only sent its representative to the school on 16 July 2024 knowing fully well that 17 July 2024 would be the last day. The first respondent as any right administrator would do sought guidance from his superiors. At para 20 of the founding affidavit, the applicant further said:

> "At any rate, the first respondent let slip that he was at large to take his time since his business day ended at 16:45 hours, hence he could give guidance on the matter even at 16:44 hours."

In response, the first respondent in para 6 of the opposing affidavit stated;

> "He was informed to allow the school to consult and come after the time agreed but before the end of the day at 16:45 hours. The legal practitioner agreed and the representative left the school promising to return after 09:00 hours. The representative did not return and did not inform the school of the reason. Therefore, the applicant neglected to fulfil the requirements on his own accord."

[37] Faced with the above two conflicting versions can it be said that the applicant established that it was denied the right to be heard or that the first respondent denied it the chance to file an objection? I do not think so. Even if I adopt a robust common-sense approach, I cannot safely say the applicant proved that it was denied its right to be heard or the right to object in terms of s 73 of the Act. I am also reminded of the principle stated by this court in *Jirira v ZIMCOR Trustees Ltd & Anor* 2010 (1) ZLR 375 (H) at 378 that:

> "There is no way of ranking affidavits in terms of veracity. One simply cannot find one affidavit more credible than the other."

[38] In my view, given the apparent dispute of fact on a material issue, it cannot be said that the applicant had proved its case. The allegations of procedural unfairness of the administrative decision or conduct of the first respondent were not established by the evidence placed

before me. I did not, therefore, find that the decision in *casu* was inflicted by irregularities as pleaded by the applicant warranting this court to interfere with the tender proceedings. Those tender proceedings are a matter under the purview of an administrative authority. It is a settled principle of the law that this court generally does not interfere with administrative decisions or actions except in exceptional circumstances. Thus, in *ZIMSEC v Makomeka & Anor* SC 10/20, the court said:

> "The general principle is that the courts will not interfere with the actions or decisions of an administrative authority unless they are shown to be unlawful, grossly unreasonable or procedurally irregular or unfair. This fundamental canon of the common law, as embodied in the so-called Wednesbury principle, is now codified in s 3 (1) of the Administrative Justice Act [Chapter 10:28]. The corollary to this principle is that the courts will generally not substitute their own decisions for those of the administrative authority. As was aptly recognised by MCNALLY JA in *Affretair (Pvt) Ltd & Anor v M.K. Airline (Pvt*) Ltd 1996 (2) ZLR 15 (S) at 21: "The duty of the courts is not to dismiss the authority and take over its functions, but to ensure, as far as humanly and legally possible, that it carries out its functions fairly and transparently. If we are satisfied that it has done that, we cannot interfere just because we do not approve of its conclusion." However, this latter principle is not immutable and may be departed from in exceptional circumstances. In particular, the court may substitute its own decision for that of the administrative functionary in the following instances:
>
> - where the end result is a foregone conclusion and it would be a waste of time to remit the matter;
> - where further delay would prejudice the applicant;
> - where the extent of bias or incompetence displayed is such that it would be unfair to force the applicant to submit to the same jurisdiction;
> - where the court is in as good a position as the administrative body or functionary to make the appropriate decision.
>
> See the *Affretair* case, *supra*, at 24–25: *Gurta AG v Gwaradzimba N.O*. HH 353-13, at pp. 9–10; C.J. *Petrow & Co (Pvt) Ltd v Gwaradzimba N.O*. HH 175–14, at pp. 8–9." [Emphasis added]

[39] The administrative authority, as correctly submitted by the applicant, has the obligation in terms of the Administrative Justice Act to act lawfully, reasonably and fairly. I did not agree, however, that the first respondent failed in any of its administrative duties in terms of the law either under the public procurement laws or administrative law. The applicant failed to establish any legal basis for the first respondent's decision to be set aside or for the tender proceedings to be invalidated.

DISPOSITION

[40] The first respondent's decision was in accordance with the law and cannot be impeached. There were no proven irregularities which afflicted the tender proceedings or the conduct

of the first respondent in the award of the tender to the sixth respondent. This application is devoid of any merit and ought to fail. Costs must follow the cause.

[41] In the result, it is ordered as follows:

The application be and is hereby dismissed with costs.

DEMBURE J: ……

Hogwe Nyengedza, applicant's legal practitioners
Civil Division of the Attorney-General's Office, 1st – 5th respondents' legal practitioners