HB 73/19
HC 950/15

RECLON CONSULTING ENGINEERS (PVT) LTD

Versus

NATIONAL UNIVERSITY OF SCIENCE & TECHNOLOGY

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 26 – 28 FEBRUARY 2018 & 16 MAY 2019

Civil Trial

Advocate T. Mpofu for the plaintiff
N. Mazibuko for the defendant

TAKUVA J: The plaintiff is a company duly registered in terms of the Companies Act Chapter 24:03 and carrying on business at 3rd Floor Mership House, J.M. Nkomo Street/9th Avenue, Bulawayo.

The defendant is a body corporate with perpetual succession capable of suing and of being sued in its corporate name, performing all acts that a body corporate may by law perform.

On 14 April 2015 plaintiff sued defendant for payment of the sum of US$225 593,01 in respect of professional mechanical and electrical engineering services rendered to defendant by plaintiff at defendant's special instance and request. Plaintiff also claimed payment of interest at the prescribed rate of 5% from the date of service of the summons to date of full and final settlement and costs of suit. The claim arises from the clauses of the agreement entered into between the parties on 18 August 2013. The fees were for preliminary design, detailed design, tender drawings and documentation. In terms of the agreement the fees were to be levied as follows:

> "Clause 7.4.1 Stage one report
>
> Fees for this stage become due on submission of the report to the defendant unless otherwise agreed, with interim payments made monthly in accordance with sub-clause 19.1.

17.4.2 Stage two – Preliminary design

The fee for this stage shall become due when the preliminary design for the construction of the work has been prepared and submitted to the defendant, subject to the consulting engineer allowing appropriate credit for the value of such work related to the preliminary design and carried out under sub-clause 6.1 as utilized in the development of the preliminary design.

17.4.3 Stage three – Detailed design, Tender drawings and Documentation

The fee shall become due when the drawings and other documents necessary to enable the works to be tendered for or otherwise placed by the defendant have been prepared and submitted to the defendant."

Upon completion of instructions on or about the 16th September 2013, plaintiff invoiced defendant for the mechanical and electrical engineering services rendered to defendant in terms of the agreement and SI 133/2012 amounting to US$225 593,01. Defendant acknowledged its indebtedness to plaintiff in a letter dated the 29th day of October 2014. Further, defendant undertook to settle the amount owed once they received funding. Notwithstanding this, defendant has refused to pay plaintiff causing the latter to issue summons praying for judgment as enumerated above.

Defendant having filed a special plea and exception but not having set the same down within ten days in terms of Order 21 Rule 138 pleaded over to the merits. Defendant averred as follows:

1. The services provided by the plaintiff were provided at the specific instance and request of the Government of the Republic of Zimbabwe through the Local Organising Committee of the Zone 6 Youth Games which were held in the City of Bulawayo in December 2014.
2. The government was to pay the cost of the construction of the student residences and defendant was just a beneficiary and not the driver thereof. As a result, any agreement entered into with plaintiff should be understood in that context.

3. The plaintiff signed an agreement for the provisions of services without an authorized representative of the defendant and as such, the agreement is of no force or effect and is not binding on the defendant.
4. In any event, the plaintiff was aware from the beginning that any payment for any work done was going to be effected by the Government of the Republic of Zimbabwe through the Local Organising Committee of the Zone 6 Youth Games and not by the defendant.

The following issues for trial were listed in a joint pre-trial conference memorandum;

"1. Whether the plaintiff provided the professional mechanical and electrical engineering services as claimed by the plaintiff and whether the plaintiff is entitled to payment of the sum of $225 593,01 together with interest thereon at the prescribed rate as claimed in the event the defendant's special plea and exception are dismissed.

2. Whether the plaintiff was obliged to comply with section 6 of the State Liabilities Act (Chapter 8:14) before issuing summons.

3. If the answer to 2 above is in the affirmative, whether the plaintiff is entitled to any relief in the absence of compliance with section 6 of the State Liabilities Act aforementioned.

