ELECTRICITY MANAGEMENT SERVICE LIMITED
versus
PROCUREMENT REGULATORY AUTHORITY OF ZIMBABWE
and
VICE PRESIDENT OF ZIMBABWE N.O
and
MINISTER OF FINANCE AND ECONOMIC DEVELOPMENT N.O
and
ZIMBABWE ELECTRICITY TRANSMISSION & DISTRIBUTION COMPANY
and
INHEMETER CO. LTD

HIGH COURT OF ZIMBABWE
BACHI-MZAWAZI J
HARARE, 20 April and 11 May 2022

Urgent Chamber Application

T Mpofu, SM Hashiti & A S Ndlovu, for the applicants
A Moyo & G Sithole, for the 1st respondent
I Salanje, for the 2nd & 3rd respondents
N M Phiri & N Munyurwi, for the 4th respondent
M Hogwe, for the 5th respondent

BACHI-MZAWAZI J: The doctrine of Constitutional Supremacy, entails that in a democratic society, the Constitution is the supreme law of the land. Any law, practice, custom or conduct inconsistent with the Constitution is in valid to the extent of the inconsistency.

[1] Through the exercise of the power of judiciary review courts are empowered to interpret laws and conduct that infringe the provisions of the Constitution and declare them Constitutionally invalid. [2] However, this varies with the circumstances of each case and the qualifications provided for in the Constitution. [3]. In this case applicants have exercised their democratic right to challenge certain Statutory provisions, that in their view deny them access to justice and encroach their specified constitutional rights. They want to exploit the domestic remedies by unlocking the Review proceedings provided for by the governing Act but the impugned section prohibits them to automatically do so until the fulfillment of conditions stipulated therein. As a result they have approached this court on two separate applications simultaneously. One challenging the constitutionality of the impeding section and the current one for an interim relief suspending that which they intended to take up for review within the context of the Act in question.

The summarized common facts are that, the applicant a foreign registered Company who has a history of several successful contracts with the fourth respondents, Zimbabwe Electricity Transmission & Distribution Company (Private) Limited, lost a tender bid in a separate contract to the fifth respondent. The first respondent is the Statutory Authority responsible for all State procuring contracts both in terms of the Statute and the Constitution of Zimbabwe. Whilst the second and third respondents are central to the whole procuring process and have been cited in their official capacities, it is the first and fourth respondents whole play active roles. That being so, after being informed of the outcome of the tender bid through a letter dated the 18th of February 2022 from the respondents the applicants commenced a chain of interactive communications with the respondents in an effort to establish why they lost the bid given the history of their other contracts with the fourth respondents.

In a debriefing meeting in that regard of the 4th of March 2022, applicants where appraised of the reasons of the objections to their bid as well as the need, for a foreign company to pay security costs in the region of US50 000.00, as a prerequisite for the launching any challenges to tender proceedings and outcomes. Further deliberations, however, ensued between the parties culminating in a letter dated the 5th of April 2022, from the respondents, emphasizing the need for the applicants to comply with s 73(4)(b) Public Procurement and Disposal of Public Assets Act

[*Chapter 22:23*], and the fact that if they fail to do they were to proceed within the time frame provided by the said enactment and conclude the tender deal.

It is against this background that applicants filed a court application with this court in case number HC 2398/22, challenging the constitutionality of the impugned section, alongside this urgent chamber application in which they seek an interim relief staying or suspending the tender process in tender number ZETDC/INTER/07/2021 and attendant contracts, pending the outcome of their main action.

It is the applicant's case that in an application for provisional order, all what they have to do is establish a *prima facie* case. They assert that they established a *prima facie* right because of their pending constitutional challenge which they feel has merit. From their perspective the merit lies in that the amounts requested as security costs are exorbitant and prohibitive thereby fettering their right to challenge the tender process within the context of the Act in question. The gist of the applicant's argument is, that, s 73(4)(b) of the Act in question as read with s 44, of the Public Procurement and Disposal of Public Assets (General) Regulations 2018, and the third schedule to the regulation of the Public Procurement and Disposal of Public Assets (General) Amendment Regulations, 2020, S.I. 219 of 2020, is a catalyst and an impediment to access the review or challenge mechanism outlined in the governing Act. They contend that the said provisions requiring the payment of such large sums of money, as security costs infringes their Constitutional rights to administrative justice and the protection of the law in terms of ss 68(1) and (3)(a) and 56(1) respectively of the constitution of Zimbabwe Amendment Act No. 20 of 2013.

