GLENIX ENTERPRISES (PVT) LIMITED
versus
ZIMBABWE NATIONAL ROADS ADMINISTRATION

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 7 November 2019, 8 November 2019 & 20 January 2020

Civil Trial

P Kufakwaro, for the plaintiff
L Makumbe, for the defendant

MUSITHU J:

BACKGROUND FACTS

On 20 August 2018 the defendant dispatched an email invitation through its Mr Nehumba to interested suppliers to attend a pre-bid meeting at its Harare Showgrounds office at 1400hours of the same day. The purpose of the meeting was for suppliers to assess the Defendant's site at the Showgrounds and provide quotations for concept and stand designing for the upcoming agricultural show. Participants were required to record their details in a register provided by the Defendant for that purpose. The prospective suppliers were also required to submit by end of day soft copies of their concepts through email, or hardcopies by delivery at the Defendant's Highlands offices. The Plaintiff responded to the invitation through its managing director, Ms Rebecca Charuka. She also attended the aforementioned meeting.

The email of 20 August 2018 set off a chain of events culminating in the institution of the current proceedings in which the plaintiff claims the following against the defendant:

a. Payment of the sum of sixteen thousand eight hundred and fourteen United States of America Dollars (US$16 814.00), being the amount due in respect of exhibition stand design and set up services rendered in August 2018 at Harare by Plaintiff to Defendant at Defendant's exhibition stand at the 2018 Zimbabwe Agricultural Show, which amount Defendant has not paid.
b. Costs of suit.

The defendant denied engaging the plaintiff to carry out any work at its stand as alleged. It averred that plaintiff's workmen had been stopped by its senior officials when they were found working on site. In any event, and assuming it was established that plaintiff was contractually engaged by defendant as alleged, such contract was null and void for want of compliance with procurement laws. The joint pre-trial conference minute signed by the parties set out the following as issues for determination:

a) Whether or not the parties entered into a contract for the design and set up of Defendant's exhibition stand at the 2018 Zimbabwe Agricultural Show (ZAS); and
b) Whether or not the defendant is indebted to the plaintiff in the sum claimed.

THE EVIDENCE

Ms Charuka gave evidence in support of the plaintiff's claim. Her evidence was as follows. The plaintiff submitted its concept and quotation in response to Mr Nehumba's communication through an email of 21 August 2018. The email from Ms Charuka to Mr Nehumba of the defendant was worded as follows:

> "Good day Mr Nehumba
>
> Please find attached our concept and quotation for the stand design and set up for the Zimbabwe Agricultural Show 2018 Exhibition.
>
> Please be advised, we stand guided by your budget and instructions, therefore we are available to explain, clarify and adjust the concept and quote according to your expectations
>
> Kind regards
> Rebecca Charuka"

The quotation for $US19 962.00, covered the concept and implementation of the design. On the same day, Ms Charuka wrote a follow up email which was phrased as follows:

> "Good day Mr Nehumba
> I would like to express our concern on the stringent timelines remaining to set up the ZAS exhibition stand. We would greatly appreciate an urgent response regarding awarding of the contract to the respective company. The execution lead time available to the start of the ZAS 2018, will impact on delivery of the concept submitted e.g the repainting of the stand, requires 3-4 days to allow for the paint to dry.
>
> Your urgent feedback will be appreciated.
>
> Kind regards
> Ms Charuka"

On 23 August 2018, Ms Charuka received a call from Mr Moyo, the defendant's Public Relations Manager, inviting her to the defendant's offices to receive a purchase order for the

work, sign a contract as well as discuss the work to be done. The meeting was initially scheduled for 1430 hours, but it was pushed to 1630 hours to allow the defendant to carry out relevant internal processes leading to the signing of the purchase order. At 1630 hours Ms Charuka proceeded to the defendant's offices in the company of the plaintiff's head of projects, Brian Munyoro. At the defendant's offices, they were made to wait in Mr Moyo's office while Mr Nehumba printed the concept visuals for discussion. They were joined in Mr Moyo's office by Mr Boterere, the defendant's administration manager. Delays in the processing and signing of the purchase order prompted Mr Moyo to give plaintiff permission to proceed with work on the stand, while the purchase order was being sorted out. This was done cognisant of the stringent timelines plaintiff had to contend with since it only had 24 August to procure the material required for the works. The witness told the court that Mr Moyo gave her the assurance and confidence to proceed with the work on the understanding that the contractual matters were receiving attention.

