

ZEMQOS INCORPORATED (PVT) LTD  
versus  
PROCUREMENT REGULATORY AUTHORITY OF ZIMBABWE  
and  
MINISTRY OF LOCAL GOVERNMENT, PUBLIC WORKS  
AND NATIONAL HOUSING  
and  
UNIVERN ENTERPRISES (PRIVATE) LIMITED  
t/a SOUTHERN REGION TRADING CO.  
and  
MUNICIPALITY OF CHEGUTU

HIGH COURT OF ZIMBABWE  
MUSHORE J  
HARARE, 18 March 2019 & 2 October 2019

*S.T Mutema*, for the applicant  
*M Makuvire*, for the 1<sup>st</sup> respondent

### **Opposed Motion**

MUSHORE J: The applicant is a private limited company, whose core business is the “designing developing supply and installation” of Automated Parking and Enforcement Systems for Municipalities and City Councils. On 8 February 2017, the applicant applied for a tender to provide Traffic and Parking system for various Municipalities around the country, but its tender was rejected by the first respondent’s predecessor. The first respondent is a statutory body which oversees the awarding of government tenders, *inter alia* and was previously known as the State Procurement Board (SPB). The second respondent is the Ministry responsible for the administration of local authorities. The third respondent is a private limited company whose core business is parking management. The third respondent successfully competed with the applicant for the tender in question, which tender forms the subject matter of this application. The fourth respondent is the Municipality of Gweru and a potential beneficiary of the automated parking and enforcement traffic system.

This is an application for a *declaratur* in which applicant prays that the directive which granted the third respondent a tender for Traffic and Parking metered system, be declared null and void. The draft order reads:

IT IS DECLARED THAT:

- (a) The entire resolution and directive of the 1<sup>st</sup> respondent's predecessor (State Procurement Board) to grant a "No Objection" to the request for a blanket approval for ZIMTIS project, as contained in PBR 0859 of 8<sup>th</sup> September 2016 be and is hereby declared null and void.
- (b) The directive of the 1<sup>st</sup> Respondent's predecessor (State Procurement Board) and second respondent to 4<sup>th</sup> respondent, other Municipalities and City Council, to engage the Department of Modernisation under the Office of the President and Cabinet (OPC), be and is hereby declared null and void.
- (c) Within 7 days if the date of this order, 1<sup>st</sup> and 2<sup>nd</sup> Respondents jointly be and are hereby ordered to communicate in writing with all Municipalities and Councils that the directive contained in PBR 0859 of 8 September 2016, granting approval of direct engagement of 3<sup>rd</sup> Respondent has been declared null and void, and such communication shall be copied and delivered to the Applicant.
- (d) Costs"

At the hearing of this matter on my opposed roll, the respondents took three points *in limine*. The first being that the papers were not in order because the applicant should have applied for a review and thus placed the papers before the court in the correct format. Secondly it was the respondents' contention that the application cannot be properly determined because the OPC was not joined to these proceedings. Thirdly that of *locus standi* in that until such time that the applicant can show that it has a right to be awarded the tender in question by the SPB, the applicant remains without standing to apply for a declaration of rights in terms of s 14 of the High Court Act [*Chapter 7:06*].

Respondents presented submissions on the effects of the Procurement Regulations and their applicability. However, I believe those additional points on the regulations go into the merits of the case and thus they are meant to be argued in the main and not as points *in limine*. I will now deal with the procedural points *in limine* taken by the respondents which

1. That the matter is a disguised application review and because the review format has not been observed by the applicant, the matter is thus not properly before the court.

I think it fair to state at the outset that in order for me to determine whether the decision to award the third respondent the tender, instead of awarding it to the applicant, I would have to evaluate the determination by the first respondent's predecessor, both in its procedures and in its reasoning. It appears that the first respondent's predecessor did not act alone in coming to its decision and that the OPC was also involved in reaching the decision to award the third

respondent with the tender. On 13 September 2016, the OPC wrote a letter to the third respondent, in which it stated the following:

Page 52, record, letter dated 13 September 2016:

“The State Procurement Board having reviewed the Accounting Officer’s submission in line with SI 126 of 2015 has, through PBR 0859 RESOLVED THAT:  
There is “No objection to the Accounting Officer’s request for Direct Engagement with Univern Enterprises PL in the Zimtis project, as follows.”

