TWENTY THIRD CENTURY (PRIVATE) LIMITED
versus
MINISTER OF HIGHER AND TERTIARY EDUCATION,
INNOVATION SCIENCE AND TECHNOLOGY DEVELOPMENT N.O.
and
PROCUREMENT REGULATORY AUTHORITY OF ZIMBABWE

HIGH COURT OF ZIMBABWE
CHINAMORA J
HARARE 30 September 2022, 12 October 2022 and 7 November 2022

**Urgent chamber application**

*Adv M Ndlovu* with *Ms P Matutu*, for the applicant
*Mr P Jaricha*, for the 1st respondent
*Mr I Chikaka*, for the 2nd respondent

**CHINAMORA J:**

**Introduction and background facts**

This is an urgent chamber application for an order suspending the procurement process instituted by the first respondent under reference number ZPCR33-2022. The tender was advertised by the Zimbabwe Manpower Development Fund (ZIMDEF), which falls under the first respondent on 9 September 2022. The relevant tender documents are marked Annexure "TC2", which appears on pages 16-36 of the record. On the return date, the applicant seeks nullification and cancellation of the tender process. This application comes soon after the determination of HC 1727/22, which was an application for review and setting aside of the decision of ZIMDEF awarding a tender to provide SAP software services to Tano Digital Solutions (Pvt) Ltd (the third respondent in that case) ("Tano Digital Solutions"). Unhappy with this award, the applicant sought a determination of the matter by a review panel in terms of s 74 of the Public Procurement and

Disposal of Public Assets Act [*Chapter 22:23*] ("the Public Procurement Act"). The said panel dismissed the challenge, a decision that prompted the applicant to file the application which I determined in HC 1737/22.

On 16 July 2022, I granted an order in the following terms:

> "1. The decision of the Review Panel of the second Respondent dated 22 February 2022 dismissing the application made by the applicant be and is hereby set aside.
> 2. The decision to award the third respondent a contract by tender for the provision of software services to the first respondent dated 9 December 2021 be and is hereby set aside.
> 3. The first and third respondents shall bear the costs of this application".

The respondent avers that around October 2021, the first respondent published a notice inviting bids for the provision of SAP software support services under tender number ZPCR29-2021. The tender document spelt out the bidding procedures and requirements, and the applicant submitted its bid in response to the aforesaid notice. The applicant also states that, on 9 November 2021 before the result of the bids was released, it gave a notice to the second respondent (in terms of s 73 (1) of the Public Procurement Act) challenging clause 10 of the tender on the basis that it was restrictive, unreasonable and anti-competition. The offending clause required bidders to hold an SAP licence. The applicant emphasized that at the time of this tender, the applicant was providing SAP application support services to the first respondent, and two tenders had been floated for the same services without the restrictive condition carried in clause 10.

On 2 February 2022, the first respondent gave a response to the challenge in accordance with the provisions of the Public Procurement Act. Then, on 24 January 2022, the second respondent wrote to the applicant advising that a review panel had been constituted to determine the tender dispute. Subsequent to that, on 22 February 2022, a decision was made by the review panel dismissing the applicant's challenge to the award of the tender to Tano Digital Solutions. (See Annexure "TC3" on pages 37-41 of the record, in particular at page 41). The applicant submitted that, while there was a pending challenge to the tender process, the first respondent awarded the tender to Tano Digital Solutions. It filed the application for review under HC 1737/22 seeking to set aside the aforesaid decision of the review panel. The entire application in that matter is marked "TC4" and appears on pages 42-275 of the record. *In casu*, the applicant asserted that, in HC 1737/22, it sought an order setting aside the decision to award the tender to Tano Digital

Systems while a challenge which was before the second respondent had not yet been determined. After hearing argument, I granted the relief sought on 26 July 2022 under judgment HH 506-22 and, in particular, set aside the decision of the review panel.