In their founding affidavit they indicated that if the interim relief is not granted it is the general public of Zimbabwe which will suffer irreparable harm as they will be laden with a substandard end product. To borrow from the wording in their answering affidavit to the first respondent's opposing papers they state that:

> "…The failure to afford the relief will prejudice the people of Zimbabwe who will have to make use of a half baked but expensive product."

It is their further contention that the balance of convenience favors their interests more than those of the respondents. In support of their argument they made reference to the case of *Mupini* v *Makoni* 1993 1 ZLR 80 (S) amongst a host of other authorities.

Answering to the applicant's case, the first, fourth and fifth respondents argue, that the fact that the applicants had initiated a Constitutionality challenge does not mean that they should not comply with an existing law as it is basing this urgent application on a right yet to be determined. Therefore, until such right has been determined, which in any event is not automatic as there are issues of limitation of rights and confirmation of the ultimate decision with the Apex constitutional court, that challenged statute is still the law. They controvert that as statutory bodies they are obligated to administer and protect the statutory provisions of their respective Acts to the letter. It is the respondents' submission that the applicant has an option to comply with the legislative provision under contestation so as to set out in motion its review proceedings. Therefore, the ball is their court. As such, their unwillingness to comply with that law falls short of being either a *prima facie* right or case. They counter-argued that the allegations of corruption and any underhand dealings are mere unsubstantiated bald allegations and a bitter reaction from an unsuccessful bidder. They therefore, must be disregarded and are not for this platform but subject to the main application. It is their argument that, the law says that the applicant must pay off the requisite amount so as to initiate the review mechanism which is the appropriate forum to challenge whatever disgruntlement they may have with the results of the tender.

As has become the norm, several preliminary points where brought to the fore. In all six preliminary points have been put forward. Through mutual consensus, the parties involved propagated for what is colloquially termed a holding up procedure whereby the arguments on the merits and the preliminary points are compounded and a determination on both be given at once. I granted the application. Of the six, three common to the respondents are, that of urgency, incompetent draft order and the need to exhaust domestic remedies. The other two points raised by the fourth respondent are those pertaining to the issue of security costs, in the current application, a suit involving a *peregrinus* respondent and *incola* applicant. The second one is that of the defective resolution filed by the applicant, which in their view was executed outside this jurisdiction but not notarized. Not to be outdone, the applicant had its own *point in limine* reverberating throughout its papers.

I have to agree with counsel for the applicant on the issue of numerous objections that take the case no further than just delaying and clouding of the main issue at hand. In actual fact, the rate at which litigants are raising preliminary points at the expense of directly dealing with the

crux of the matter is alarming. I associate myself with the observations made by MATHONSI J (as he then was) in *Telecel Zimbabwe Private (Ltd)* v *PORTRAZ* HH 595-15, wherein it was highlighted that*:*

> "Legal practitioners should be reminded that it is an exercise in futility to raise points *in limine* simply as a matter of fashion. A preliminary point should only be taken where, firstly, it has merit and secondly, it is likely to dispose of the matter. The time has come to discourage such waste of court time by the making of endless points *in limine* by litigants afraid of the merits of the matter or legal practitioners who have no confidence in their client's defence *vis-à-vis* the substance of the dispute, in the hope that by chance the court may find in their favour. If an opposition has no merit, it should not be made at all. As points i*n limine* are usually raised in points of law and procedure, they are the product of the ingenuity of legal practitioners. In future, it may be necessary to rein in the legal practitioners who abuse the court in that way, by ordering them to pay costs *de bonis propriis*."

