

CLOVGATE ELEVATORS PRIVATE LIMITED  
versus  
STATE PROCUREMENT BOARD  
and  
ZESA HOLDINGS PRIVATE LIMITED

HIGH COURT OF ZIMBABWE  
CHITAPI J  
HARARE, 3 November, 2016

**Urgent chamber application**

*L Uriri*, for the applicant  
*LT Muradzikwa*, for the 1<sup>st</sup> respondent  
*E Shumba*, for the 2<sup>nd</sup> respondent

CHITAPI J: The applicant filed an urgent application headed “Urgent Chamber Application for Stay of Tendering Proceedings for ZESA Holdings Private Limited under Tender Number ZH/HQ/09/2016”. The application was filed on 27 October 2016. When the application was referred to me to deal with on 31 October, 2016, I directed that it be set down for hearing in chambers on 3 November, 2016 at 4:00pm. The draft provisional order filed with the application read as follows:

“TERMS OF THE FINAL ORDER SOUGHT

That you show cause to this Honourable Court, why a final order should not be made in the following terms:

- (a) The calling of new tenders for the manufacture, supply, installation commissioning and maintenance of elevators by the 1<sup>st</sup> and 2<sup>nd</sup> respondents is hereby stalled.
- (b) The invitation of tender number ZH/HQ/09/16 is hereby stayed pending the appeal and application for review filed with the Administrative Court under case numbers P31/16 and P32/16 respectively.
- (c) First and second respondents to pay costs on an attorney and client scale.

INTERIM RELIEF GRANTED

That pending the final determination of applicant’s appeal and review in the Administrative Court under case numbers P31/16 and P32/16 respectively;

1. The 1<sup>st</sup> and 2<sup>nd</sup> respondents are hereby ordered to stay the tendering process under tender number ZH/HQ/09/2016 upon service of this order.

#### SERVICE OF ORDER

The applicants through their legal practitioners of record are hereby granted leave to serve a copy of this order on the respondent's legal practitioners."

#### BACKGROUND

The brief background to the application was as follows:

- (1) Following procurement procedures by the second respondent, it concluded a contract with the applicant for the supply, delivery and installation of elevators at its head office. The second respondent was the principal and the applicant the supplier under the contract. The contract was referenced ZE/HQ01/2013 and the parties signed it on 30<sup>th</sup> September, 2013. The contract involved a substantial amount of money (\$930 165-54) and was executed after the first respondent had given its nod in awarding the tender to the applicant.
- (2) For reasons which are not necessary to be adjudged on in this application, the second respondent purported to cancel the contract aforesaid. The second respondent then invited fresh tenders under tender number ZH/HQ/09/2016 for the works previously contracted to the applicant. The closing date for the fresh tender was 25 October, 2016.
- (3) The applicant did not accept the purported cancellation of contract No. ZE/HQ 012/2013. It thus challenged the fresh tender NO. ZH/HQ/09/2016. The applicant filed an appeal in the Administrative Court on 27 October, 2016. The appeal was filed under reference P31/2016 and was directed against the first and second respondent's decision to flight tender NO. ZH/HQ/09/2016 in the face of the first tender ZE/HQ01/2013 which had allegedly not been lawfully terminated. The appeal is pending before the Administrative Court.
- (4) On the same date that it filed its appeal in the Administrative Court, the applicant filed before the same court under ref P 32/16, an application for review directed against the first and second respondents. The application is pending disposal by the administrative court.

- (5) On 2 November, 2016 the second respondent filed a 51 paged notice of opposition and accompanying documents. The urgent application itself comprises 63 pages. I was only able to peruse the notice of opposition a few minutes before the hearing which I had scheduled for hearing as I have indicated at 4.00 pm. The timing of 4.00 pm was chosen because that would be the time available after presiding an ongoing criminal trial, the morning having been devoted to pre-trial conferences which commenced at 8.30 am until 10.00 am when the criminal trial court commences. So much about a judge's working schedule, adverted to herein for information and not as a complaint about the pressures and stresses which go with the office of judge in the High Court.
- (6) The bulky notice of opposition first dealt with the urgency of the application, it being the second respondent's position that the matter was not urgent. The opposition also dealt with the merits of the application, particularly that the applicant had not demonstrated on its papers that it was entitled to the interim relief of the interdict which it was seeking.

So much about the summarised background facts.

Point in Limine

Before I heard the parties in their submissions, I asked counsel to address me on whether the application was properly before the High Court. I asked counsel whether they had acquainted themselves with the provisions of the Procurement Act, [*Chapter 22:14*] and in particular ss 43 and 44 thereof. Apparently counsel had not considered the aforesaid sections. In the interests of time and convenience, I availed a copy of the Procurement Act to counsel and adjourned the hearing for 15 minutes to allow for discussion amongst the three counsel on the purport of the aforesaid statutory provisions and for counsel to then address me on whether the application was properly before me. Counsel gratefully agreed to discuss the law on the matter and to reflect on their positions. The adjournment was not in vain. When I recommenced the hearing after about 30 mins, counsel advised that they had struck common ground. They accepted that the Procurement Act provided for the effect of an appeal on matters involving procurement procedures and also for the forum to petition for further relief. I wish to record my appreciation to counsel for finding each other on a matter of law

and note as I indicated to them that the law cannot be found reposed in one legal brain. Counsel agreed by consent that the application be withdrawn with each party to bear its own costs. It would not have been proper to order either of the parties to shoulder the other's costs because the matter was disposed of on a point *in limine* raised by the judge (myself) and not by the parties. None of the parties in the circumstances would have been justified to individually benefit or take credit on account of the wisdom or point of law taken by the judge.