On 9 September 2022, ZIMDEF advertised a tender for the provision of SAP software application services, and bids would close on 22 September 2022. On 21 September 2022, the applicant's lawyers wrote to the second respondent the letter marked Annexure "TC9", which appears on pages 304-305 of the record. The said letter, *inter alia*, reads as follows:

> "21 September 2022
>
> Procurement Regulatory Authority of Zimbabwe
> 6th Floor Pearl House
> 61 Samora Machel Avenue
> HARARE
>
> Dear Sir/Madam
>
> **RE: DOMESTIC ZPCR 33-2022 TENDER FOR MAINTENANCE AND SUPPORT SERVICES FOR ZIMDEF**
>
> 1. …
> 2. …
> 3. You will recall that our client has been tangled in litigation with ZIMDEF and yourselves in the High Court and Supreme Court in respect of procurement Domestic ZPC 29-2021. The same procurement is the same with the one referred above. **[My own emphasis]**
> 4. ZIMDEF has sought to proceed in a manner that violates the law of this land. You will recall that the review panel appointed by you made findings dated 18 February 2022 dismissing the challenge made by our client. The decision of the review panel is attached hereto marked as Annexure TTS1.
> 5. Our client proceeded to institute proceedings against both the procuring entity and yourselves and this resulted in the decision of the review panel marked Annexure TTS1 being set aside by the High Court.
> 6. We refer to the judgment of the High Court per CHINAMORA J dated 26 July 2022 and attach the same as Annexure TTS2. The judgment is extant. ZIMDEF made an unsuccessful appeal to the Supreme Court under SC 153/22.
> 7. As it stands, the requirement of SAP partnership which the review panel found to be valid was set aside by the High Court in the above referred judgment. It is thus unlawful and contemptuous for ZIMDEF to seek to proceed with the procurement process afresh and maintaining the same requirement. **[My own emphasis]**
> 8. …
> 9. We thus call upon your office to immediately stop the procurement process at the instance of ZIMDEF as it is unlawful and meant to circumvent orders of court …
> 10. …
> 11. …

Yours faithfully,

**DUBE MANIKAI & HWACHA**

cc ZIMDEF

The second respondent replied on 22 September 2022 (by way of Annexure TC10 on page 306 of the record) stating the following:

"22 September 2022
Dube Manikai & Hwacha Commercial Law Chambers
4 Fleetwood Road
Alexandra Park
HARARE

**RE: DOMESTIC ZPCR33-2022 TENDER FOR MAINTENANCE AND SUPPORT SERVICES FOR ZIMDEF**

The above matter refers, particularly, your letter of 21 September 2022.

Please take note of the following:

1. The Authority notes your request to stop the procurement process in the above matter. Please be informed that the Authority further notes that your client TTCS has lodged a challenge to the ongoing proceedings. If your client is not satisfied with the response from the procuring entity, it can lodge an appeal with the Authority. By operation of law, procurement proceedings are then suspended from that point. **[My own emphasis]**
2. …
3. In this regard, the Authority is yet to receive such application which would result in a suspension of the process.

Please be guided accordingly

C Ruswa
Chief Executive Officer
**PROCUREMENT REGULATORY AUTHORITY OF ZIMBABWE**
cc Chief Executive Officer, ZIMDEF

When the parties appeared before me on 30 September 2022, they agreed to an order by consent in the following terms:

"**IT IS ORDERED BY CONSENT THAT**:

1. The interim relief sought in HC 6461/22 be and is hereby granted in terms sought in the draft order, namely:
   (a) The procurement process initiated by the first respondent who administers the Zimbabwe Manpower Development Fund under reference Domestic ZPCR 33-2022 be and is hereby suspended.
2. The hearing of the urgent chamber application on the final relief sought in HC 6461/22 be and is hereby postponed to 10 October 2022 at 10.00 am.

3. The first respondent shall file and serve its opposing affidavit no later than close of business on 4 October 2022.
4. The applicant shall file and serve its answering affidavit and heads of argument no later than close of business on 5 October 2022.
5. The first and second respondents shall each file and serve their respective heads of argument no later than close of business on 7 October 2022.
6. Each party shall bear its own costs".