The more the objections are, the more they cloud the central issues, at the expense of time and other resources. Whilst in essence they are meant to expedite and curtail proceedings by disposing the matter on crucial technical points at the onset. In my opinion they have now fallen prey to abuse. They are now used as a delaying tactic, a mechanism meant simply to frustrate proceedings, as a show of muscle or show down or as a downright ploy to justify the legal bill. It is important to note that, litigants approach courts to have the main source of their disputes resolved expediently and less costly. Thus, the interests of the litigant should take precedent over those of the legal representative. The trend to skirt around the crux of the controversy, concentrating on peripheral issues and dancing around the main bone of contention, is in my view distracting side shows and one of the reasons why cases are not finalized as urgently as they should be.

In an effort to win the battle before it had begun, counsel for the applicant urged the court to hear and determine its own point *in limine*, there and then, as they were confident it had the potential to decisively derail the submissions of the other respondents leaving only those of one contestant. In that regard, they asked that the opposing papers of the first and fourth respondents be expunged from the record of proceedings, arguing that they should have assumed the stance taken by their counterparts the second and third respondents and not opposed the application. The reason being, that the tenor of their opposing papers tend to side with each other as well as with the fifth respondent. As it where they were pitching camp with the fifth respondents, as opposed to playing a neutral and silent role. From their perspective, the first and fourth respondents partook

in the tender procedures as arbiters and administrators they therefore, should be official bystanders and not descend into the arena and in the merits of the current proceedings as they will be presiding over the intended review proceedings. Applicants further, contend that when the said respondents presided over the tender process they became *officious functus*. Hence, there is no room for them to actively participate in this matter. In support of their argument applicants relied on the case of *Leopold Rock Hotel Co. (Pty) Ltd & Another* v *Walenn Construction (Pty) Ltd*, 1994 (1) ZLR 255 (S), 279 and *TM Supermakets* v *Chimhini* SC-49-18, amongst a plethora of other authorities.

Responding to the applicant's objection the respondents pointed out that the applicants cannot have their cake and eat it. In that they cannot throw accusations at them and then ask them not to defend themselves. They did not cite them in their official capacities that distinguishes them from the other two cited in that capacity and as a matter of convenience. In contrast, they posit that several allegations have been leveled and directed to them individually. It follows that, they have the right at law as the averments made against cannot be left uncontroverted lest they will be taken as truth.

The first respondents contend that they are not only a statutory body with defined statutory duties but they are also Constitutionally constituted in s 315 (1) in particular, with a mandate to administer and protect the provisions of the Public Procurement and Disposal of Public Assets Act [*Chapter 22:23*]. From that angle, they submit that they have a duty to see to it that there is compliance with the stipulated legislative provisions and are obligated to respond to the averments made by the applicant in order to straighten the record and state the accurate position of the law.

Respondents argue that the *officious functus* argument is far-fetched and has no relation to the case at hand. They state that even though they sat in the tender board as dictated by statute, they are not the ones who will preside over the decision they made in that capacity. They submit that, the law governing the Review procedure and the composition of the review panel is clear and very detailed in the piece of legislation in issue. Legal representatives of the first and fifth respondent denied pitching camp with each other or the fifth respondent by stating that they are individually stating the facts and the law as they apply to them and view them. They further, assert that the *TM Supermarkets* case is out of context as it dealt distinctly with questionable conduct in review proceedings. They express that, they are independent from the review panel which is selected in terms of s 75 of Act, [*Chapter 22:23*], to preside over decisions or grievances over

tender procedures and outcomes. and they will not partake in the review proceedings. The applicants are still to appear before that Review panel as and when they have complied with the impugned statutory requirement.

I am persuaded with the submissions made by the respondents on the applicant's preliminary point. Respondents are central to the tender proceedings as well as the decisions made thereafter as illustrated by the very fact that applicant not only cited them but made some averments that need their response. I see nothing wrong in them, as the key players in this dispute, exercising their rights to respond as opposed to the first and second respondent who opted not to, as there are no allegations pointed at them. The review procedures, which are internal dispute resolution mechanisms are well outlined in ss 74 ,75 and 76 of the Act under challenge In terms of s 75, the Review panel is selected from a cross- section of reputable bodies and Commissions which the fourth and first respondent are not part. The applicant's *point in limine* thus lacks merit and is dismissed.