The parties agreed to meet again on 24 August 2018, at which meeting Mr Moyo undertook to bring the purchase order. They met at the stand on 24 August 2018. Mr Moyo told her that the purchase order was still to be prepared. Prior to this meeting, defendant had given instructions to its representative at the ZAS, a Mr Fero to allow the plaintiff's team access to the defendant's stand for the commencement of the works. On 24 August, the plaintiff's team was on site as early as 0800 hours to commence work on the stand designs. During the course of the day, Ms Charuka was in constant communication with Mr Moyo who was checking on progress. Mr Moyo informed her that the acting Chief Executive Officer (CEO) and some of the defendant's executives were coming to check on progress at 1600 hours. He requested her to be on site when the team arrived so she could provide any updates required. Mr Moyo came to the site earlier and told Ms Charuka that the defendant's acting CEO had directed that some of the graphic designs be prepared by defendant's internal graphic designer, one Tino in order to cut costs. Tino was present at this meeting, and was asked by the witness when he could deliver the designs which were critical to the delivery of the stands. He admitted to Ms Charuka and her team that the instruction from the acting CEO had put him in an invidious position, as the timelines were too restrictive. Regrettably, he could not decline the instruction. Ms Charuka told the court that plaintiff's original quotation included work that Tino was now required to perform internally. Plaintiff accordingly revised its quotation downwards to $16 814.00 on 28 August 2018.

After the preparation of the designs, plaintiff's team continued to work over the weekend in order to complete the work in time for the coming show. Part of the work was onsite, while the other part, such as preparation of customised countertops and fabricated signage was offsite. During this time, Ms Charuka was in constant communication with Mr Moyo who would occasionally visit the site or check on progress through calls or *watsapp.* He kept assuring her that the purchase order and the payment would be processed once all the paperwork had been regularised. Work on the stand was completed on 27 August 2018, although refurbishments had been carried out by 26 August 2018. The stand was officially handed over to the defendant on 27 August 2018. Mr Moyo requested Ms Charuka to assist with the setting up of the video screen during the handover process. The witness denied that plaintiff was instructed to stop work at any stage by anyone from the defendant. After the handover process, Ms Charuka submitted plaintiff's invoice for services rendered through an email to Mr Moyo on 28 August 2018. The email was as follows:

> "Good day
>
> Please find attached invoice for the work done at the ZAS 2018-ZINARA stand.
> The invoice has been revised downwards to $16 814.00 from the amount quoted as we did not do all the work as per concept submitted, as we were instructed some of the works will be done in-house by ZINARA personnel.
> We appreciated the stringent timelines, your process and urgency of the project, therefore we proceeded without a deposit or full payment, which is in accordance with our terms. we kindly request your cooperation in expediting payment to enable us to honour our obligations
>
> Kind Regards
> Rebecca Charuka"

The email was not responded to, prompting Ms Charuka to send another email on 4 October 2018. The email was addressed to Mr Moyo and copied to Mr Boterere. It was couched as follows:

> "Good day Mr Moyo
> We have been following up our payment for the work done at the ZINARA stand for the Harare Agricultural Show 2018.
> It has now been over a month and we still await our payment, efforts of follow-up have been fruitless as you are not available at your offices and on the phone as well. As a company we have been highly prejudiced financially, resulting in a loss making position on this project and relationships with our service providers compromised.
> To date we still have no indication or commitment when payment will be done, since both Mr Moyo and Mr Boterere have been unreachable and have not returned our calls or emails. I do appreciate the processes you may have as an organisation, but unfortunately it is at the expense of crippling our viability as a business.
> Please may you kindly respond to our payment follow-up, as we eagerly await payment of the services rendered to ZINARA.

Kind Regards
REBECCA CHARUKA"

The email was neither acknowledged nor responded to.