4. Whether the agreement between the parties is subject to the provisions of the Procurement Act (Chapter 22:14)

5. If the agreement is subject to the provisions of the Procurement Act aforementioned, whether section 10 as read with sections 31 and 32 of the Procurement Act were complied with.

6. If section 30 as read with sections 31 and 32 of the Procurement Act aforementioned were not complied with, whether the agreement is unenforceable.

7. Whether the agreement between the parties was signed by an authorized person within the meaning of the Procurement Act aforementioned as read with the Procurement Regulations and the National University of Science and Technology Act, and if not whether the agreement is valid and enforceable.

8. If there was no need for formal tender procedures to be followed. Whether nonetheless the parties failed to comply with section 5 subsection (1) as read with subsections (3) and (4) of the Procurement Regulations SI 171 of 2012 as amended.

9. If the parties did not comply with section 5, subsection (1) as read with subsections (3) and (4) of the Procurement Regulations aforementioned, whether the contract between the parties to nevertheless lawful and enforceable.

10. Whether the plaintiff's claim against the defendant does not disclose a cause of action on account of the plaintiff's failure to allege in its summons and declaration that it submitted its work to the defendant in compliance with clauses 17.4.1 and 17.4.2 of the agreement between the parties.

11. Whether, notwithstanding the agreement signed by the parties, it was understood and the plaintiff was aware that the project being undertaken was under the auspices of the Government of Zimbabwe as represented by the Local Organising Committee of the Zone 6 Youth Games to be held in the City of Bulawayo in December 2014 and that any payments for services rendered in terms of the agreement were going to be effected by the Government of the Republic of Zimbabwe.

12. Whether or not plaintiff is entitled to costs of suit on an attorney and client scale."

As regards onus of proof, it was agreed that on issues of 1, 3, 5, 7, 9 and 12 it was on plaintiff while on defendant in respect of issues 2, 4, 6, 8, 10 and 11.

The Evidence

Engineer Cleopas Dube is a director of the plaintiff. He holds a BSc Hons degree in Electrical Engineering from the University of Zimbabwe. After graduating in 1991 he worked for a number of companies until he became a founding partner of plaintiff. Before this project plaintiff had done work for defendant since 2000. In respect of three previous projects, defendant's authorized signatory to the agreements was its Director of Works. Engineer Dube specifically referred to the following projects in which plaintiff did electrical services.

(a) Central Stores and Maintenance Building

Plaintiff was appointed by defendant's Campus Development Committee as the mechanical and electrical engineers for this project in 2001. The letter of appointment was written and signed by one M. Maphosa the Director of Works. See page 49 of the plaintiff's bundle of documents;

(b) Campus Services Centre project signed on 1 March 2005 between plaintiff and defendant. Again the Director of Works and Estates one M. Maphosa signed as the defendant's duly authorized signatory.

(c) The proposed Mpilo Refurbishment Works

This agreement was signed by the parties on 4 November 2004. Once more M. Maphosa signed the agreement for and on behalf of the defendant in his capacity as the Director of Works and Estates. See pages 54-56 of the bundle of documents. As regards the role played by the Vice Chancellor, Mr Dube said none of the above agreements was signed by the Vice Chancellor. He also said no procurement process was done in that they never went through any tender processes for these three projects.

Dealing with the current project, Mr Dube said they were called by the Director of Works at the defendant's instruction to meet G. Chitima the team leader of a consortium. They were

shown a letter that appears on page 34 wherein they were recommended to undertake electrical engineering services for defendant. Subsequently, they were directly appointed by defendant and they entered into a written agreement on 19 August 2013. Defendant signed it on 2 September 2013.

The plaintiff being a member of an association called Zimbabwe Association of Consulting Engineers ensured that the agreement complied with the provisions of SI 153/12 as to the definition of work to be provided and tariffs to be levied. In terms of clause 2, of the agreement, defendant was responsible for payment of fees as stipulated in the tariff. There is no clause in the contract placing the duty to pay plaintiff's fees on any third party or the Government of Zimbabwe. Also there is nothing in the contract referring to funding coming from government and/or that payment was conditional on receipt of funds from Government or any Government Department.