Coming to the respondents' points, I find the point on the un-notarized resolution lacking in detail as it was not taken up in oral submissions. They failed to establish where the resolution was executed. Though it is common cause that applicant is, *peregrinus*, nothing was placed on record that he does not have business offices within this jurisdiction and that the resolution was executed elsewhere, given that they did not deny that they had several business transactions with them both current and in the past. On that basis this point does not stand. See, *Zupco Ltd* v *Pakhorse Services* SC 13/17. I am swayed by the applicant's submissions on this point. It thus stands dismissed.

On the issue of Security costs, the same argument that the applicant is a company which had prior dealings with the fourth respondent with current equipment and ongoing contracts obtains. In, *Schunke v Taylor and Symonds* (1891) 8 SC 104 at BUCHANAN, J stated,

> "This matter of security to be given by litigants is one arising purely out of judicial practice. This practice has been a progressive one, the principle underlying it appearing to be, that justice shall not be denied by unreasonable obstacles being placed in the way of the persons seeking redress. I find nothing turning on this point."

In, *Grandwell Holdings Pvt Ltd v Minister of Mines and Mining Developmen*t HH-193-16, it was noted that:

> "…Substantively, an order for security costs is one entirely in the discretion of the court. It is a rule of practice, not substantive law."'

This point is also dismissed.

On the third point, on exhaustion of domestic remedies, respondents contend that, the applicant must first of all exhaust local remedies available or show cause why they must not be adhered to. This point is without merit. The applicants are simply saying that in order to exhaust those internal or local remedies provided in s 76 of the act under challenge there is a hurdle in the form of s 73(4)(b) of the Public Procurement and Disposal Of Public Assets Act [*Chapter 22:23*], which is the impugned legislative provision being challenged in case HC 2398/22 as unconstitutional. It is as per the applicant's argument, a section that acts as a catalyst to the domestic remedy provided for in the Act to initiate review proceedings. In their words, it fetters their challenge of the tender proceeding within the mechanism of the Enactment in question. I concur with counsel for the applicant on this point and conclude that the argument by the respondents that the applicant should firstly comply with the same does not hold water as this is the gist of the dispute before this court. It thus fails.

Respondents argue that the interim relief is the same as the final order sought therefore it is defective and the application should fail on this point. The incompetent relief point is also without merit. Whilst courts do frown at litigants' careless disregard of its rules, this court cannot deny the relief sought on the basis of poor drafting. Rule 7 of the 2021 High court rules gives the court the leverage to condone departure of its rules when it is in the interest of justice. In any event whilst not sanctioning shoddiness, the impugned sections can always be amended. In the *case of Samukeliso Mabhena v Edmund Mbangani* HB 57-18 p 4 pronounced that:

> "Having said that, I must hasten to state that, an application cannot be defeated merely on the basis of a defective draft order. The draft order, is after all, the wishful thinking of the applicant. It is for the judge or the court to grant the order and there he or she should be able to grant the order whatever order would have been proved in the application."

See, *Econet Wireless (Private) Limited* v *Trustco Mobile (Pty) Limited, and Anor* **SC-**43-13, *Hwange Coal Gasification Company (Private) Limited* v *Hwange Colliery Company and Another***,** HB 246/20.

I find nothing turning on the points in relation to, the no cause of action and the dirty hands principle as it is clear that there was a misapprehension of the law.