Under cross examination by *Miss Makumbe* for the defendant, Ms Charuka confirmed that plaintiff was registered as a supplier with both the defendant and the Procurement Regulatory Authority of Zimbabwe (PRAZ). The plaintiff had once submitted a quotation to supply branded cutlery to the defendant but the contract had not been consummated. The plaintiff had also performed work for the Zimbabwe Electricity Transmission and Distribution Company (ZETDC), which is a procuring entity like the defendant. Plaintiff was therefore familiar with procurement procedures. On being asked why plaintiff proceeded to carry out work before procurement procedures were fully complied with, Ms Charuka denied any wrongdoing and insisted that plaintiff was orally engaged by Mr Moyo whom she had confidence in as a senior manager of the defendant. Moyo and Boterere had given her the confidence to proceed with the work while contractual issues were being regularised. The two ought to have been aware of the procedures given their senior positions in the defendant. In any case, the engagement of the plaintiff was done at the defendant's offices. It was put to Ms Charuka that the defendant's then acting CEO had stopped plaintiff from carrying on with work at the site as no purchase order had been issued. The CEO had not been aware of the plaintiff's presence at the site and neither had she approved the engagement of the plaintiff. Ms Charuka denied that plaintiff was stopped from carrying on with work at the site by anyone from the defendant, and in any event, some of the visuals used by the plaintiff on the stand were supplied by the defendant's intern.

The defendant's first witness was Mr Boterere, the administration manager. He has been with the defendant for 9 years. He knew the plaintiff as a supplier of designs and an advertising agency for agricultural shows. He told the court that defendant used the request for quotation method of procurement in the present case. The method entails sending out a request for quotations to approved suppliers. The invitation can be sent through email or affixed to the defendant's notice board. If the works are of a technical nature, the suppliers are required to attend a pre-bid meeting so that parties can agree on the specifications of the work to be undertaken. After the meeting, the suppliers are expected to send their respective quotations, following which a cost comparative schedule is prepared and signed off by defendant's procurement officers and forwarded to this witness for verification and validation. The contract is awarded to the cheapest supplier based on the design concept and the actual price. If the

witness is satisfied with the schedule, he signs it off and sends it to his director for further validation. The director in turn escalates it to the CEO for approval. The director can also approve in the absence of the CEO. The approval of the cost comparative schedule by the director or the CEO leads to the preparation of a purchase order. In the present matter, the cost comparative schedule was indeed brought to the witness, but he did not recommend its approval because the prices were above the permissible threshold of $10 000.00 for goods and services. The authorised thresholds are $20 000 for construction works, and $10 000 for consultancy services respectively. The witness told the court that he declined to validate the comparative schedule since the work to be carried out was not construction in nature, and consequently the threshold of $20 000 that the procurement officers had considered was wrong.

The witness could not recall whether or not he attended the suppliers meetings at which this procurement was discussed. From his recollection, the tender for the design of the stand was not awarded to any supplier. The witness also told the court that the acting CEO, Mrs Mujokoro, and the then Director Administration and Human Resources Mr P Murove had visited the defendant's stand to assess defendant's level of preparedness for the upcoming show. On her return to the office the acting CEO told the witness that she had found a supplier working on the defendant's stand and asked if she had approved the supplier's engagement. She told him that she had instructed the supplier not to continue with the works. The witness told the court that plaintiff was not paid for the work done since it had not been awarded the tender and had been stopped from carrying on with work at the defendant's stand by the acting CEO. According to the witness, when a supplier is awarded a tender, a physical purchase order is generated by defendant and issued to that supplier. He told the court that Mr Moyo had no authority to award tenders, as he was merely a representative of a user department which required services to be procured on its behalf. The tendering for such services was the preserve of the administration division.

Under cross examination, the witness could neither confirm nor deny whether plaintiff indeed carried out work at the defendant's stand since he had not visited the site. He could neither confirm nor deny receiving any emails from Ms Charuka. When further prodded to clarify if the services for which suppliers had been requested to provide quotations were consultancy or construction in nature, the witness said they could have been both. On being asked how the thresholds were determined under those circumstances, his response was that the defendant would split the work to be done in order to come up with the limits.

The defendant's second witness was its public relations manager, Mr Augustine Moyo. He knew the plaintiff as one of the suppliers who submitted a bid for the provision of graphic designs in response to an invitation for quotations by the defendant. He explained his position in the procurement cycle as that of a user, in the sense that he was consulted when a procurement affecting his division was done. He denied giving Ms Charuka permission to carry out work on the defendant's stand, or making an undertaking that a purchase order would be issued to the plaintiff. He could not have made such commitments as it was not within his domain to negotiate contracts or issue purchase orders. The responsibility to release the purchase order lay with the director for administration. The plaintiff was stopped from carrying out further works on the defendant's stand by the acting CEO since the defendant had internal capacity to do the same work. The plaintiff's team was painting the tarmac within the stand premises and planting flowers when they were stopped. He denied visiting the stand three times after commencement of works as alleged by Ms Charuka. He also denied that on completion of the works the stand was handed over to him in the presence of Mr Fero. To his knowledge the tender for the design of the stand was not awarded to any supplier.