After signing the contract, plaintiff performed its part by completing stages 1, 2 and 3 as required. Defendant did not at any stage query the manner in which plaintiff performed its mandate. Upon conclusion of stage 3, plaintiff submitted drawings to the defendant who happily accepted them and used then to secure a development permit from the City of Bulawayo. When plaintiff demanded payment from defendant the latter did not deny liability. Mr B. Gaule the defendant's Director of Physical Planning, Works and Estates wrote a series of letters acknowledging that indeed the work was satisfactorily completed and that the plaintiff must be paid its fees "once funding is received from the Government." See page 1 of exhibit 1 which is the plaintiff's bundle of documents and page 46 of exhibit 2 which is the defendant's bundle of documents.

In yet another letter to Mr G. Chitima the lead consultant dated 9 November 2015, Mr Gaule explained the delay in payment of the "outstanding consultancy fees for work done" as follows:

"We reiterate that the proposed project was meant to be funded by the Government. As you may know our efforts to get funding from the Government have not been fruitful. However, we are in the process of sourcing for a partner through a joint venture agreement, who will make use of the drawings and bills of quantities prepared by yourselves. As part of the conditions of the contract the partner will meet the costs of preparation of the documents.

It is our hope that through this arrangement we will be able to offset your outstanding consultants fees. We apologise for the delay."

The letter was copied to the Vice Chancellor, Registrar and Bursar of the defendant.

The witness also referred to another letter by Mr Gaule, this time addressed to the Ministry of Higher and Tertiary Education, Science & Techonology Development and dated 27 February 2015. According to Engineer Dube, this letter, apart from setting out the background also illustrates the defendant's position as regards the need to pay plaintiff.

The letter reads:

"Re: Proposed Students Hostels- Outstanding Consultancy Fees For Work Done

The Supreme Council for sport in Africa had initially indicated that the Games Village for the under 20 Youth Games would be at NUST Campus, scheduled for December 2014.

Communication received from the Lead Organizing Committee – Public Works Department and Ministry of Sports,, prior to the games prompted NUST to prepare drawings by engaging consultants as shown in the attached copy.
The Games Village was later relocated to Hillside Teachers College. This, however, left

NUST with an outstanding bill of US$2 807 985,59 due for payment to the consultants. The consultants have since approached the University enquiring on when these payments would be made since their work of preparing designs was done. We kindly seek your advice on the matter."

Engineer Dube denied that the person who signed for and on behalf of the defendant was on a frolic of his own by arguing that all internal and external correspondence was copied to the Vice Chancellor who at times would chair meetings of the Campus Development Committee

responsible for projects at NUST. In the minutes of one such meeting dated 25th March 2015 the issue of defendant owing $2.8 million to consultants was discussed. The plaintiff's debt is part of the $2.8 million according to Engineer Dube. Various options of dealing with the "consultants' debt" were proposed but there was no denial of liability by defendant. These minutes appear on pages 73-78 of the plaintiff's bundle of documents. See also pages 57 and 65.

At once time the witness said he was approached by Mr Zenzo Nsimbi who was vice Chairman of defendant's council with a proposal to abandon 50% of the bill and settle for half the amount. He turned it down insisting that the defendant should pay 50% there and there and the balance over time. Mr Nsimbi who was in the company of one Nyambura informed him that they needed a mandate from defendant to pay. Another meeting was set down but defendant's representatives did not turn up and the efforts were abandoned after defendant suggested that it would settle only after plaintiff withdrew its court case against defendant.

As regards authority by the Director of Works the witness was adamant that in his experience, all agreements for projects at NUST were signed by the Director of Works and never by the Vice Chancellor personally. He also said he had done a lot of work for the Government but in such cases, the client would be the Ministry of Public Works which would remain the payer. The fact that funding would come from the Government through the Ministry of Finance does not change the "payer". He referred to pages 79-82 of exhibit 1 where plaintiff's agreements with Government Ministries are filed. The witness was however surprised that defendant was raising the issue of its Director for Works' authority to sign the agreement belatedly.