Had this not been the holding up procedure, I could have been compelled to start with preliminary point regarding the issue of Urgency. That being the so, the aspect of urgency calls for for some interrogation. The respondents argue that the applicant has not laid a basis justifying urgency. They argue that the applicants did not act when the cause to act arose but are only reacting to the day of reckoning that has befallen them. They however advance three dates as the dates the applicant was supposed to proactively react. From their point of view applicant was supposed to take action in September 2020 when the statutory regulations, S.I 219/20 introducing the refuted security cost amounts was promulgated. Respondents expound that since the applicants proclaim that they had been in the business of tenders and other related contracts not only with the fourth responded but at a Global level they are bound to have acquainted themselves with all the pertinent legal frameworks of the transactions they enter such as the impugned provision. As such they argue, that applicants should not plead ignorance as it is not an excuse at law. The second date advanced by the respondents, is the 18th of February 2022, when the winner of the bidder was announced whilst 15th of March 2022, is the date the applicant was advised of the need to pay the security costs in question. Correspondingly, respondents argue that even if the last date was to be taken into consideration, there is an inordinate delay from that date to the date of the current application which is the 12th of April 2022. It is the first respondent submissions that the applicant's urgency has been propelled by the imminent arrival of the day of reckoning and such is not a permissible ground for jumping the queue of other litigants on ordinary roll.

Applicants deny that they did not act when the need to act arose and that the urgency has been propelled by the imminent arrival of the day of reckoning. The applicants maintain that the need to act arose on the 5th of April, 2022 when they had their last communication with the respondents. They further, enunciate that even though they had been formally informed of the provisions of the Act in contention on the 15th of March 2022, their continued discourse with the respondents was an intervening act which arrested the need to at that given time. Therefore they did not sit on their laurels. They submit that, even if the court is to persuaded by the date of the 15th of April 2022. Proceedings by the date of the 15th of March 2022, the delay in between the date of filing this urgent chamber application, the 12th of April, 2022 and that date, is not

inordinate, given their peculiar circumstances highlighted above. However, it is the 5th of April 2022 that they urge the court to consider. In support of this averment applicant relied on the *Econet Wireless (Pvt) Ltd* v *Trusco Mobile (Pty) Ltd & Anor* S-43-13 case above.

Both parties also relied heavily on the cases of *Kuvarega* v *Registrar-General & Anor* 1998 (1) 188(H) at 193E*; Document Support Centre (Pvt) Ltd* v *Mapuvire* 2006 (2) ZLR 240 (H); *Gwarada* v *Johnson & Ors* 2009 (2) ZLR 159 (H) *and Sitwell Gumbo* v *Porticullis (Pvt) Ltd t/a(Pvt) Ltd t/a Financial Clearing Bureau SC 28/14* and many more.

In light of the above arguments, the issue to consider is whether or not the applicant treated the matter as urgent when the need to act arose?

I am not convinced by the respondents' argument that the cause of action arose on the day S.I. 219 of 2020 came into operation. Even against the background that the applicant was experienced in the field of tenders and contracts of a similar nature it cannot be held against them that they have a prerogative to acquaint themselves with every piece of legislation in the absence of breach or the need to make reference to the same. The constant interaction between the applicant and the first and fourth respondents up to the 5th of April 2022, arrested the need to act on the 15th of March 2022. I am therefore not satisfied that, the 5th of April, is the date the need to act arose and the applicants did not sit on their laurels but sprout to action when the need to act arose. There is an abundance of authorities spelling out the requirements of an urgent chamber application *Kuvarega* v *Registrar-General & Anor* 1998 (1) ZLR 188 (HC) it was stated:

> "What constitutes urgency is not only the imminent arrival of the day of reckoning; a matter is urgent, if at the time the need to act arises, the matter cannot wait. Urgency which stems from a deliberate or careless abstention from action until the dead-line draws near is not the type of urgency contemplated by the rules."

Gwarada v *Johnson & Ors,* HH 91/09 enunciated that:

> "Urgency arises when an event occurs which requires contemporaneous resolution, the absence of which would cause extreme prejudice to the applicant. The existence of circumstances which may, in their very nature, be prejudicial to the applicant is not the only factor that a court has to take into account, time being of the essence in the sense that the applicant must exhibit urgency in the manner in which he has reacted to the event or the threats, whatever it may be."

In *Documents Support Centre (Pvt) Ltd* v *Mapuvire* 2006 (2) ZLR 240 (H) it was noted:

> "… urgent applications are those where if the courts fail to act, the applicants may well be within their rights to dismissively suggest to the court that it should not bother to act subsequently as the position would have become irreversible and irreversibly so to the prejudice of the applicant."