The witness described a stand as consisting of an existing office cum banking hall with four cubicles, reception area, a strong room for keeping cash and security documents, a kitchen and two bathrooms. Only the area outside of the office needed to be designed and refurbished. The plaintiff had carried out the following activities at the point that the defendant's acting CEO intervened: painting of the carpark, planting of flowers, mounting of an outdoor LED screen, and a couch and a table. The defendant had used the existing banking hall as its stand during the agricultural show. Asked to clarify what exactly was designed, the witness explained that it was just the graphic images and the theme of the show, which had nothing to do with the physical structure. Concerning his communication with Ms Charuka, the witness remembered one email in which she was making a follow up on the purchase order which ought to have been processed before the plaintiff commenced work. He did not recall whether he responded to any of the emails from Ms Charuka because of the lapse of time.

Under cross examination, the witness confirmed receiving an email of 25 August 2018 from Ms Charuka. The email which was copied to Boterere was phrased as follows:

> "Good day Mr Moyo
> We have been trying to get hold of your graphic designer to provide us with visuals as agreed on Thursday the 23rd of August to no avail.
> This has compromised out timelines to complete the stand for handover on Sunday the 26th of August. The other work is progressing well and will be completed as schedule with the only exception being the graphics.

> We had our graphics ready for print as committed when we submitted our concept, but we disregarded as per your instruction. However, if your in-house designs are not ready we are. Kindly advise how we should proceed, as the stand is 90% complete due to the outstanding visuals, which are key to the exhibition.
> Kind regards
> Rebecca Charuka"

The witness maintained that there was no agreement between plaintiff and defendant since no purchase order had been generated. He had not taken any measures to stop the plaintiff from carrying on with work at the defendant's stand, because plaintiff had already been instructed to stop by the time the email of 25 August 2018 was sent to him.

At the conclusion of the oral testimonies, the plaintiff and defendant filed closing submissions which I shall proceed to consider hereunder.

ANAYSIS OF THE EVIDENCE, ISSUES AND THE LAW

Whether or not a contract existed between the parties

For the plaintiff, it was submitted that the work carried out at the defendant's stand was based on an oral contract concluded on behalf of the parties by Ms Charuka and Mr Moyo. Mr Moyo had ostensible authority to bind the defendant to the contract through representations he made to Ms Charuka. The court was referred to the case of *Engen Petroleum Zimbabwe (Pvt) Ltd* v *Wedzera Petroleum (Pvt) Ltd & Another*[1]. *Mr Kufakwaro* submitted that there was a meeting of the minds of the parties as evinced by the defendant's decision to allow plaintiff to perform work at the defendant's stand, excluding other suppliers in the process. The defendant proceeded to use the plaintiff's concept designs, and did not deny that work was done at its stand. Mr *Kufakwaro* attacked the evidence of Boterere, especially his failure to stop plaintiff from carrying on with work at the stand at the outset, seeing as he was the person in charge of procurement. Instead, the witness only got to know of the decision to stop the plaintiff from the acting CEO. His failure to respond to Charuka's probing emails did not help matters. As the person responsible for administration and procurement he surely ought to have set the record straight when the earliest opportunity to do so arose.

For the defendant *Ms Makumbe* submitted that no contract existed between the parties as there was no meeting of the minds. The emails produced by the plaintiff in evidence were insignificant as they were not backed by any correspondence from the defendant. There were no minutes of the meeting of 23 August 2018 at which meeting Moyo is alleged to have made representations that resulted in plaintiff proceeding with work at the stand pending the

[1] HH 253/16

processing of the purchase order. Even assuming Moyo indeed made those representations, he did not have express or ostensible authority to bind the defendant to a contract with the plaintiff. He would have acted on a frolic of his own. Reference was made to the cases of *Reed No* v *Sager's Motors*[2] *and Seniors Service* v *Nyoni*[3], as authorities for the proposition that a claimant pleading ostensible authority must show a representation by words or conduct by a principal and not just the agent. In the instant case, there was no representation by defendant, either by words or conduct such as would have convinced the plaintiff to believe that Moyo was authorised to negotiate a contract on behalf of the defendant. As the defendant's Public Relations Manager, Moyo had no business dabbling in procurement matters. His mandate did not extend to procurement.

