

NOKEL SECURITY (PVT) LTD  
versus  
UNITED BULAWAYO HOSPITALS  
and  
NONHLANHLA VERONICA NDLOVU

HIGH COURT OF ZIMBABWE  
TAGU J  
HARARE, 1 February & 22 March 2017

### **OPPOSED APPLICATION**

*T Thondhlanga*, for the applicant  
*C Siquza*, for the 2<sup>nd</sup> respondent

TAGU J: This is an application for contempt of court against the second respondent. The application is based upon the following background of facts: Sometime in 2014 a tender was flouted for the provision of security services to United Bulawayo Hospitals. The applicant participated in the tender proceedings but it lost the tender. Aggrieved by the outcome of the tender proceedings applicant noted an appeal in the Administrative Court where it sought an order directing that the tender be awarded to it. The Administrative Court ruled in favour of the applicant. However, the judgment of the Administrative Court could not be enforced at the time as it was suspended by an appeal that was filed to the Supreme Court by one of the interested parties. That appeal was subsequently withdrawn on 12 May 2016. The applicant then advised the second respondent that the appeal in the Supreme Court had been withdrawn and as such a procurement contract should be entered into between applicant and United Bulawayo Hospitals. The second respondent then verbally advised the applicant that she could not enter into the contract without an instruction to do so from the State Procurement Board. As a result the applicant approached the State Procurement Board which indicated that second respondent was responsible for the conclusion of the contract. However, the second respondent, being an employee of the first respondent the United Bulawayo Hospitals and in her capacity as the Chief Executive Officer is required at law to conclude contracts following procurement proceedings, is deliberately disregarding an order of the Administrative Court which is extant. The applicant now wants an order for contempt

of court to be granted against the second respondent with costs at the scale of Attorney and Client. It further, wants an order directing the second respondent to proceed to conclude a procurement contract between United Bulawayo Hospitals and the applicant in respect of Tender Number UBH/SUB-SEC/01/2014 within seven days from the date of service of this order on her, failure of which the second respondent should be committed to prison for a period of ninety (90) days.

The second respondent opposed the application on the basis that the tender advertised by the respondents was for the provision of security services from the period 1<sup>st</sup> December 2014 to 30<sup>th</sup> November 2015. Hence the applicant's cause of action has since been overtaken by events that took place between the filing and withdrawal of the appeal in May 2016. The respondents no longer require the services of the applicant.

What is clear from the papers is that the respondents floated a tender for the provision of security services. The State Procurement Board awarded the tender to Cobra Security (Pvt) Ltd. The applicant challenged the award of the tender to Cobra Security (Pvt) Ltd in the Administrative Court and it won the appeal where the Administrative Court awarded the tender to applicant. Cobra Security (Pvt) Ltd appealed to the Supreme Court against the decision of the Administrative Court. In September 2015 applicant and first respondent entered into an interim arrangement to the effect that pending the determination of the appeal filed by Cobra Security (Pvt) Ltd in the Supreme Court, first respondent would enter into one month contracts with applicant which had an option for renewal at the instance of first respondent. At the end of November 2015 the first respondent decided not to renew the contracts. In June 2016 Cobra Security (Pvt) Ltd withdrew its appeal in the Supreme Court and applicant approached first respondent so that a procurement contract could be entered into as directed by the Administrative Court. The first respondent then refused to enter into the procurement contract on the basis that the tender was for the period November 2014 to November 2015 and also that it was not in a good financial position to cater for external security guards. This prompted this application.

In the case of *Zellco Cellular (Pvt) Ltd v Net-One Cellular (Pvt) Ltd* 2012 (1) ZLR 164 at 165 it was observed that –

“A court will not entertain an application for committal for contempt unless wilful or reckless disregard for the court order has been proved. Before a person can be found guilty of contempt, his disobedience of the order must not be only wilful but also a *mala fide*. In contempt proceedings, once a failure to comply with a court order has been established, wilfulness will normally be inferred and the onus is on the person who

failed to comply with the order to rebut the inference of wilfulness on a balance of probabilities.”

*In casu* the respondents did not deliberately fail to comply with the Administrative Court order. After the applicant won its appeal the Administrative Court order could not be implemented because Cobra Security (Pvt) Ltd which had initially won the tender appealed to the Supreme Court. This was not the problem of the respondents. I agree with the respondents that the order of the Administrative Court was then overtaken by events. The other event was that the respondent and the applicant then entered into a contract agreement which was renewable at the end of every month. Secondly, the period within which the security services were required also elapsed and the respondent no longer required such services due to financial constraints. In my view the failure to abide by the court order was not wilful. It was also not actuated by malice. The respondents have managed to rebut the inference of wilfulness on a balance of probabilities. In the result the application will fail.

In the result it is ordered that-

1. The application is dismissed.
2. Each party to meet its own costs.

*Thondhlanga and Associates*, applicant’s legal practitioners  
*Civil Division of the Attorney General*, respondents’ legal practitioners