UPSET INVESTMENTS (PRIVATE) LIMITED
versus
CHITUNGWIZA MUNICIPALITY

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 2 November 2016 and 15 February 2017

Civil Trial

T Zhuwarara, for the plaintiff
Ms *R.R Mutindindi,* for the defendant

MUREMBA J: The plaintiff issued summons claiming the following.

"(i) payment of the sum of US$119 300-00 being the remaining balance of the agreed purchase price for one x 20 Tonne Hyundai Excavator, sold and delivered by the plaintiff to the defendant, at its specific instance and request.
(ii) Interest at the prescribed rate calculated from the date of delivery being 19th of June 2014 to the date of full payment.
(iii) Costs of suit on a legal practitioner and client scale."

In its declaration the plaintiff averred the following. In 2011 the parties entered into a procurement contract in which the defendant ordered one by 20 tonne Hydraulic Excavator from the plaintiff. The agreed purchase price was US$209 300-00 inclusive of VAT. The defendant was obliged to pay 50% deposit towards the purchase price. The remaining balance was payable upon delivery of the excavator. In partial fulfilment of the agreement, the defendant paid in instalments the sum of US$90 000-00 as part deposit to the agreed purchase price. The plaintiff accordingly delivered the excavator on 19 June 2014 which delivery was accepted. The excavator was accepted in good working order by the defendant at its premises. The defendant has, despite demand, refused or neglected to pay the outstanding balance of US$119 300-00.

In its plea, the defendant raised a point *in limine* stating that the matter was improperly before the court. However, it later on abandoned this point in *limine* before the close of pleadings. So I shall not deal with the point in *limine* in this judgment. To the merits the defendant averred that the plaintiff delivered a defunct Hyundai Excavator contrary to the

undertaking that it made that it would deliver a new excavator. It had to incur unnecessary costs in having the excavator checked by an independent company. The defendant averred that it will only effect payment of the balance after delivery of a brand new and properly functioning machinery.

The defendant also made a counter claim. It averred the following. On 16 May 2014 it advertised a Tender Notice in the Herald newspaper in terms of s 211 of the Urban Councils Act [*Chapter 29:15*] . The notice was inviting tenders for the supply of brand new machinery, *viz*:

(i) One Jet machine Chigu Velocity clearing machine

(ii) One Tracked Excavator 30 tonne

(iii) One Front End Loader

On 18 July 2011 the defendant in reconvention won the tender to supply it with a 20 tonne Tracked Excavator and a 3 tonne Front End loader. It was a term of the agreement that:

(a) the defendant in reconvention would deliver a brand new excavator and a brand new Front End loader.

(b) The plaintiff in reconvention would pay the deposit of the agreed purchase price before delivery of the machinery.

(c) The plaintiff in reconvention would pay the outstanding purchase price upon delivery of the machine.

The plaintiff in reconvention paid the initial deposit to the defendant in reconvention on 29 January 2014 in the sum of US$140 000-00. On 19 June 2014 the defendant in reconvention delivered a dysfunctional excavator in breach of the agreement terms. It has refused and failed to deliver a brand new machinery. The plaintiff in reconvention has been prejudiced by the breach. The plaintiff in reconvention is entitled to specific performance of the agreed terms of the contract. Alternatively it is entitled to restitution of US$140 000-00 being the deposit paid as part of the purchase price and damages for breach of contract. Consequently it claims for:

> "(a) An order compelling the defendant in reconvention to deliver brand new excavator and Frond End loader to the plaintiff in reconvention in terms of the agreement.
>
> (b) Alternatively, an order compelling defendant in reconvention to pay the sum of US$140 000-00 being the deposit paid as part of the purchase price.

(c) An order compelling defendant in reconvention to pay US$30 000-00 as damages for breach of contract.

(d) An order compelling defendant in reconvention to pay US$20-00 per day from date of summons to date of collection being storage fees for the excavator.

(e) An order compelling defendant in reconvention to pay interest at the rate of 5% per annum from the date of demand to date of payment in full.

(f) Costs of suit on a legal practitioner client scale."