The question of compliance with the Procurement Act and the Regulations was not new to him as he was familiar with their provisions. According to him in terms of SI 171/2002 the threshold was US$300 000,00 while their invoice was far less than $300 000.00. Therefore, there was no need for a tender in that defendant as the procuring entity could seek permission to avoid the tender process. His view was that it was up to the defendant as the procuring entity to

decide which way to go but they were never informed of the need to go to tender or seek approval.

Under cross-examination, the witness denied that he over-charged the defendant for services rendered. He explained that while the tariff permits a 65% charge, a consultant is allowed to add 10% to make it 75%. On the quantum of the debt, he said had the defendant raised it earlier, the parties could have examined the bill closely and if need be, it could have been adjusted. He insisted that on the three occasions they did work for the defendant, they did not follow tender procedures and were paid by the defendant. His understanding from the 27 years of experience in the industry is that consultancy work does not go to tender because of the tariff system. The fees are quality based.

This witness' evidence is straight forward. Other than his own opinion on legal provisions, he acquitted himself very well on the facts, most of which are common cause. He candidly admitted that mistakes of a mathematical nature could have arisen but these should have been raised and discussed immediately after the defendant received the invoice. Engineer Dube's evidence established that plaintiff and defendant entered into a contract. The plaintiff performed its part in terms of the agreement and produced the invoice which the defendant accepted initially but later challenged. This witness' testimony is supported by documentary evidence which is common cause. I have no hesitation in declaring Engineer Dube, a credible witness whose evidence is clear and satisfactory in all material respects.

After this witness' evidence, plaintiff closed its case and defendant opened its case by calling Mr Baron Gaule who is employed by defendant as the Dean of the Faculty of Built and Environment. Prior to that, he was the Director of Physical Planning, Works and Estates. Sanelo P. Ncube was his predecessor and when he took over, he familiarized himself with this case. He said P. Ncube signed the agreement in issue on behalf of the Organizing Committee for the games. According to him such agreements are signed by the Director of Physical Planning and Estates on behalf of Council with authority from Council. He said *in casu*, there is no written authority from Council or the Vice Chancellor. His view on who is responsible for payment was

that it was the Ministry of Education, Sports and Arts. Further, he declined to comment on whether or not the project was taken to tender arguing that he was not part of the arrangements.

As regards the plaintiff's fees, he agreed that plaintiff should be paid in line with the tariff in terms of the Statutory Instrument. However, he was of the view that should there be any anomalies these should best be resolved through dialogue with the plaintiff. The witness agreed that he authored all the letters in exhibit 1 and 2 in an effort to get plaintiff's invoices paid through the relevant Ministry since defendant was a conduit between Government and Consortium they expected payments from Government. When asked whether plaintiff knew it was going to be paid by the Government, his answer was "it was generally known that it was a Government project.'

The witness described as awkward a situation prevailing at defendant, whereby all projects are signed by defendant although the money does not come from defendant but made available through the Ministry. In principle, he agreed that plaintiff should be paid since he had no issues with the quality of work done. He said defendant was struggling to get "funding from the initiator of the project." As soon as funding is made available the consultants, plaintiff included will be paid. In view of the fact that the witness is not a quantity surveyor, he said he could not challenge the plaintiff's claim. All he would say was that defendant was still trying to get developers to build and if they pay, defendant would off -set plaintiff's debt. Further, he agreed that the parties to that agreement were plaintiff and defendant and that defendant was bound by the agreement. In answer to a question, the witness said although the agreement does not have a clause transferring liability to pay plaintiff to Government "it is a general agreement in all our projects that Government makes provision for payment of these projects, "through our Ministry". Despite this position the witness said defendant was bound by the agreement. As regards efforts to pay plaintiff, the witness said the defendant as an institution did not condone Engineer Dube's efforts to dialogue with Engineer Nsimbi and Mr Nyambuya who were Council members as well as Campus Development Committee members. When it was put to him that defendant was leading plaintiff down the garden path because defendant knew that Government will not pay plaintiff, he said an individual in the Ministry had refused to pay but the dynamics

have since changed with the appointment of Professor Murwira as the new Minister who is handling the matter now. He also said defendant is searching for a Pro-Vice Chancellor to spearhead the process.