**The submissions of the parties**

In the application before me, the applicant argued that the second respondent cannot conduct a tender process with the condition that a bidder must be a holder of a SAP license, as that would effectively undermine this court's judgment of 26 July 2022 (HH 506-22). In this connection, the applicant (in paragraphs 11-12 of its founding affidavit) averred that:

> "On 9 November 2021 and prior to the results of the tender bids, the applicant submitted a notice to the second respondent challenging as restrictive, unreasonable and anti-competitive, a condition inserted by the first respondent under tender number ZPCR29-2021. The challenge to the second respondent was made in accordance with s 73 (1) of the Public Procurement and Disposal of Public Assets Act [*Chapter 22:23*]"
> …
> The basis of the challenge emanated from clause 10 of the tender documents which required that bidders must be holders of a SAP licence. The applicant challenged this clause as taking away competition against the spirit of the competition law legislation in this country. Further, the applicant challenged this on the basis that the clause constituted a restrictive business practice which does not promote competition amongst bidders".

Additionally, in para 17 of its founding affidavit, the applicant submitted as follows:

> "Whilst a challenge was pending as against the tender process of the first respondent, the same proceeded to grant a tender to a company called Tano Digital Solutions (Private) Limited. The tender was made notwithstanding the pending process before the regulatory authority, the second respondent. This was unlawful and irregular".

I observe that the first respondent, (in para 9 of its opposing affidavit), in a blanket response to paragraphs 14-28 of the applicant's affidavit did not address the issues raised by the applicant above. The answer it gave is that *"the present tender has been done to correct the irregularities".* It has also not eluded my notice that the second respondent did not file any opposition to the application before me, which means that what the applicant said concerning the second respondent is taken as having been admitted. (See *Fawcett Security Operations* v *Director of Customs &*

*Excise* 1993 (2) ZLR 121 (SC). Thus, the inevitable conclusion I make is that the applicant's averments were not challenged by either the first or second respondent.

The applicant proceeded (in para 32 of its founding affidavit) to assert that, when the decision of the review panel was set aside in HC 1737/22, its expectation was that the procuring entity would continue with the old tender process and determine the successful bidder. In this respect, I am mindful that the pending appeal to the second respondent has not yet been determined, a fact not denied by the regulator. Instead of doing that, the applicant submitted that ZIMDEF flighted a new tender on 9 September 2022. Again, (in para 12 of its opposing affidavit) in a blanket answer to paragraphs 30-33 of the applicant's affidavit, the first respondent did not specifically deal with the applicant's averments. In a nutshell, its unequivocal intransigent response was that the decision *"to restart the tender process is the correct procedure at law".*

At the hearing of the matter on 12 October 2022, the applicant submitted that the interim protection order was issued with the consent of all parties, who agreed that they would argue for the final relief when they returned to court. It is common cause that the arguments now relate to the final relief which reads:

> "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 interim relief be and is hereby confirmed.
> 2. The procurement process initiated by the first respondent who administers the Zimbabwe Manpower Development Fund under reference Domestic ZPCR 33-2022 be and is hereby cancelled and nullified.
> 3. The first respondent shall pay costs of this application on a legal practitioner and client scale".

**The points *in limine***

Three preliminary points were raised by the first respondent, namely, (a) non-joinder of ZIMDEF; (b) that the application is improperly before the court; and (b) no cause of action had been pleaded *in casu*; The parties agreed to adopt a rolled-up approach where I would hear the points *in limine* and merits at the same time and give my judgment dealing with everything at the conclusion of all arguments. Let me first deal with the issue of non-joinder of ZIMDEF.

***The non-joinder of ZIMDEF***

The applicant submitted that this point was ill-taken because under HC 1737/22, it was argued that ZIMDEF was not a legal *persona* and could not be sued. Essentially, the first respondent's argument was that ZIMDEF did not exist as an entity with capacity to sue and be sued at law. It seems to me to be cheeky for the first respondent to now contend that ZIMDEF should be joined to these proceedings. At any rate, r 32 (11) of the High Court Rules, 2021 (r 87 of the High Court Rules, 1971), provides that a cause shall not be dismissed by reason of misjoinder or non-joinder of a party. (See *Sobuza Gula-Ndebele* v *Chinembiri Bhunu N.O*. SC 29-11). Therefore, if the first respondent felt that ZIMDEF should be joined to these proceedings, nothing precluded it from applying for ZIMDEF's joinder. In this regard, r 32 (11) permits any of the parties and the court to join any party who the court considers necessary to the disposition of the matter before it. Moreover, s47 of the Manpower Planning and Development Act [*Chapter 28:02*] provides that ZMDEF, which was established by s 23 of the Zimbabwe Manpower Development Act, 1984 (No 36 of 1984) [now repealed], shall continue in existence under the new Act [i.e *Chapter 28:02*]. *Adv Ndlovu* for the applicant, submitted that to the extent that the first respondent is a trustee of ZIMDEF in terms of s23 of the repealed statute, the first respondent was correctly cited, and I agree with him. Accordingly, I dismiss the point *in limine* for lack of merit.