The defendant in reconvention pleaded as follows to the counter claim. When the plaintiff in reconvention advertised its tender notice the tender was not won by the deadline. The tender notice was then revised and extended. It (the defendant in reconvention) submitted its bid during the extension. According to the specifications of the re-advertised tender notice, it was not a requirement that the excavator be brand new. Even its tonnage had also been reduced. The tender that was won by the defendant in reconvention was not as per the initially advertised tender notice as evidenced by the discrepancy in tonnage of the excavator. The defendant in reconvention averred that at all material times the plaintiff in reconvention was fully aware that the excavator to be supplied would be pre-owned. When the excavator was delivered it was inspected by all responsible authorities and then certified to be in good working condition. The parties did not agree that the machinery to be supplied would be brand new. The defendant in reconvention prayed for the dismissal of the counter claim with costs on a higher scale.

In its replication the plaintiff in reconvention averred the following. The excavator was supposed to be new. It disputes that the tender that was won by the defendant in reconvention was not the one that was initially advertised. The defendant in reconvention was paid the deposit for both the excavator and Front End loader after a meeting was subsequently held. It disputes that the excavator that was delivered was in good working condition.

At the pre-trial conference the parties agreed that the issues for trial were:

1. (a) whether or not plaintiff should be compelled to deliver a brand new excavator or alternatively
2. (b) whether or not the defendant is entitled to a refund of the deposit paid.
3. Whether or not the plaintiff is entitled to payment of the outstanding amount.

To prove its case the plaintiff led evidence from one witness, Darlington Chirara who is its Managing Director since 2007. His evidence was as follows. In June 2011 he went to Chitungwiza Municipality head office chasing after his payment. At the Registry section

noticeboard there was a tender notice asking for a refurbished 20 tonne Crawling Excavator and a 3 tonne Front End loader. Tender documents were going for US$ 5000-00. He went back the next day and bought the tender documents which included a tender form which was supposed to be filled in duplicate and attached to the quotation. He filled in the tender form for the excavator and attached it to his quotation and had them stamped by the defendant's registry section on 9 June 2011 on receipt. The tender document together with the tender form and the quotation were produced as exh(s) 4 and 5 – (p73-75 & p 76-77 of the record) respectively. The tender reference number for the supply of the excavator is CH.05/11.

Darlington Chirara said that on the tender form he filled in the condition of the machinery as a 200g Model, a Hyundai Model which had already done 2972 hours as it was a second hand. Its undercarriage life percentage was 76% meaning that 24% was already warn out or gone because of use. He said that in exh 5 which is the quotation he quoted a 20 tonne Excavator valued at $182 000-00. He said that on 7 July 2011 he received a letter from the defendant saying that the plaintiff had won the tender to supply a refurbished 20 tonne Excavator and a 3 tonne Front End Loader. The letter was produced by consent as exh 6 in the supplementary bundle. The letter was written on 6 July 2011 to the directors of the plaintiff by G. Tanyanyiwa who was the then Town Clerk. It is on the defendant's letter head. It reads:

> "REF: Supply of refurbished 20 tonne Crawling Excavator and 3 tonne Front Loader
>
> Reference is made to the above.
>
> You have been awarded the Tender to supply the Municipality with the above equipment.
>
> You are required to supply the equipment within 30 days from receipt of deposit which is going to be paid within the next 2 weeks.
>
> May you please treat this order with urgency since there are disease outbreaks and we would like to use the equipment to arrest the spread of diseases."

Darlington Chirara said that in August 2011 the plaintiff received a purchase order and a transfer copy of the RTGs from Metropolitan Bank dated 24 August 2011 showing that the defendant had paid the 50% deposit as per the plaintiff's request in the quotation. The purchase order was produced as exh 7 at p 78. It is dated 18 July 2011, but it was signed on 1 August 2011. It is for the purchase of a tracked excavator 20 tonne for US$182 000-00. The RTGs – exh 8 at p 80 shows that it is dated 24 August 2011 for US$91 000-00 for the benefit

of the plaintiff by the defendant. However, on top of the date stamp it is crossed and written "not processed".