In *Mushore* v *Mbanga & 2 Ors* HH 381/16 it was held that:

> 'There are two paramount considerations in considering the issue of urgency, that of time and consequences. These are considered objectively. "By 'time' means the need to act promptly where there has been an apprehension of harm. One cannot wait for the day of reckoning to arrive before one takes action… By 'consequences' means the effect of a failure to act promptly when harm is apprehended. It also means the effect of, or the consequences that would be suffered if a court declines to hear the matter on an urgent basis."

My construction of the above precedence is that after the enquiry on the two stages, of when did the need to act arose and whether the action taken by that party is consistent with urgency or exhibited urgency, there is need to go a step further and establish whether the applicant would be visited with irreparable or irreversible harm if the court does not act or grant the relief sought. This is what has been referred to in the *Mushore v Mbanga* case above as the, "consequence" that would be suffered if a court denied to hear the matter on an urgent basis."

In, *Tonbridge Assets Limited and others* v *Livera Trading (Private) Limited and Others* HH 574-16 p 4. MWAYERA J, (as she then was) outlined an additional three other determinants of agency over and above those stated in the above case as the unavailability of an alternative remedy, the balance of convenience tilting in favor of granting the relief and where delay will render hollow the relief sought. Going by the precedent in the *Tonbridge* case above it seems to me the requirements of urgency are interwoven or have been compounded with those of an interim relief and or an interdict.

In casu, in tandem with the guidelines outlined above, the next stage of enquiry is will there be irreparable harm visited on the applicants if the court fails to grant this order? The applicant stated that the harm will befall the people of Zimbabwe who will bear the brunt of a contract tainted with irregularities and corruption, In their heads of argument in paragraph four applicant buttresses the same point by declaring that, "The relief sought by applicant is in the public interest in that it ensures that an illegal, corrupt and incompetent contracts is not concluded and consummated pending the challenge'

The fifth respondent submitted that there is no harm that will be visited on the applicants. If there is any allegation in relation to the illegality of the contract then the review channel is the ideal platform for them to ventilate their grievances. As such the respondents emphasized that the applicants should pay the security costs to access that remedy.

It is my considered stand point that it is an undisputed fact that applicants lost a tender which they want to challenge, but before that there is a statutory requirement that they pay costs. In this regard paying the stated amount *albeit* grudgingly will not defeat their pending constitutional challenge. The payment will actually be beneficial to them as they will access the remedy provided for in s 76 of the governing Act and challenge the alleged irregularities whilst fighting the ousting or review of the offensive provision. Instead of asking this court to do that for them, they yield the power to do so by paying then recover later after winning the wrangle. Applicants allege that what they are asking is not the suspension of the legislative provision but the contract. On the face of it, it may seem so but the indirect implication for such an interim relief is the suspension of the said statutory section. What then this means is the judiciary will have been placed in a direct collision course with the Legislature. This in turn is an affront to the doctrine of separation of powers which advocates that the three arms of government though interdependent each should stick to its lane. There is another provision giving deadlines for them to comply with the impugned section requirements or the law will take its course by allowing the conclusion of the tender contract. Again, the effect of an interim order will affect those sections of the law that require the conclusion of the contracts if the challenger does not pay the required security deposit. I agree with the respondents' submission that the presumption of validity of legislation up to the time they are declared unconstitutional. See, *Mayor logistics (Pvt) Ltd v Zimbabwe Revenue Authority* CCZ 7-14. *Econet Wireless (Pty) Ltd* v *Minister of the Public Service, Labour and Social Welfare &* Others SC 31/02, *Broadcasting Authority of Zimbabwe and Obert Muganyura* v *Dr. Dish (Pvt*) Ltd SC 62/18. *Judicial Service Commission v Zibani and Others* SC 68/2017.