***That the application is not properly before the court***

I now move on to consider the objection that this application is not properly before the court. The first respondent's argument was that the applicant was required to follow the procedure laid down in the Public Procurement Act. It was submitted by the applicant that it had complied with s73 and s74 of the Public Procurement Act and the first respondent had ignored the applicant's challenge. It is relevant to look at these provisions in order to have a proper perspective of the point *in limine* raised by the first respondent. In terms of section 73 (1) of the Public Procurement Act, what must be done is that:

> "A potential or actual bidder in procurement proceedings who claims to have suffered, or to be likely to suffer, loss or injury due to a breach of a duty imposed on a procuring entity by or under this Act, may challenge the procurement proceedings by lodging a written notice with the procuring entity in accordance with this section".

Let me start by repeating what I said earlier, that this application comes very soon after the one I determined in HC 1737/22. As such, I am aware that a challenge on the inclusion of the inclusion of the SAP licence condition was made and the appeal to the second respondent is awaiting determination. Counsel for the applicant contends that following the internal remedy provided by s73 is a mere academic exercise. Given that the appeal in respect of a challenge to tender number ZPCR29-2021 is still pending, it is easy to understand this argument. Obviously, the purpose of such a challenge is to ensure that the tender is not awarded to a competing bidder until it is decided, otherwise its objective is not achieved. The law in this country is that an alternative remedy must be reasonable, adequate and effective. (See *Tribac (Pvt) Ltd* v *Tobacco Marketing Board* 1996 (2) ZLR 56 (SC). In this context, I observe that the statutory regime created by s73 of the Public Procurement Act does not provide for suspension of the tender process pending a decision on the challenge. In my view, such a remedy can hardly be described as effective.

The first respondent also submitted that the applicant ought to have utilized s74 of the Public Procurement Act and filed an application for review before a review panel constituted in terms of s75 (4) of the Act. I am unable to consider the s73 separately from s74, because I am aware that whilst an appeal was pending consideration, the review panel in HC 1737/22 proceeded to review the applicant's challenge. It is my view that disregarding a statutorily sanctioned process and going ahead with the review while an appeal was awaiting decision is telling about the inadequacy of the remedy. In this respect, *Mhungu* v *Mtindi* 1986 (2) ZLR 171 (SC) at 173A-B, a court is allowed to refer to its own records and take note of their contents. At any rate, it is trite that the existence of a domestic or alternative remedy does not take away the right to approach this court seeking redress. For this proposition of law, *Gwaradzimba N O* v *Gurta* AG SC 10-15 is apposite. For these reasons, there is no merit in the point *in limine*, and I dismiss it. I will now examine the final preliminary objection that the application does not disclose a cause of action.

***That the application does not disclose a cause of action***

The first respondent argued that the applicant had not pleaded a cause of action for the relief that is sought. I need to briefly examine the law on what constitutes a "cause of action" to determine if there is merit in the preliminary point taken by the first respondent. Perhaps it is useful to start by stating what is elementary. The pleadings of a party must state in clear terms the applicant or, in the case of an action, the plaintiff's cause of action. In my view, the purpose of pleadings is to clarify the issues between the parties that require determination by a court of law. The courts have said this in a number of cases. For example, in *Durbach* v *Fairway Hotel Ltd* 1949 (3) SA 1081 (SR), the court made these self-explanatory remarks:

> "The whole purpose of pleadings is to bring clearly to the notice of the court and the parties to an action the issues upon which reliance is to be placed".