Mr Gaule said since he was not part of the negotiating team he could not say whether or not documents were referred to tender. He is aware that there are provisions in the Procurement Regulations allowing certain projects to be exempted.

In my view, this witness was not only eloquent but also candid, truthful and fair. This, notwithstanding that he is still an employee of the defendant. His explanation on why he wrote the letters exhibits a mature, reasonable and fair approach to dispute resolution. What should be noted is that although he was not the Director of Works at the time the agreement was signed, his evidence remains relevant and helpful to the resolution of the dispute *in casu*. For these reasons, I find Mr Gaule to be a credible witness whose evidence is worthy of belief.

Defendant's next witness was Maswazi Maphosa who has been employed by the defendant as a Maintenance and Project Officer in the Department of Physical Planning from May 2014. He was not involved in any way in this case but simply "perused files" at a later stage. When referred to pages 72 – 73 of exhibit 2 defendant's bundle of document he was quick to say that plaintiff erred by including "contingencies" in the fees. Further, he said plaintiff should have claimed 65% instead of 75% of the cost of works. For these reasons, he concluded that plaintiff over stated his fees. However, he agreed that in terms of the contract the plaintiff was entitled to charge 75% and not 65%.

Under cross-examination, the witness conceded that in its plea, defendant does not challenge the quantum of the debt. He admitted that he never spoke to Mr Dube or Mr S. P. Ncube and more importantly that he never set out in the bundle of documents those figures he claims to be correct. He also saw it fit to cast aspersions on plaintiff's designs by accusing it of "duplication" without ascertaining the true facts. It is clear from this witness' evidence that he was requested by defendant's legal practitioners to comment on the quantum of plaintiff's claim in 2016.

This witness contradicted himself in a number of ways. Despite being neither a quantity surveyor nor an electrical engineer he nonetheless authoritatively rubbished plaintiff's claim in an unmistakable display of bias against the plaintiff. Clearly he was either mistaken on contingencies or simply wanted to mislead the court. Further he wanted to defend the indefensible on duplication. It is apparent that this witness did not know what he was talking about. As a result, he proffered a convoluted argument. I find him to be an untruthful, unreliable and biased witness whose testimony I reject *in toto*. Defendant closed its case after calling this witness.

The Law

In principle an agreement must be legal (geoorloof) to constitute a contract. Generally, therefore an illegal agreement will not create obligations. It has however, come to be accepted that in some instances an illegal agreement will constitute a contract, but one which is not enforceable at law – See Van Der Merwe, Van Huyssteen, Reineicke and Lubbe, *Contract – General Principles* Fourth Edition Juta 2012 at page 165.

Illegality affects the enforceability of contracts because some rule of law has been contravened. Such rule may be statutory or it may stem from the common law. A statutory illegality occurs when the legislature expressly prohibits a contract of a certain type and declares that any such contract shall be void. In *York Estates Ltd* v *Wareham* 1949 SR 197 it was held that;

> "As a general rule a contract or agreement which is expressly prohibited by a statute is illegal and null and void even when as here, no declaration of nullity has been added by the statute."

KORSAH JA (as he then was) in *Hatting & Ors* v *Van Kleer* 1997 (2) ZLR 240 at 245 cited the following passage by GUBBAY JA (as he then was) in *Dube* v *Khumalo* 1986 (2) ZLR 103 at 109D – F

> "There are two rules which are of general application. The first is that an illegal agreement which has not yet been performed, either in whole or in part, will never be enforced by the courts. This rule is absolute and admits no exception. See *Matheus* v *Robinout* 1948 (2) SA 876 (W) at 878; *York Estates* v *Wareham* 1950 (1) SA 125 (SR) at 128. It is expressed in the maxim *ex turpi causa non oritur actio.* The second is expressed in another maxim in *part delicto potior est conditio possidentis* which may be translated as meaning where the parties are equally in the wrong, who is in possession will prevail. The effect of the rule is that where something has been delivered pursuant to an illegal agreement the loss lies where it falls. The objective of the rule is to discourage illegality by denying judicial assistance to persons who part with money, goods incorporeal rights, in furtherance of an illegal transaction. But in suitable cases the courts will relax the *par delictum* rule and order restitution to be made. They will do so in order to prevent injustice, on the basis that public policy should properly take into account the doing of simple justice between man and man."