The onus reposed in a party seeking to found a contract on ostensible authority is an onerous one, especially where it involves an employer and an employee. It goes beyond the making of mere representations by the employee. In the *Engen Petroleum Zimbabwe*[4] (supra) matter, MAFUSIRE J set out the principle as follows:

> "The principles that emerge from case authority in relation to the ostensible authority of employees in general, and bank managers in particular, are that the principal [the employer] must have created an impression in the mind of the third party, even though that impression might be wrong, that his agent [the employee] had the requisite authority to transact on behalf of the principal. The third party must show a representation by words or conduct by the principal, not merely by the agent. The representation must have been in such form as would reasonably lead outsiders to act on the strength of it to their prejudice.
> The court considers the *façade of regularity* of the employee's actions purporting to act on behalf of the employer, given *all the trappings* of his appointment as set in a context."(Underlining for emphasis)

Earlier in the same judgment the learned Judge had referred to the case of *Reed No* v *Sager's Motors*[5], [quoted with approval in *Seniors Service [Pvt]* v *Nyoni*[6]] where BEADLE CJ explained ***apparent*** or ***ostensible*** authority as follows:

> "The word 'ostensible' in the *Rhodes Motor Company* case (1965 (4) SA 40) is used in the sense of 'apparent' and in the language of the law of agency these two terms are synonymous. If a principal employs a servant or agent in a certain capacity, and it is generally recognised that servants or agents employed in this capacity have authority to do certain acts, then any of those acts performed by such servant or agent will bind the principal because they are within the scope of his 'apparent' authority. The principal is bound even though he never expressly or impliedly authorised the servant or agent to do these acts, nor had he by any special act [other than the act of

[2] [1969](2) RLR 519 at 523
[3] 1986 (2) ZLR 293 SC
[4] Page 8 of the judgment
[5] 1969 [2] RLR 519 [AD], at p 523; 1970 [1] SA 521 [RAD]
[6] 1986 [2] ZLR 293 [SC]

> appointing him in this capacity] held the servant or agent out as having this authority. The agent's authority flows from the fact that persons employed in the particular capacity in which he is employed, normally have authority to do what he did."

Author R H Christie in *Business Law in Zimbabwe* weighs in as follows:

> "In the language of the law of agency ostensible and apparent authority are synonymous (Reed loc cit), and ostensible authority is sometimes said to be created by the principal holding out the agent as having authority (*Henney v Annesley* 1960 R&N 691 697, 1960 (4) SA 462 at 466), although sometimes a distinction seems to be drawn between apparent authority (flowing from the capacity in which the agent is employed) and holding out (by particular words or actions): *Bristow v Lycett* 1971 (2) RLR 206 (A)222-3, 1971 (4) SA 223 237-8. This distinction, when it is drawn, refers only to the nature of the principal's representation, it being necessary in either case that the representation should have come to the attention of the of the third party and acted upon by him, and the third party must be unaware of the agent's lack of actual authority: *Baldachin's Trustees* v *Sloman & Sloman* 1944 SR 55"[7]

In the Engen Petroleum Zimbabwe matter MAFUSIRE J made the following finding in the dispute before him:

> "However, in spite of the ousting by s 30 of the IDBZ Act of the provisions of the Companies Act, and any other law relating to companies; in spite of such further provisions of the IDBZ Act as may repose in the Bank's Board the sole power to represent it and to consider all funding proposals, and furthermore, notwithstanding the Bank's argument that Mugwara's powers might have been limited, I find that as between himself and the Bank Mugwara had *actual* or *implied* authority to issue those guarantees. I find that as between Engen and the Bank, Mugwara had *ostensible* authority to issue the guarantees and to bind the Bank to third party recipients"[8]

The learned judge made the following observation to support his finding:

> *"……. In casu*, Munengwa and Mugwara were respectively no 1 and no 2 from the top in the Corporate Banking Unit. The Unit, among other things, had the requisite mandate to issue guarantees. Mugwara was the Head. He had layers of staff below him. He managed other regions, not just Harare. He had the authority to use the Bank's stationery. He was expressly entitled and empowered to market the Bank's new innovative trade in non-traditional products in the new multi-currency dispensation. In the overall administrative structure of the Bank, he was no 4 from the Chief Executive Officer, the topmost officer. Mugwara's job description empowered him "*to generate, manage and control the bank's short term lending portfolio as well as* [to] *supervise … Regional Offices*." Expressly, he was tasked with ensuring that his unit achieved its set business volumes and, significantly, he was also tasked with the "*disbursements of funds on approved facilities*."[9]

