

**ONE INFORMATION SYSTEMS (PVT) LTD**

**Versus**

**STATE PROCUREMENT BOARD**

**And**

**NATIONAL RAILWAYS OF ZIMBABWE**

IN THE HIGH COURT OF BULAWAYO

CHEDA J

8 FEBRUARY 2006 AND 15 JUNE 2006

*Mr G. Nyoni* for the applicant

*Mr J James* for the respondents

**Urgent Application**

**CHEDA J:** This is an application for an interim order interdicting and prohibiting first and second respondents from re-tendering for the supply of mid-range servers, orders of which, were made by second respondent to applicant. Alternatively, that, in the event that the respondents have invited bids for the servers then the respondents be interdicted and prohibited from adjudicating and making any award in respect of the bids so received. The following order was prayed for:-

**Terms of final order sought**

**It is ordered that:-**

“That you show cause to this Honourable Court why a final order should not be

made in the following terms:-

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- 1) There is an existing and binding contract between applicant and the second respondent in terms of which applicant is to supply to the second respondent the goods ordered through second respondent's Purchase Orders 134642 and 134747.
- 2) The purported cancellation by the respondents of tender enquiring 6599:4573 and purchase orders 134642 and 134747 be and is hereby declared to be null and void is hereby set aside.
- 3) Respondents jointly and severally pay the costs of this application on the scale as between legal practitioner and client.

#### **INTERIM RELIEF GRANTED**

- 1) Pending final determination of this application the 1<sup>st</sup> and 2<sup>nd</sup> respondents be and hereby interdicted and prohibited from re-tendering for the supply of mid-range servers orders for which were made by 2<sup>nd</sup> respondent to applicant under purchase orders 134642 and 134747.

Alternatively and if at the time this order is served on the respondents the respondents have invited bids for the servers then the respondents are interdicted and prohibited from adjudicating and making any award in respect of the bids so received."

#### **SERVICE OF THE PROVISIONAL ORDER**

That leave be and is hereby granted to serve the urgent chamber application and Provisional order by serving copies on the respondents through the deputy sheriff or applicant's attorneys or their clerk.

Applicant is a registered company in terms of the Laws of Zimbabwe and is duly represented by its Managing Director, Winston Mutasa.

First respondent is the State Procurement Board an agency established under the Procurement Act [Chapter 22:14] while second respondent is the National Railways of

Zimbabwe, a parastatal established by the Railways Act [Chapter 13:09.]

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It is common cause that some time in June 2005, 2<sup>nd</sup> respondent floated a bid for the supply of among other things mid-range data servers. By letter of the 9<sup>th</sup> day of September 2005, applicant was advised by 1<sup>st</sup> respondent that its bid was successful.

While applicant was expecting payment from 2<sup>nd</sup> respondent in order to facilitate delivery of the said mid-range data servers, they received a letter from 2<sup>nd</sup> respondent requesting them to convert the purchase price and other charges from foreign currency to local currency as 2<sup>nd</sup> respondent had failed to secure foreign currency. They further requested applicant to assume the responsibility of monitoring customs shipping, clearance and delivery of the mid range servers to 2<sup>nd</sup> respondent. In the previous agreement this was the responsibility of the 2<sup>nd</sup> respondent.

On receipt of this communication, applicant converted the United State dollar at the rate of (USA \$1) One United States Dollar to (ZD\$105) One hundred and five Zimbabwe dollars, and accordingly advised 2<sup>nd</sup> respondent by their letter of the 15<sup>th</sup> day of December 2005 of this change. This was on the anticipation that it would be the rate at the time of payment by 2<sup>nd</sup> respondent. In addition, Applicant submitted a new proforma invoice with the following new terms:-

- 1) That the purchase price be based on the ruling exchange rate.
- 2) That there be 10% handling fee on the basis that it had an additional burden of :-
  - a) foreign currency

- b) customs clearance of the mid-range servers, and;
- c) the delivery of the servers to 2<sup>nd</sup> respondent.

On the 30 December 2005, applicant was advised by 1<sup>st</sup> respondent that due to applicant's failure to raise foreign currency, the tender awarded to them had been cancelled. It is this purported cancellation which has resulted in this application.

It is applicant's contention that respondents have no right to cancel the contract as applicant has honoured its part of the contract. First respondent despite service has not opposed this application.

On the day of hearing, Mr Nyoni for the applicant submitted that he would like to have the matter postponed in order to allow applicant to file an answering affidavit as 2<sup>nd</sup> respondent was then raising issues of freight, rate of interest and handling fees. He went further and argued that applicant already had the said mid-range servers ready for delivery.

Mr James opposed this application on the basis that applicant had proceeded by way of an urgent application, which if it had been granted would have prejudiced 2<sup>nd</sup> respondent on applicant's mere say-so. It is essential that applicants should make full disclosures of all material facts in the support of their cases, see *Graspeak Investments Private Limited v Delta Corporation Private Limited* and another 2001 (2) ZLR 551 (H) at 555 D where Ndou J stated:

“The courts should, in my view, discourage urgent applications, whether ex parte or not, which are characterised by material non-disclosures, mala fides, or dishonesty.”

It is trite, that in an urgent application, the judge or court is confined to, at that stage to what is in the application. If he believes the contents, he will grant the

Provisional Order. It is therefore, incumbent upon the applicant to ensure that he places before the court all the salient facts necessary for the determination of his application.

He can not be heard to seek to postpone the matter in order to plug in loopholes which under normal circumstances he ought to have foreseen.

Applicant's interim order is similar to the final order. It has been pointed out by these Courts, that this approach is undesirable (see Kuvarenga v Registrar General and another 1998 (1) 188 at 193 A-C, where Chatikobo J stated:

The requirements for a permanent interdict which Applicant has failed to establish are:-

- 1) that a clear right has been infringed.
- 2) That the existence of a reasonable apprehension that its rights will be violated, or such rights have been violated.
- 3) That it has no other remedy.

The requirements for a permanent interdict were laid down in *Setlego v Setlego* 1914 AD 221 at 227; *Econet Wireless Holdings v Ministry of Information* 2001 (1) ZLR 373 at 374 B and *Charuma Blasting and Earthmoving v Njanji* 2000 (1) ZLR 85 at 89.

Second respondent's view is that applicant's new proposals contained in their letter of the 15<sup>th</sup> December 2005 to 2<sup>nd</sup> respondent amounted to a counter-offer since it now contained new proposals. In introducing these new proposals, they argue, applicant should have foreseen that they will be disputed since they were now a complete departure from those which were contained in the previous agreement.

There are two issues which need to be determined in this matter firstly, whether the previous agreement is still valid and therefore enforceable against 2<sup>nd</sup> respondent. In my view, it is not as it was cancelled by applicant's counter-offer. A counter-offer

cancels the previous order and it cancels it entirely. Therefore applicant cannot succeed.

Secondly, applicant has failed to establish the requirements of an interdict and for that reason to it should fail.

In light of the above reasons the application is dismissed with costs.

*Majoko and Majoko* applicant's legal practitioners

*James, Moyo-Majwabu and Nyoni* second respondent's legal practitioners