Darlington Chirara said that to the plaintiff's surprise the money never came through. It was only paid after the plaintiff had issued summons. The defendant finished paying the deposit for both the excavator and the Front Loader in February 2014. $90 000-00 was paid for the excavator and $50 000 was paid for the front end loader. He then delivered a 20 tonne excavator on 19 June 2014. On delivering the machinery he saw the Director of Works, Mr Gwanzura who called the now current Town Clerk Mr George Mukunde who in turn called 7 councillors who were there. They came and inspected it and then instructed the Chief Internal Auditor Mr Chipunza to accompany him to the workshop with the machine. At the workshop they saw Mr Musiwa and the Worksop Foreman who inspected the machine and tested it for almost 2 hours. After that they signed the delivery note which was produced by consent as exh 9 at p 103. The delivery note shows that it was signed by one Innocent on behalf of the defendant and it is states that the machinery was received in good working order. Darlington Chirara said that the machinery had tips and a cigarette lighter. The fuel gauge and the wipers were working. On the tender form he had stated that the machinery which was going to be supplied was a 7 series model i.e. 210 LC-7.50. He said that the defendant knew from the onset about the type of machinery that was going to be supplied. He said the defendant even had the Ministry of Local Government, Public Works and National Housing write a letter to ZIMRA indicating that it (the defendant) had been granted a duty free certificate to facilitate the delivery of a Robex 210 LC-7H Hyundai Excavator valued at US$182 000-00. It was signed on 14 April 2014. The letter was produced by consent as exh 12 at p 140.

Darlington Chirara said that after delivering the excavator on 19 June 2014, he was then furnished with a report dated 11 July 2014 from the defendant listing the defects it said it found on the excavator. He said that he was disputing all of them. He said that he was not even aware of the qualifications of the person who did this report, but he suspected that this person was an interested party in the same business as the plaintiff because after issuing the report he went on to issue a quotation to supply the same machinery to the defendant. He said that when he delivered the excavator it was in good working order. When the inspection was done and the report was compiled 3 weeks later no one from the plaintiff's company was present. The plaintiff was not made aware of the inspection. He said that there was need for him to train the defendant's employees on how to operate the machinery. He said that in his quotation he had indicated that he would provide Basic Operator Orientation under the

heading "Handover". He said that he has not yet trained them because he has not been paid the outstanding amount.

During cross examination the witness said that he did not respond to the Tender Notice which was flighted in the Herald Newspaper, but the one on the noticeboard of the Registry section at defendant's headquarters. He said he did not have proof of such since it was on the noticeboard. He admitted that the delivery note that was signed by Innocent on behalf of the defendant was prepared by the plaintiff. He disputed that the excavator was not inspected on delivery as it was inspected by defendant's employees and signed for by Innocent as to have been received in good working order. He said that he would have done the commissioning of the excavator once the purchase price had been paid in full within 7 days from the date of delivery. He was shown minutes of a meeting which was held on 17 September 2013 between the plaintiff's directors and the defendant's management. These minutes were later produced by the defendant as exh 20 (at p 134). He admitted that he attended that meeting. Although in those minutes it is stated that it was agreed that the plaintiff would supply and deliver brand new equipment, Darlington Chirara disputed this saying that these minutes were not a true record of what was agreed on. He said that these minutes were prepared by the defendant. He maintained that when he delivered the machinery it had no defects and US$182 000.00 was its value. He said that the minutes were not sent to him before they were confirmed. Referring to exh 10 at p 79 which is a letter which he wrote to the defendant's Town Clerk on 22 August 2011, he said that it was the defendant which was supposed to prepare the tender contract between the parties but it was never prepared. He said that instead the defendant furnished the plaintiff with a purchase order.

During the defendant's case Mary Mukonyora who is its Acting Chamber Secretary testified as follows. The Tender Notice by the defendant inviting tenders to supply an excavator and a front end-loader was placed in the *Herald Newspaper*. The closing date which was set for the submission of tenders was 31 May 2011. The Tender Notice was produced as exh 13 at p 72. It shows that the defendant advertised for the supply of a 30 tonne excavator and a 3 tonne front end loader. The witness said that on 23 June 2011 there was a procurement meeting that was held by the Procurement Committee and in that meeting the Procurement Committee recommended the awarding of the tender for the supply of the excavator and front end loader to the plaintiff. The minutes were produced as exhibit 14 at p 113. These minutes show that the plaintiff was accorded the tender to supply a 20 tonne Tracked Excavator for US$182 000.00 and a 3 tonne Front End loader for US$105 000.00.

However, it was specified that the machinery was supposed to be new. The minutes also show that the Town Clerk Mr. G Tanyanyiwa was in attendance of the meeting.