Let me point out that the law on what constitutes a cause of action is settled in this jurisdiction. In this respect, this court has stated time and again that a cause of action consists of all the facts that must be pleaded in order to establish the relief that is sought by that party. In *Patel* v *Controller of Customs and Excise* 1982 (2) ZLR (HC) 82 at 86C-E GUBBAY J (as he then was) stated that:

> "In Controller of *Customs* v *Guiffre* 1971 (2) SA 81 (R) at 84A, BECK J, in *Abrahamse & Sons* v *SA Railways and Harbours* 1933 CPD 626 at 637 WATERMEYER J stated:
>
> > "The proper legal meaning of the expression 'cause of action' is the entire set of facts which gives rise to an enforceable claim and includes every act which is material to be proved to entitle a plaintiff to succeed in his claim. It includes all that a plaintiff must set out in his declaration in order to disclose a cause of action. Such cause of action does not 'arise' or 'accrue' until the occurrence of the last of such facts and consequently the last of such facts is sometimes loosely spoken of as the cause of action. (See Halsbury, vol 1, sec 3, and the cases there cited.) **[My own emphasis].**

*The same point was reinstated in Peebles* v *Dairiboard Zimbabwe (Pvt) Ltd* 1999 (1) ZLR 41 (H) at 54E-F, when the concept *"cause of action"* was defined by MALABA J (as he then was) to mean:

> "… every fact which it would be necessary for the plaintiff to prove if traversed in order to support his right to the judgment of the court".

See also, *Abrahamse & Sons* v *SA Railways and Harbours* 1933 CPD 626 at 637.

Now I return to the basis of the first respondent's point *in limine*. Its submission was that, as the applicant had not participated in tender number ZPCR33/22, he cannot seek to interdict that process as it would not meet the requirements for an interdict. The applicant disagreed and maintained that it had set out the cause of action in its application. It contended that the parties cited *in casu* are those against whom the order in HC 1737/22 operate. The applicant submitted that a judicial finding was made by this court that the first and second respondents had conducted the tender process unlawfully by ignoring s73, s74 and s75 of the Public Procurement Act. It is common cause that the interim relief was granted by consent of the parties. The applicant seeks, as final relief, the cancellation and nullification of the procurement process initiated under tender reference Domestic ZPCR 33-2022. The basis for this is that the first respondent cannot be allowed to institute a new procurement process as it violates s 28 (2) and s 73 of the Public Procurement Act, and I have already summarized the applicant's pleadings in that respect. To me the pleadings are clear on the relief that the applicant seeks and its foundation. There is therefore no basis for the submission that no cause of action has been pleaded. I will also dismiss this point *in limine*.

**Merits of the case**

The applicant contended that by instituting a fresh tender process, the first respondent violated and ignored s73, s74 and s75 of the Public Procurement Act in a contemptuous manner. I have already observed in this judgment that the first respondent continued with the tender process despite an appeal which was lodged by the applicant and is still pending. The appeal required a decision on the propriety or otherwise of including a condition which required a bidder to hold a SAP license. Despite the pendency of an appeal on this issue, the review panel proceeded to hear and determine the review on the applicant's challenge to the tender process. In fact, as argued by Counsel for the applicant, the review panel went on to state as follows:

> "Ultimately, there was only one issue to decide the challenge: whether the inclusion of clause 10 of the bidding procedures was lawful. Clause 10 of the bidding procedures reads as follows:
>
> > '10. Bidding companies should provide proof of being a SAP certified partner to carry out the required services'.
>
> …
> The panel is unable to agree with the applicant that clause 10 is problematic. The requirement to be a SAP partner does not appear to be onerous".

The applicant argued that, in HC 1737/22, this court set aside the decision of the review panel including its finding above, which pronounce on the propriety of Clause 10 of the bidding documents. There can be no doubt that once set aside, the above conclusions on Clause 10 were also set aside, and for a good reason I must say. In the first tender process (under tender number ZPCR29-2021), the first respondent should have allowed the internal appeal to be concluded in order for a decisive position on Clause 10 to come out. The importance of doing so is underlined by s 28 (3) of the Public Procurement Act which provides:

> "Procuring entities shall not impose eligibility criteria that are unduly restrictive or designed to reduce competition and shall prepare them for each procurement requirement, taking into account the size, complexity and technical requirements of the proposed procurement contract".
> **[My own emphasis]**