#### Disposition

Having endorsed the withdrawal of the application as aforesaid, a thought crossed my mind that it would benefit the administration of justice to compose a short judgment which would act as a reminder on the legal issue which arose.

It is important that parties intending to appeal or who have appealed against an administrative act by an administrative board created by statute acquaint themselves with the provisions of the various legislations under which the administrative bodies will have acted. More often than not, the legislations under which an administrative body will have acted will have provision for appeal against the decisions of the particular body. Decisions of administrative bodies are of course subject to review by this court as a matter of law or by a specially created body under the instruments governing the operations of that body. It is not the issue of review which I am concerned with but appeal. With appeals, enactments which allow for appeal will specify the court to which an appeal will lie including matters which may not be appealed against and the consequences or effect of the appeal on the decision appealed against pending the appeal determination. A good and very common example which every legal practitioner comes across is the Labour Act [*Chapter 28:01*]. It provides for appeals against decisions of administrative, quasi-judicial and judicial bodies created by it, where such appeals will lie and the effect of the appeal on the decision appealed against, that is, whether the decision is or is not suspended pending determination of the appeal.

*In casu* the Procurement Act defines procurement entities covered by the Act and also creates the State Procurement Board. It was therefore incumbent on the parties to have acquainted themselves with the provisions of the legislations which govern procurement and those which create the first and second respondents. It is in these enactments that the powers of the first and second respondents are set out as well as the process of challenging the exercise of the powers as given in the enactments.

*In casu*, had the parties acquainted themselves with the Procurement Act, and in particular sections 43 and 44, they would not have brought this application before this court. The aforesaid sections provide as follows:

**“43 Appeal to Administrative Court**

- (1) Subject to this section, any person who is aggrieved by a decision of the State Procurement Board or any procuring entity-
  - (a) In any procurement proceedings; or
  - (b) In terms of section *forty-one*;;May appeal against that decision to the Administrative Court.
- (2) An appeal in terms of subsection (1) shall be noted by lodging a written notice of appeal with the Registrar of the Administrative Court and the principal officer of the State Procurement Board within twenty days from the date on which the appellant was notified of the decision that is the subject of the appeal.
- (3) In an appeal in terms of subsection (1), the Administrative Court may confirm, vary or set aside the decision appealed against or give such other decision as in its opinion the State Procurement Board ought to have given, and may make such order as to costs as it thinks fit.
- (4) The Administrative Court Act [*Chapter 7:01*] shall apply in relation to the composition, procured and powers of the Administrative Court in an appeal in terms of subsection (1).

**44 Suspension of procurement proceedings pending appeal**

- (1) Subject to this section, where an appeal has been noted in terms of section *forty three*-
  - (a) the procurement proceedings concerned shall be suspended for a period of seven days from the date on which the appeal was noted; and
  - (b) the operation of the procurement contract concerned shall be suspended for seven days from the date on which the appeal was noted, where the contract period.
- (2) The noting of an appeal in terms of section *forty –three* shall not have effect referred to in subsection (1) if-
  - (a) The Administrative Court considers that the appeal is frivolous or vexatious or is noted solely to delay the procurement proceedings or the operation of the procurement contract concerned, and directs that the noting of the appeal shall not suspend the proceedings or the operation of the contract, as the case may be; or
  - (b) The procuring entity concerned certifies in writing that urgent public interests considerations require the procurement to proceed.
- (3) A certificate in terms of paragraph (b) of subsection (2) shall be included in the record of the procurement proceedings concerned kept in terms of section thirty-five.
- (4) The period during which procurement proceedings or the operation of a procurement contract are suspended in terms of subsection (1) may be extended by a president of the Administrative Court.”

*In casu*, the applicant did not need to make an application to suspend the procurement proceedings pending. Once the applicant filed the appeal, obviously timeously, the effect of the noting of the appeal was to automatically suspend the procurement proceedings in issue. It was on the contrary the procuring entity or the second respondent in this application who would, if it intended that the automatic suspension of the procurement proceedings should be set aside, apply to the Administrative Court for an order of execution (so to speak) pending appeal. The grounds for such application are set out in s 44 of the Procurement Act.

This court cannot usurp the legislated function of the Administrative Court in terms of the Procurement Act as detailed above. This application was therefore bad in law and as indicated counsel were so agreed and hence its withdrawal.

*Chivase & Partners*, applicant's legal practitioners  
*Attorney General's Office*, 1<sup>st</sup> respondent's legal practitioners  
*Shumba & Partners*, 2<sup>nd</sup> respondent's legal practitioners