The witness said that these recommendations were being made to the full council which later held its meeting on 21 July 2011. The minutes of the full council meeting were also produced by consent as exh 15 at p 116. They show that G Tanyanyiwa the Town Clerk was in attendance again. The full Council adopted the recommendations of the procurement board on the award of tenders for the supply of the machinery.

Mary Mukonyora said that when the plaintiff then delivered a second hand excavator the new Town Clerk Mr. G. Makunde wrote to the plaintiff on 11 July 2014 raising the issue. The letter was produced as exh 16 at p 147. In that letter Mr Makunde stated that the defendant noted with great disappointment that the excavator was second hand. The witness said that according to an expert the defendant engaged, the machinery was not in good working condition. The report that was compiled by the expert was produced as exh 19 at p 144. It enumerates about 19 defects and states that key accessories were missing. It states that the machine is an old machine that was repaired and resprayed. The witness disputed that the Tender Notice was ever flighted on the Registry notice board for the supply of a refurbished excavator. She said that from the time the excavator was delivered it has never been used by the defendant. It is at the defendant's workshop.

The witness also made reference to the minutes of a meeting which was held on 17 September 2013 involving the directors of the plaintiff and the defendant's management. These minutes were produced as exh 20 at p 134. They show that the meeting was held following the issuance of summons by the plaintiff for breach of contract in that the defendant had not paid the deposit for the supply of the machinery by the plaintiff despite the plaintiff having won the tender in 2011. The plaintiff was suing for damages for breach of contract or for the payment for the equipment since the machinery was already there. The minutes show that the parties agreed that the defendant would pay for the machinery and the plaintiff was to supply brand new equipment after payment of 50% deposit of the total value.

During cross examination the witness said that she got employed by the defendant on 1 October 2012 as head of Human Resources, and in 2015, she assumed the position of Acting Chamber Secretary. She admitted that the letter notifying the plaintiff of having won the tender to supply a 20 tonne refurbished excavator and a 3 tonne front end loader which was written by G. Tanyanyiwa, the then Town Clerk, on 6 July 2011 (exh 6) and the minutes of the procurement board recommending that the plaintiff supplies a 20 tonne Excavator and

3 tonne front end loader were consistent. She said that she, however, doubted the authenticity of the letter of G. Tanyanyiwa. She said that she doubted if it was genuine. She, however, admitted that, other than this document which was written by G. Tanyanyiwa, there is no any other document from the defendant which notified the plaintiff of having won the tender. She also said that she sent the minutes of 17 September 2013 to the plaintiff for authentication, but admitted that she had no evidence to prove that she had indeed sent the minutes for confirmation. She said that Innocent who received the excavator on behalf of the defendant and signed the delivery note is not an expert in such machinery, but is just a clerk who works at the stores department. She said that the machine had not even been commissioned yet its standard practice to have equipment demonstrated to be in good working order. She said that all the defendant's Tender Notices are done through the newspapers. She, however, explained that if all tenderers say they can supply a 20 tonne excavator instead of a 30 tonne excavator which would have been advertised for, the defendant can make adjustments and accept the supply of a 20 tonne. She said that the excavator was received by the defendant on 19 June 2014. It was inspected by the expert on 30 June 2014. The letter of complaint to the plaintiff about the defects on the excavator was written on 11 July 2014. She said that the tender number on the Tender Notice which was flighted by the defendant is 5/11 yet on the tender documents that the plaintiff submitted quoted the tender number as CH/05/11. She said that showed that the plaintiff was responding to a different Tender notice than the one advertised in the *Herald Newspaper* with a deadline for submissions of 31 May 2011.

George Makunde the current Town Clerk of the defendant testified as follows. He said that he joined the defendant in August 2012 and got to know about this case through a perusal of the defendant's documents. He outlined the procedure that is followed by the defendant in procuring equipment. He said that a tender notice is flighted in a national newspaper guided by s 30 and 31 of the Procurement Act [*Chapter* 22:14] inviting the submission of tenders. The procurement committee/board then deliberates on the submitted tenders and makes recommendations in terms of the award of the tender to the winner of that particular tender. The recommendation is made to a formally constituted full council of the defendant in the form of a report. Full council then makes a resolution on the issue which resolution then allows or authorises the Town Clerk as the Chief Executive Officer or Accounting Officer to then notify the winning tenderer for the provision of the goods or service so required.