In the *Engen Petroleum Zimbabwe* matter the court concluded that the Head of Corporate Banking in the Infrastructure Development Bank of Zimbabwe, the second defendant therein,

[7] 1998 Edition at pages 338-339
[8] At pages 7-8 of the judgment.
[9] At pages 10-11 of the judgment.

had ***ostensible*** authority to issue guarantees and to bind the Bank to third party recipients. The court went through a painstaking process of studying the employee's job description amongst other key documents to establish his span of control. It found, on the evidence placed before it, that the employee concerned had the requisite authority intrinsic in his job description, notwithstanding protestations to the contrary by the employer. Put differently, even in cases where the employer denies the extent of an employee's authority to engage in contractual matters with third parties, evidence in the form of a contract of employment or the employ's job description can come in handy in establishing whether or not the employee concerned had the requisite authority. That is what distinguishes the *Engen Zimbabwe Petroleum* case from the present matter. The plaintiff did not go beyond stating the capacity in which Moyo was employed by the defendant; his failure to respond to Charuka's emails and calls; and the fact that he called for a meeting on 23 August 2019. Beyond that nothing was placed before the court suggesting that the defendant made any representations which the plaintiff acted upon.

Mr *Kufakwaro* submitted that the law of contract does not accord entities like the defendant a uniqueness that make them immune to the application of generally acceptable principles of law governing the validity of contracts. He further submitted that even company directors have ostensible authority to represent their companies by virtue of office. He referred to the rule in the case of *Royal British Bank* v *Turquand,*[10] in which the common law rule of company law, known as the *Turquand* rule was first crisply spelt out. This rule says that any person dealing with a company is entitled to make certain assumptions, such as that the company's internal regulations have been duly complied with. The company is estopped from denying the truth of such assumptions. Anyone is entitled to assume that every person whom the company represents to be its officer or agent has been duly appointed and has authority to exercise the functions customarily exercised by him. This position of the common law was codified through Section 12 of the Companies Act[11] which imputes a presumption of regularity. It states that:

> "Any person having dealings with a company or with someone deriving title from a company shall be entitled to make the following assumptions, and the company and anyone deriving title from it shall be estopped from denying their truth—
> (*a*) that the company's internal regulations have been duly complied with;
> (*b*) …….

[10] (1856) 6 E & B 327; (1843-60) 119 ER 886
[11] [*Chapter 24:03*]

I do not agree with *Mr Kufakwaro's* submission that section 12 of the Companies Act or the *Turquand* rule is applicable to the present matter. The procurement process *in casu* was done in terms of the procurement regulations as read together with the parent Act, since the defendant is a procuring entity for purposes of the *Public Procurement and Disposal of Public Assets Act*. It is not governed by the provisions of the Companies Act. I am persuaded by defendant's argument that Moyo had no ostensible authority to bind the defendant under the circumstances. Nothing was placed before the court to suggest otherwise.

Legality

Even assuming plaintiff had managed to establish ostensible authority on the part of Moyo, it still had another legal hurdle to overcome. Ms *Makumbe* submitted that the method of procurement used in *casu* was the request for quotations as set out in section 17 of the *Public Procurement and Disposal of Public Assets (General) Regulations* [12](the Regulations). Section 17 states as follows:

> ***"17. Use of request for quotations method***
> (1) When engaging in procurement by the request for quotations method, a procuring entity shall solicit, by way of a notice board advertisement, e-mail and the procuring entity's website, quotations from as many bidders as practicable but from at least three competitive bidders, using standard documents produced by the Authority.
> (2) In procurement proceedings using the request for quotations method—
> (*a*) the written request for quotations shall—
> (i) contain a clear statement of the procurement requirement, with particulars as to quality, quantity, terms and time to delivery, as well as any other special requirements; and
> (ii) specify the period for which bids are required to remain valid, which period shall be at least thirty days;
> (*b*) bidders shall be given adequate time, and in any event not less than three days, to prepare and submit their quotations;
> (*c*) each bidder shall be permitted to submit only one quotation, which may not be altered or negotiated;
> (*d*) sealed quotations shall be deposited unopened in a tender box which shall be opened at the end of the bidding period by a member of the procuring entity's procurement management unit and internal audit section or by any senior officer appointed by the entity's accounting officer:
> Provided that, where quotations made by e-mail or in some other electronic form are received before the end of the bidding period, they shall be printed out, marked appropriately and deposited in the tender box without delay;
> (*e*) the quotations taken from the tender box shall be opened, stamped and signed by the officers appointed to preside over the opening;