On p 33, Annexure ‘B’ of the papers the Board resolution which was to award the tender to the third respondent demonstrates that the input from the OPC was critical in the determination of this tender to the third respondent.

“Board Resolution

Accordingly, the Board, having reviewed the Accounting Officer’s submission in line with SI 126 of 2015, resolved that:

- The matter be considered en block with an omnibus proposal from the OPC and Cabinet for the consolidation of all ZIMTIS projects which is pending consideration by the Board”

It is evident from these documents that there was a chain of decision making which resulted in the award to the third respondent. In determining the unfairness or illegalities to the decision, the Accounting Officer’s deliberations and that of the OPC are necessary to inquire into. Applicant did not cite either the Accounting Officer or the OPC as parties to the matter making it impossible to determine whether the process was fair and lawful. The non-suiting of those parties’ presents an encumbrance to any determination this court might make in the propriety of the decision to award the second respondent the tender to the extent that the enquiry would be rendered inconclusive. Applicant’s failure to join these parties goes to the root of the application which now cannot be resolved.

REVIEW OR COURT APPLICATION?

The application is headed “*Court Application for a Declaratory Order*” but it actual fact this is an application for review. Applicant is complaining about the proceedings leading to the directive which was issued by the 1<sup>st</sup> respondent as being unprocedural and unfair. The present application should have been an application for a review of the proceedings complained about. Order 33 r 256 which deals with the review criteria reads as follows:

## REVIEWS

### “256. Review proceedings by notice of motion

Save where any law otherwise provides, any proceedings to bring under review the decision or proceedings of any inferior court or of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions, shall be by way of court application directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairman of the court, tribunal or board or to the officer, as the case may be, and to all other parties affected.”

The application placed before me does not meet the laid-out criteria for filing a review application. The format is wrong in that it has been presented as a court application. This rule is peremptory. Thus, the papers are not in order.

See: *Mugwebe v Seed Co Ltd & Anor* 2000 (1) ZLR 93 (SC)

SANDURA JA referred to the well-established case of *MacFoy v United Africa Ltd* [1961] 3 All ER 1169 (PC) at p 11721 and Lord Denning’s deliberations as to when the court can determine a declaration of rights without the necessity of conducting a review. The court held that where the determination of a court is that the action of the tribunal which is complained of, has rendered proceedings *null ab initio*, then there is nothing to review because the proceedings become obsolete. By being rendered obsolete then the court may proceed to make a declaration of rights. However, where the relief sought is to determine whether or not those proceedings complained about are voidable by virtue of being unprocedural or unfair, then a review of those proceedings is necessary to be done to determine the correctness of such a determination. The present matter resides in the latter category which therefore suggests that the proceedings of the tribunal must be looked into to determine their correctness in so far as the issuing of the NO directive issued by the first respondent’s predecessor by way of review proceedings.

I find it necessary to make an observation that it may well be that because the applicant was out of time for a review application that it may have chosen to approach the court in terms of s 14 of the High Court Act. Applicant has placed itself beyond the reach of remedy due to its papers having been filed out of time *per* r 259 which requires there to be a filing within 8 weeks of the determination. But I stress that this is a speculative observation I am making to try to make sense of the applicant’s mistake in failing to proceed by way of review. Rule 259 reads:

### “259. Time within which proceedings to be instituted

Any proceedings by way of review shall be instituted within eight weeks of the termination of the suit, action or proceeding in which the irregularity or illegality complained of is alleged to have occurred: Provided that the court may for good cause shown extend the time.”

Applicant was aware of the decision in or about August 2017. Applicant’s a failure to place proceedings for a review in the proper format and in time is fatal to the application. Applicant has also back-footed *{colloq.}* itself by failing to file for condonation for the filings time to be extended. Accordingly, there is no application before the court.

The respondents have established a basis for my rendering the application before me as being under the wrong procedure; and also that other interested parties whose reasons are key to this court’s determination of the present matter have been excluded as parties. In the result the points *in limine* raised are hereby upheld.

Accordingly, it is my ruling that:

“The application is dismissed with costs”

*Gunje Legal Practice*, applicant’s legal practitioners  
*Civil Division of the Attorney General’s Office*, 1<sup>st</sup> respondent’s legal practitioners  
*Manokore Attorneys*, 3<sup>rd</sup> respondent’s legal practitioners