The witness alluded to the tender notice that was flighted by the defendant; the minutes of the procurement committee of 23 June 2011; and the minutes of the full council meeting of 21 July 2011 that Mary Mukonyora referred to in her evidence. His evidence on all these documents was similar to that of Mary Mukonyora in all material respects. He also reiterated that the tender required that the plaintiff supplied a brand new 20 tonne excavator and a 3 tonne front end loader. He disputed that the excavator that was delivered was in good working order saying that although he saw the excavator on the day it was delivered he did not inspect it to satisfy himself that it was in good working order as he lacked the expertise in testing the machinery. He said that inspection of machinery is contained in the regulations that guide procurement and it is a process and not an event. He also said that Innocent the clerk who received the machinery has no qualifications to test its condition. He said that the excavator was not able to perform its obligations and was never used by the defendant.

The witness said that he suspected that the letter that was written by the then Town Clerk, G. Tanyanyiwa on 6 July 2011 notifying the plaintiff that it had won the tender to supply a refurbished excavator and front-end loader was as a result of a collusion between Mr. Tanyanyiwa and the plaintiff because it was written before the full council of the defendant had made a resolution on 21 July 2011 to award the tender as per recommendations by the procurement committee which had set on 23 June 2011.

The witness' evidence with regards to the minutes of 17 September 2013 (exh 20) was similar to the evidence that was given by Mary Mukonyora. He also testified that in that meeting it was agreed that the plaintiff would supply a brand new excavator and a brand new front end loader, but the plaintiff did not deliver brand new machinery.

During cross examination the witness explained that receiving machinery on its delivery and commissioning of the machinery are two different things. He also explained that the delivery note that was signed by Innocent, the defendant's employee is a document which was prepared by the plaintiff and it already had the words "received in good working order" printed on it and all that Innocent did was to affix his signature after those words. It is not Innocent who wrote those words. He said that initially it was the transport personnel who observed that the excavator was second hand and this prompted the defendant to invite an expert, Nicnel to come and inspect it. Before that, Automobile Association of Zimbabwe (AAZ) had been called to come and check if the equipment was new. He explained that the defendant never invited the plaintiff to be in attendance because in business ethics you would

not want to give the impression that you are dealing with a dubious institution. He said that the defendant wanted to satisfy itself about the excavator hence it called in AAZ to inspect it.

The witness said that the plaintiff gave them the price of US$182 000.00 for an old excavator yet Nicnel gave the defendant a quotation for a new excavator from Hyundai going for US$159 275.00 on 30 June 2014. He said that although the models are different the disparity in prices showed that the plaintiff was not dealing with the defendant in good faith.

Ryan Edward Berry testified as follows. He is and has been employed by Nicnel Plant and Equipment (Private) Limited as the Technical Sales Manager for 4 years now. He was called by the defendant to inspect the excavator which is in issue. He noticed that it was a second hand, having done over 6 000 hours yet the meter read that it had only done 6 hours. The bucket had no tips similar to a car delivered with no tyres. The engine pipes were damaged from the breather which would allow dust to enter if the engine was to run for an extended period. The machine could start and run, but it could not perform its functions properly because it did not have tips and the engine was in a poor state of repair. He said that the excavator is an LC-7 model, which is an old model which was manufactured until 2012, but a 9 model was manufactured from 2012 onwards. About his qualifications, he said that he has "O" level with technical experience from being on the job for about 8 years in the industry. He said that because of this, he took a technician with him to inspect the machine. He said that as the sales and technical manager he oversees his technicians using their expertise. He said that Wency is the technician who inspected the machine as he (witness) filled out the report. However, he admitted that his name does not appear on the report. He said that Wency refused to come to court as he had been phoned, harassed and intimidated. He admitted to supplying his own quotation for an excavator to the defendant on the same day of 30 June 2014, the excavator supplied by the plaintiff was inspected.