It was held *inter alia* that "where a contract is on the face of it legal but, by reason of a circumstance known to one party only is forbidden by statute, it may not be declared illegal so as to debar the innocent party from relief; for to deprive the innocent person of his rights, would be to injure the innocent, benefit the guilty and put a premium on deceit."

The *par delictum* rule was regarded for a long time as a strict rule until in 1939 when the appellate division of South Africa in *Jeybhay* v *Cassim* 1939 AD 537 decided that the strict application of the rule could be relaxed.

STRATFORD CJ stated that "in cases where public policy is not forceably affected by a grant or refusal of the relief claimed a court of law might well decide in favour of doing justice between the individual concerned and so prevent unjust enrichment." What is note worthy is that the *par delictum* rule itself is based on public policy. The following are some of the specific facts which could assist in a decision whether on the facts of that case, the rule should be relaxed;

(a) The relationship between public policy and individual justice could be part of this decision, in the sense that where there is conflict between the general interest and individual interests, the former should prevail.
(b) The claimant or defendant must at least adhere to the underlying agreement.

(c) The moral turpitude of the parties including whether or not the party wishing to reclaim performance was ignorant of the illegality.

In short, the *par delictum* rule means that in principle, participation in an illegal agreement precludes a claim for return of performance, unless the rule is related by the court on grounds of public policy – see *Zuvaradoka* v *Franck* 1980 ZLR 402 (A); *Chimutanda Motor Spares (Pvt) Ltd* v *Musare* 1994 (1) ZLR 310; *Nyamweda* v *Georgias* 1988 (2) ZLR 422 (S).

The Procurement Act (Chapter 22:14) ss3, 30, 31, 32 and 33 and the Procurement Regulations 2002 (SI 171 of 2002) ss4, 5, 6, 7 and 8

These provisions and their impact was discussed and interpreted by PATEL J (as he then was) in *PMA Real Estate Agency (Pvt) Ltd* v ARDA 2011 (2) ZLR 355 (H). The learned judge observed that "under s3(1) of the Procurement Act, the provisions of the Act apply to procurement by the procuring entities as defined in s2(1) including every statutory body such as the defendant. Under s30 (1) of the Act, services by a procuring entity shall be done by a method which complies with section 32, which sets out the general procedures to be followed in the procurement of services …"

It was held that the provisions of sections 30, 31 and 32 of the Act were couched in peremptory terms and compliance with them, as well as the regulations, was intended to be mandatory rather than merely discretionary. However the Act did not state the legal consequences of any failure to so comply. It was held further that a contract in breach of a statute cannot be retrospectively ratified or otherwise validated because (a) the law does not countenance the ratification of a contract or transaction which, being contrary to a statute, is null and void *ab initio* and (b) the Executive is not at liberty to waive or renounce a peremptory statutory obligation imposed by the legislature for the protection of state property and public monies. Accordingly, the contract *in casu* was invalid and unenforceable."

Applying the law to the facts, I find as follows:

As regards the 1st issue, the plaintiff proved on a balance of probabilities that it provided the professional mechanical and electrical engineering services to the defendant. On the evidence it is abundantly clear that the plaintiff's charges are proper and lawful as they were levied in accordance with the relevant regulations. Plaintiff as an engineering firm is required to charge in terms of scales and rates for professional fees outlined in the Third Schedule of the Engineering Council (General) By laws 2012 SI 153/12.

In my view, defendant's challenge is ingenious in that instead of protesting the quantum, it readily accepted liability in black and white. It pleaded poverty and promised to pay as soon as "funds were made available by Government." Years later they come up with the discredited evidence that the fees were inflated.