Because of the above provision and the fact that no decision was made on the pending appeal in respect of tender number ZPCR29-202, the applicant contended that the first respondent could not institute a parallel tender process in the face of another unterminated process. It is significant that both the first respondent and its Counsel have not said or provided anything to show that the appeal was determined. I have already dealt with this. Of course, that process must be completed in order to bring tender number ZPCR29-2021 to a conclusion. In my view, the pendency of that appeal gives the applicant the right to make the application for an interdict which is before me. Additionally, the first respondent cannot sustain the argument that the tender which is subject of these proceedings was done in order to correct irregularities. If anything, this new tender compounds the irregularities since the tender under number ZPCR29-2021 remains uncompleted until a decision is made on the appeal. It is not enough for the first respondent to argue that the judgment in HC 1737/22 was set aside on the ground that the panel was not properly constituted, and the first respondent was at liberty to start the process anew. Rather, the correct position was to deal with the unfinished business of the appeal first. It is apparent that the first respondent is unaware of the relief that the applicant is seeking. Let me set out once again the terms, of the final order sought, which are as follows:

> "That you show cause to this honourable court why a final order should not be made in the following terms:
>
> 4. The interim relief be and is hereby confirmed.

5. The procurement process initiated by the first respondent who administers the Zimbabwe Manpower Development Fund under reference Domestic ZPCR 33-2022 be and is hereby cancelled and nullified.
6. The first respondent shall pay costs of this application on a legal practitioner and client scale".

For the avoidance of doubt, the interim relief to be confirmed, which was granted by consent, *inter alia*, reads as follows:

> "The interim relief sought in HC 6461/22 be and is hereby granted in terms sought in the draft order, namely:
>
> (b) The procurement process initiated by the first respondent who administers the Zimbabwe Manpower Development Fund under reference Domestic ZPCR 33-2022 be and is hereby suspended".

It is evident from the draft final order sought that the applicant desires the cancellation and nullification of the tender initiated under Domestic ZPCR 33-2022. The basis for this relief has been set out in the application. In fact, it is common cause that the appeal process under tender number ZPCR29-2021 has not been finalized. Thus, it is incompetent and unlawful, in my view, for the first respondent to start a new process which overrides a lawful statutory process. Consequently, I am satisfied that the applicant has established the basis for the order sought.

Let me look at the issue of costs. The starting point is that an award of costs is within the discretion of the court. The exercise of this discretion is guided by certain principles and guidelines. One of the general principles is that the successful party is entitled to costs. The applicant has asked for costs on the scale of attorney and client. It is trite that an award of costs at this higher scale is a drastic measure, and one which should not be lightly resorted to except where the court is satisfied that there has been an attempt to abuse the process of the court or for some other good reason. (See *Gwinyayi* v *Nyaguwa* 1982 (1) ZLR 136 at 138F). The first respondent has not claimed that the appeal that was lodged by the applicant under tender number ZPCR29-2021 was decided. That being the case, it was cynical (if not, foolhardy) of the first respondent to oppose the application and resist the relief being sought. I note that the second respondent did not oppose the application and rightly so, in my view. Clearly, there was no lawful basis for opposing the application and it smacks of abusing the court process.

The pending process is a lawful one done in terms of the Public Procurement Act, and the argument that the respondent was entitled to start a new tender process, which effectively overrides

the unresolved appeal, is most disingenuous. The apparent disregard of the law by the first respondent caused me concern. This is an appropriate case for this court to show its displeasure by awarding costs at the higher scale of attorney and client against the first respondent.

**Disposition**

Accordingly, I make the following order:

1. The points *in limine* raised under HC 6461/22 are hereby dismissed.
2. The interim relief granted on 12 October 2022 be and is hereby confirmed.
3. The procurement process initiated by the first respondent who administers the Zimbabwe Manpower Development Fund under reference Domestic ZPCR 33-2022 be and is hereby cancelled and nullified.
4. The first respondent shall pay costs of this application on a legal practitioner and client scale.

*Dube Manikai & Hwacha,* applicant's legal practitioners
*Civil Division of the Attorney General's Office,* 1st respondent's legal practitioners
*Zvimba Legal Practice,* 2nd respondent's legal practitioners