Apart from stating that they are not seeking a relief yielding the suspension of a statutory provision but the suspension of the conclusion of a contract and the public interest argument, the applicant has not demonstrated any harm let alone irreversible harm that will be visited upon them *per se* but the people of Zimbabwe. Accordingly, the applicant does not succeed on this ground.

The next stage is that of an alternative remedy, applicants argue that they have no other alternative remedy. It seems to me, the applicant rested their case on their argument on a *prima facie* case where they advanced that in a provisional order all that has to be established is a prima facie case. In their oral submission they submitted that the requirements of an interdict or questions of irreparable harm in the test of urgency are all not essential once they plead a prima facie case. As a result they downplayed the need to emphatically address the requirements of an interim relief altogether. In *Vengai Rushwaya* v *Nelson Bvungo and Another* HMA 19/17 MAFUSIRE J, noted that,

> " an application of for stay of execution is a species of an interim interdict. As such, an applicant *inter alia* must show an apprehension of an irreparable harm, balance of convenience favoring the granting of the interdict and the absence of any satisfactory remedies."

From the above *dicta,* I can safely conclude that a provisional order is an interim relief. An interdict seeks an interim relief pending the return day, confirmation or discharge of any other litigation (*pendente lite).* The fifth respondent in their founding affidavit paragraph four, raised the issue that the applicant did not satisfy the requirements of an interdict. *Zesa Staff Pension Fund* v *Mushambudzi* SC 57/02, succinctly, spells out the requirements of an interdict which I need not repeat. The respondents in unison aver that the applicant's problem is self created as they have a remedy to simply pay the contested amount pending their constitutional challenge. In turn, that payment will unlock the review remedy enabling them to air their grievance and suspend the conclusion of the contract at the same time. They also contend that the applicant's subjective opinion that the quantum of US$50 000.00 or the whole requirement of security for costs is unconstitutional cannot amount to a *prima facie* right or case.

From this perspective, it is clear, from the record that the applicants are contesting for a multi-million dollar contract. It is also evident that by so bidding for a tender of such a magnitude, they have the financial capacity to start the ball rolling before being allocated the millions to be paid by the fourth responded. I agree with the fifth respondent that, the impugned statutory provision is a measure to test not only the seriousness of contenders but their financial muscle as well. Surely, the sum of US$50 000.00, is a paltry figure in comparison to the multi-million dollar contract. It is my considered view that the applicant holds the key to suspend the review proceedings pending its Constitutional challenge. If it pays the US$50 000.00, it unfastens the

avenue that allows them to promptly challenge the tender process. Effectively the respondents will then not conclude the contract until the review proceedings have been concluded. This does not however, destroy the cogency of their Constitutional invalidity arguments in case HC 2398/22. The ball will then be in their court to ensure that matter is heard expediently. Thus, it is my considered view that, they have an alternative remedy pending their constitutional invalidity case. For the above reasons, I find that the matter is not urgent. Applicants have an alternative remedy to pay the security costs and in the same vein suspend the tender contract issue. Reference is made to s 74(4) which reads:

> "The making of an application to the Authority within five-day period specified in subs (1), shall suspend the challenged proceedings until -
> (a) the review panel determines the challenge
> (b) the review panel cancels the suspension in terms of s 76(7)."

In terms of the above section once the security costs are paid then the proceedings giving rise to the review are suspended.

It has been argued, on behalf of applicants, that the balance of convenience favors the applicant in that, if the interim relief is not granted, the people of Zimbabwe will bear the inconvenience. It has been further expressed that the Constitutional argument will be *brutum fulmen* as the contract will have been concluded and fulfilled. In counter, the respondents stated that, a constitutional argument takes longer and may not be smooth sailing as the doctrines of ripeness and subsidiary are likely to carry the day. Further, even after the determination of the matter by a court of concurrent jurisdiction in constitutional matters, it will still be referred for confirmation or discharge by the Apex court with the final say, as well as exclusive jurisdiction in cases of that nature. Meaning the whole contract which is centered at smooth and continuous provision of electricity will be in abeyance at the expense of the whole nation. Therefore, the respondents motivate that, the balance of convenience, favors the non-granting of the relief sought. I am swayed by the submissions by the respondents on this aspect and will not detract anything from their submissions. The balance of convenience favors the respondents' argument.