[12] Statutory Instrument 5 of 2018

> (*f*) the procuring entity shall place a purchase order, prepared in accordance with a template issued by the Authority, with the bidder whose quotation provides the-lowest price and meets the delivery and other requirement of the procuring entity.(underlining for emphasise)

Crucially, the defendant pointed to the absence of a purchase order which would have served as a contract once a supplier's quotation had been accepted by the procuring entity. Mr *Kufakwaro* on the other hand submitted that the *Procurement and Disposal of Public Assets Act* [13](the Act), was not applicable to the present case as the contract between the parties was based on Mr Nehumba's email of 20 August 2018 inviting suppliers to attend a pre-bid meeting at the defendant's ZAS stand. Of the purchase order, he had this to say in his closing submissions:

> "The purchase order was not a condition precedent in the validation of the contract. The contract was already in place and any paperwork either in the form of a purchase order would simply have been just capturing the terms which were already agreed on"[14]

Counsel's slipshod approach to the essence of the defendant's submission is perplexing if not bizarre. The substance of the defendant's argument was that the alleged contract was tainted with illegality for want of compliance with section 17 of the Regulations. Ms Charuka confirmed under cross examination that the plaintiff is registered as a supplier with PRAZ. The email of 20 August 2018 from Mr Nehumba was addressed to suppliers on the PRAZ list. It is common cause that the defendant is a procuring entity as defined under section 2 of the Act. The preamble to the Act is worded in part as follows:

> "To provide for the control and regulation of public procurement and the disposal of public assets so as to ensure that such procurement and disposal is effected in a manner that is transparent, fair, honest, cost-effective and competitive;……"

Section 3 outlines the scope of application of the Act. It provides as follows:

> "3 Application of Act
> (1) Subject to this section, this Act shall apply to all stages of the process of—
> (*a*) the procurement of goods, construction works and services by procuring entities; and
> (*b*) the disposal of public assets by procuring entities"

Part VI of the Act delineates the different procurement methods, with the request for quotations specifically provided for in section 34. That section provides as follows:

> "34 Request for quotations method

[13] [*Chapter 22:23*]
[14] Paragraph 24 of the plaintiff's closing submissions.

> (1) The request for quotations method of procurement entails a process in which the procuring entity solicits at least three competitive quotations for its procurement requirement from reputable suppliers, and the procurement requirement is below the prescribed threshold.
> (2) The request for quotations method of procurement shall be effected in accordance with such procedures as may be prescribed." (Underlining for emphasise).

The prescribed procedure is that which is set out under section 17 of the Regulations.

It is common cause that a purchase order was not issued. It is also common cause that a cost comparative schedule which would have shown the successful bidder was not approved. It was not denied by Ms Charuka that a purchase order was required. The plaintiff proceeded with work on the stand on the understanding that a purchase order would be issued. The exigencies of the situation required that work be commenced without delay while the other processes to regularise the engagement of the plaintiff were under way. The plaintiff swallowed the bait and forgot the law. The wording of section 17(2)(f) is in my view peremptory. It requires that the defendant places a purchase order with the bidder whose quotation provides the lowest price. This process follows the approval of the cost comparative schedule by the defendant's CEO or director responsible for administration. A supplier is considered to be lawfully engaged after the issuance of purchase order by the procuring entity. The identity of the supplier is only known after the approval of the cost comparative schedule and the issuing of the purchase order.