The onus as regards the second issue is on the defendant but it did not lead any evidence on it. Accordingly, the court is unable to decide whether or not plaintiff was obliged to comply with section 6 of the State Liabilities Act (Chapter 8:14) before issuing summons. I therefore find no merit in defendant's claim in that regard. Since the 3rd issue is intertwined with the 2nd, it follows that it too has no merit.

The 4th issue is relatively simpler in that on the evidence on record it is apparent that the agreement between the parties is subject to the provisions of the Procurement Act and Regulations. Equally easy to deal with is the 5th issue. Quite evidently, s30, 31 and 32 of the Act were not complied with.

Since issues 6, 8 and 9 are similar in that they all raise the question of enforceability of the illegal contract, I will deal with them later in this judgment.

Defendant's argument on issue 7 is that the person who signed the agreement on its behalf was not authorized by it. Considering the evidence in its totality, I find this defence to be bogus and dishonest as it is clearly inconsistent with admissions made by defendant in its plea. It is trite that what is not disputed is admitted – see *D D Transport* v *Abbott* 1988 (2) ZLR 92 (S). Plaintiff is therefore now required to lead evidence in an issue that had been admitted. In any

event assuming I am wrong, there is another reason why defendant's defence should fail, namely, absence of authority is a fact exclusively in defendant's knowledge. If, according to the internal processes as required by the law, defendant was required to have followed those processes, it was incumbent upon it to spell out those processes. *In casu*, there is no evidence that the defendant's Vice Chancellor is legally precluded from delegating his authority to sign agreements.

In my view, where, like *in casu*, the Vice Chancellor was totally engrossed in the Campus Development Committee's developments, it would be naïve to argue that plaintiff should have known that defendant's representative had no authority. Defendant failed to rebut plaintiff's evidence that there were prior dealings between the parties where agreements signed by the same official or one in that office were honoured by defendant. Further, defendant does not deny that the Vice Chancellor would chair Campus Development Committee meetings and all correspondence relating to this case were copied to him. Can defendant in light of all this evidence, blame the plaintiff? Be that as it may, I take the view that there is no evidence to suggest that Mr S. P. Ncube had no authority from Vie Chancellor to sign the agreement for and on behalf of the defendant. I find therefore that the agreement cannot be declared invalid and unenforceable on the basis that defendant's representative was not authorized to sign it.

Coming back to issues 6, 8 and 9 the narrow issue raised is whether the parties failed to comply with section 5(1) as read with subsection (3) and (4) of the Procurement and Regulations SI 171/2002. The broader issue is the enforceability or otherwise of that agreement. While the plaintiff argued that the parties were not supposed to go to tender because the value is below the $300 00,00 threshold as required by the Procurement (Amendment) Regulations 2012 (No. 17) SI 160/2012, there is no evidence that the defendant obtained or sought the requisite "approvals" required in terms of s5 of the Regulations. Also, there is no evidence before the court to indicate that defendant adopted any other method of procurement allowed by the Regulations in its contract with the plaintiff. Therefore, the defendant's departure from the prescribed procurement rgime was neither otherwise provided for by the Act nor in accordance with the Act, and was clearly unsanctioned by the State Procurement Board or its Chairman. Consequently, the

contract *in casu* was concluded in contravention of the Regulations. As regards the wider issue of enforceability, defendant relied on the *PMA* case *supra* to argue that such a contract is simply invalid and unenforceable while plaintiff relied on the authority of *Hatting's* case *supra.* In my view, the *PMA* case is distinguishable from the case *in casu* on the following grounds:

(i) In the *PMA* case the threshold was exceeded while *in casu* it was not.

(ii) The court did not consider the principle in the *Hatting* case

(iii) In the *PMA* case the court in fact dismissed the plaintiff's case on the merits and logically there could have been no reason to invoke or consider the principle in the *Hatting* case.

(iv) *In casu*, there is no evidence from the defendant as to why it failed to follow the law.