For the sake of completeness, the arguments on the merits have been inescapably entwined. An application for stay of the contract through a provisional order seeks an interim relief. *Vengayi Rushwaya, supra,* equated an application for a stay, to that of an interdict. That being the case, in the *Econet Wireless (Pty) Ltd*, above, it was noted that, it is incompetent to ask for an interim

relief staying an extant law against the backdrop of the doctrine of the obedience of the law until its lawful invalidation. It was also noted that one cannot have a prima facie case or right that seeks to invalidate an extant law as a basis for an interim relief.

Applicant argues that they have established a prima facie case entitling them to the relief sought. If the governing Act stipulates that the contract be concluded upon failure of the contending party to lodge their challenge as specified therein, as contended by the respondents, then this court cannot give a relief stopping the operation of that law. As granting the relief suspending the contract also suspends the law in relation to timeframes upon which to conclude contracts which is not subject to any current challenge. In *Smith* v *East Elloe Rural District Council* Ac 736 at 769, LORD RADCLIFFE stated as follows:

> ".If it were not so and every litigant challenges the validity of any laws was excused from obeying the law pending determination of its validity, there will be absolute chaos and confusion rendering the application of the rule of law virtually impossible. This is because anyone could challenge the validity of any law just to throw spanners into works to defeat or evade compliance with the law."

If regard is given to the doctrine of obedience of the law until its lawful invalidation stated, in the *Broadcasting authority of Zimbabwe,* above, it will render the prima facie case defence of the applicants nugatory. See, *Econet Wireless (Pty) Ltd* v *Minister of the Public Service, Labour and social Welfare &* Others SC 31/02, *Broadcasting Authority of Zimbabwe and Obert Muganyura* v *Dr. Dish (Pvt*) Ltd SC 62/18.

DISPOSITION

A finding has already been made that the application lacks urgency as detailed herein. In as much as the applicant's right to challenge the unlawfulness of the law is respected which is the subject of another court, in the judicious exercise of my discretion, I am of the view that the justice of this case leans in favor of not granting the relief sought. There are alternative remedies open to the applicant which are less prejudicial to them. They have the means. They are an acclaimed successful Company with various International contracts. The payment of the security cost, which is recoverable if they succeed, will not dent their financial stamina. The discretion to grant or deny the relief of a stay of execution lies with the court as stated in the case of *Mupini* v *Makoni* 1993 1 ZLR 80*(*S*)* and *Desmond Humbe* v *Muchina* & *Others* SC 81/21.

In the result, it is ordered that:

1. The matter is not urgent and is struck off the roll of urgent chamber applications.

2. Each part to pay its own costs.

Messers Gill, Godlonton & Gerrans, applicant's legal practitioners
Kantor & Immerman, first respondent's legal practitioners
Muvingi and Mugadza, fourthrespondent's legal practitioners
HogweNyengedza, Fifth respondent's legal practitioners

NOTES

1. Section 2 of the Constitution of Zimbabwe Amendment Act No 20 of 2013, reads'
Section 2. Supremacy of Constitution: (1). This Constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency.

2. Section 86 of the Constitution, amendment actNo.20 of 2013 is a clause on limitations placed on rights and freedoms which are not absolute rights.

3. Encyclopedia Britannica defines **judicial review**, as the power of the courts of a country to examine the actions of the legislative, executive, and administrative arms of the government and to determine whether such actions are consistent with the constitution. Actions judged inconsistent are declared unconstitutional and, therefore, null and void.

The following cases are some of the constitutional proceedings where the doctrine of judicial review featured;

. CCZ 2015-12 Mudzuru v The Minister of Justice, Legal Parliamentary affairs

S v Williams & 9 Others (CCZ 14/17, Constitutional Application No. SC 263/12) [2017] ZWCC 14 (12 July 2017);

S v Chokuramba Justice For Children's Trust Intervening As Amicus Curiae Zimbabwe Lawyers For Human Rights Intervening