The engagement of a supplier outside the procedure set out in section 17 of the Regulations as read together with section 34 of the Act is clearly a violation of the law. It offends the letter and spirit of the procurement process as set out in the preamble to the Act, as read with sections 34 and 17 of the Act and the Regulations respectively. In her closing submissions, Ms *Makumbe* referred to the case of *Hativagone & Another v CAG Farms (Pvt) Ltd*[15], where GOWORA JA elucidated the legal position as follows:

> "It is my view that the issue concerning the right of first refusal vested in the Minister in relation to the sale of rural land was critical in resolving the question that was before the court *a quo* as to whether the parties had entered into a valid agreement of sale.
>
> Where such contract is proscribed by statute, it is invalid and non-compliance with the condition invalidates the whole contract. This principle is well enunciated in *X-Trend-A-Home (Pvt) Ltd v Hoselaw Investments (Pvt) Ltd[7]*wherein MCNALLY JA (as he then **was) quoted** with approval the words of LEWIS ACJ in *York Estates Ltd v Wareham* 1949 SR 197 who remarked as follows:
>
> *"*As a general rule a contract or agreement which is expressly prohibited by statute is illegal and null and void even when, as here, no declaration of nullity has been added by the statute."

[15] SC 42/15 at pages 11 and 12 of the judgment.

> Had the court *a quo* considered the provisions of s 3 of the Regulations, it would have resolved that the "agreement" it was being enjoined to endorse as valid was an agreement that was proscribed by law. Such a finding would have disposed of the matter"

See also LORD DENNING'S animating pronouncement in the celebrated case of *McFoy* v *United Africa Co. Ltd*[16] .

In the final analysis, I find that the failure by the parties to comply with the provisions of the Act and the regulations undermined the entire process which culminated in the rendering of services by the plaintiff to the defendant. It does not matter that section 17 of the Regulations and section 34 of the Act do not expressly proscribe a contract that does not conform to the requirements of these provisions. A purchase order is a prerequisite to the engagement of a supplier.

My finding on the first issue for determination is dispositive of this matter. Consequently, it is unnecessary for me to deal with the remaining issue.

COSTS

The defendant sought the dismissal of the plaintiff's claim with costs on an attorney and client scale. As a general rule, the question of costs is a matter for the exercise of the trial court's discretion. Authors *Hebstein and Van Winsen* in their book *The Civil Practice of the High Court and the Supreme Court of Appeal of South Africa*[17], make the following apposite point:

> "The award of costs in a matter wholly within the discretion of the court, but this is a judicial discretion and must be exercised on grounds upon which a reasonable person could have come to the conclusion arrived at. In leaving the magistrate (or judge) a discretion,
>
> > …….the law contemplates that he should take into consideration the circumstances of each case, carefully weighing the various issues in the case, the conduct of the parties and any other circumstance which may have a bearing upon the question of costs and then make such order as to costs as would be fair and just between the parties…….[18]
>
> Even the general rule, *viz* that costs follow the event, is subject to the overriding principle that the court has a judicial discretion in awarding costs."

It was not disputed by the defendant's witnesses that the plaintiff rendered services to the defendant. Had it not been for the legal impediments that beset the plaintiff's claim, the court would only have been called upon to determine the actual services rendered and the amount due to the plaintiff. The legal obstructions aside, I am convinced the plaintiff must have

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[16] [1961] 3 All ER 1169 [PC] at 1172
[17] 5th Edition: Volume 2 at page 954
[18] See also Cronje v Pelser 1967 (2) SA 589 at 593; Erasmus v Grunow 1980 (2) SA 793 (O) at 797B-D

rendered services with the blessings of someone within the structures of the defendant. I would be gobsmacked to believe that the plaintiff commenced work on the defendant's stand even to the extent described by Moyo without anyone in the defendant's structures taking notice and raising alarm. Moyo and Boterere did not deny receiving emails sent to them by Charuka following up on visuals which were to be prepared by defendant's internal graphic designer. Further emails were dispatched following up on payment after the work had been completed.

Reference was also made in the emails to calls that went unreturned. Ms Charuka's frustration at the duo's unresponsiveness is quite evident in her emails. It can safely be concluded that these two senior officials ignored the emails and the calls prompting the institution of these proceedings. The two did not strike me as dependable witnesses. They prevaricated in their testimonies, as if to hide something they knew. These proceedings could have been averted had the defendant taken decisive action at an early stage. The conduct of the defendant's officials is highly reprehensible and deserving of censure. The only way that this court can express its profound displeasure with such conduct is to deny the defendant costs.

DISPOSITION

Accordingly, it is ordered that:

1. The plaintiff's claim be and it is hereby dismissed.
2. Each party shall bear its own costs.

Mugomeza & Mazhindu, plaintiff's legal practitioners
Kadzere, Hungwe & Mandevere, defendant's legal practitioners