In any event, the court in the *PMA* case did not say all contracts entered into in contravention of the law are null and void *ab initio* and unenforceable. At page 366, the court expressed itself thus:

> "In the premises, I am of the view that the contract under consideration, in as much as it was concluded in breach of the prescribed requirements, is invalid and unenforceable for contravention of ss30 and 32 of the Act. <u>As a general rule,</u> it is trite that a contract which is null and void *ab initio* is illegal and therefore unenforceable: (my emphasis)
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> In *Gambiza* v *Taziva* 2008 (2) ZLR 107 (H) GUVAVA J (as she then was) held that the usual way of treating illegal agreements, where the parties were equally to blame is to let the loss lie where it falls. However, the courts have indiscretion, in suitable cases, to relax the *par delictum* rule in order to do justice between man and man and to prevent the injustice of one party being enriched at the expense of another."

The pertinent question becomes whether I should exercise my discretion to relax the *par delictum* rule in order to do justice between man and man. In view of the circumstances of the case, I find that this is a proper case to do so. I say so for the following reasons:

(1) The plaintiff innocently entered into a contract with defendant believing that all was well like in the previous agreements.

(2) Plaintiff proceeded to fully perform its part of the contract producing diagrams and other documents that were submitted, accepted and used by the defendant to obtain a development permit from the Bulawayo City Council.

(3) Plaintiff genuinely, on the totality of the evidence believed that since the amount was below $300,900,00 there was no need to go to tender.

(4) Plaintiff after completing the work submitted its bill quantified in terms of the law to the defendant for payment.

(5) Defendant being a procuring entity adopted a rather bizarre and cavalier approach inconsistent with any institution of higher learning employing highly qualified personnel.

(6) Defendant did not explain or justify why it failed to comply with the Procurement Act and Regulations. The explanation given by their legal practitioner, that defendant has always been signing agreements unlawfully is shocking. The question then becomes why would the defendant deliberately enter into illegal contracts only to turn around and argue that such contracts are void *ab initio* and unenforceable? In my view this raised the defendant's degree of turpitude.

(7) Defendant was clearly unjustly enriched as it openly accepted that it used the designs prepared by the plaintiff for its benefit.

(8) In my view, public policy demands that persons, natural or juristic who innocently provide goods or services to a parastatal or state enterprise after being misled by either corrupt, inefficient, incompetent or ignorant officials to enter into illegal contracts, be permitted to recover the value of the goods or services in order to prevent unjust enrichment.

(9) Instead of being permitted to hide behind their self created illegality, these institutions must be made to take action against their wayward employees in order to discourage such blatant violations of the Procurement Act and or Regulations.

(10) Surely, they should not be allowed to hide behind the mantra of "public funds" to enrich themselves at the expense of innocent business people or entities.

(11) The agreement itself is not illegal in the sense that what plaintiff did was not prohibited by the law. The illegality arises from the fact that the Procurement Act and Regulations were not complied with.

Issues 10 and 11 have no merit at all. The agreement is between plaintiff and defendant and nowhere in that agreement is it suggested that the Government of Zimbabwe is a party or is liable to pay the plaintiff for services rendered. It is neither here nor there who the defendant's donor was going to be. I take the view that defendant cannot be allowed to shirk liabilities on the basis that the Government through the Ministry of Sport or Higher Education did not place it into funds.

As regards costs, I am of the view that the defendant put plaintiff unnecessarily out of pocket. Plaintiff used its resources to perform its side of the bargain. Instead of paying defendant started rather belatedly to raise flimsy and technical objections leading to these proceedings. If defendant had adopted Mr Gaule's wisdom this litigation could have been avoided. Instead defendant opted to abandon dialogue and opposed the plaintiff's claim to the end. For these reasons, plaintiff is entitled to costs of suit on an attorney and client scale.

Accordingly, it is ordered that judgment be and is hereby entered against the defendant for:

(a) Payment of US$225 593,01 in respect of professional, mechanical and electrical engineering services rendered to defendant by plaintiff at defendant's special instance and request.
(b) Payment of interest at the prescribed rate of 5% from the date of service of the summons to date of full and final settlement.
(c) Costs of suit at attorney and client scale.

Coghlan & Welsh plaintiff's legal practitioners
Calderwood, Bryce Hendrie & Partners, defendant's legal practitioners