Analysis of Evidence

It is necessary to first determine whether or not the parties entered into a contract for the supply and delivery of brand new or refurbished machinery. Having listened to the evidence given by the witnesses of both parties, it is clear that there is a dispute as to which tender notice the plaintiff responded to when it submitted its tender documents and quotation to the defendant's registry section on 9 June 2011. This is because although the defendant's witnesses said that the response was to the Tender Notice it flighted in the Herald Newspaper with a deadline for submissions of the tenders of 31 May 2011, the defendant's date stamp on

the plaintiff's tender documents show that they were received by the defendant's registry section on 9 June 2011 and the Tender Notice reference number that is quoted which is CH/05/11 is different from the Tender Notice reference number which is on the Tender Notice that was flighted in the *Herald Newspaper* by the defendant. Whilst the plaintiff's witness said that the plaintiff was responding to a revised tender notice that was flighted on the defendant's registry noticeboard, he did not furnish the proof thereof saying that since the tender notice was on the notice board he could not get a copy thereof as other people also needed to see the notice. However, despite this explanation by the plaintiff, I am convinced by the evidence which was given by the defendant's witnesses, that the defendant flights tender notices in the national newspapers and not on noticeboards. They made reference to the provisions of the Procurement Act [*Chapter 22:14*] which Act makes provision for the procurement of goods, construction work and services by the State and Statutory bodies. Section 30 (1) (a) thereof states that the procurement of goods, construction work and services by a procuring entity shall be done by means of tendering proceedings in accordance with s 31. Section 31 (1) (a) (ii) then reads:

> "Subject to this Act, in any tendering proceedings conducted by a procuring entity the invitation to suppliers to tender shall be published in a newspaper circulating in the area in which the procuring entity has jurisdiction or carries on business, where the procuring entity is not the State." (my emphasis)

The use of the word 'shall' in s 31 means that it is peremptory for the tender notice to be flighted in a national newspaper. I also looked at s 211 (1) and (2) of the Urban Councils Act which deals with tender proceedings by municipals. It reads,

> **211 Tenders**
> (1) In this section—
> "municipal procurement board" means a municipal procurement board appointed by a municipal council in terms of section *two hundred and ten*.
> (2) Subject to subsections (8) and (9), before entering into a contract for the execution of any work for the council or the supply of any goods or materials to the council which involves payment by the council of an amount exceeding such sum or sums as may be prescribed, the council or, in the case of a municipal council, the municipal procurement board shall call for tenders, by notice posted at the office of the council and advertised in two issues of a newspaper, .." (my emphasis)

Whilst in terms of the Urban Councils Act a tender notice shall be posted at the office of the municipal council, it should also be advertised in a newspaper. The defendant must therefore flight tender notices in accordance with the provisions of the Procurement Act and the Urban Councils Act. If the defendant only flighted a tender notice on its noticeboard and did not do so in the newspaper it did not comply with the law. However, if this is what

happened the plaintiff ought to have produced proof of the advertisement of such tender notice. In the absence of such proof I am led to conclude that the plaintiff's director was not being honest with the court about having seen such a tender notice on the noticeboard of the defendant on 8 June 2011. Such advertisement would not have been in compliance with s 31 of the Procurement Act and s 211 (2) of the Urban Councils Act. Besides, the defendant has no such tender notice in its files or records. He who alleges must prove and the plaintiff failed to prove the existence of Tender Notice CH.05/11. The only tender documents that were produced are those that came from the plaintiff which were said to be its copies. The defendant's witnesses had no knowledge that the tender notice 05/11 which had a deadline of 31 May 2011 was ever revised and extended. There is nothing that shows that in the defendant's records.

With this I am not satisfied that Tender Notice 05/11 which was flighted by the defendant in the Herald Newspaper was ever revised and extended. In any case it defies logic that the defendant, a municipality, would invite tenders for the supply of second hand machinery. I cannot think of a reason why it would do that.

What is disturbing about this case is that on 23 June 2011, when the defendant's procurement committee/board set and recommended in its report to full council that the tender for the supply of a brand new excavator and front end-loader be awarded to the plaintiff, Mr G. Tanyanyiwa, the then Town Clerk was in attendance. In terms of procedure, the recommendation was subject to adoption as a resolution by a full council meeting. Such a meeting was only held on 21 July 2011. The Town Clerk, Mr. G. Tanyanyiwa even attended that meeting as well. At that meeting, full council passed a resolution that the plaintiff be awarded the tender to supply a brand new excavator and front end-loader. What is buffling is that on 6 July 2011, well before full council had set, Mr. G. Tanyanyiwa wrote to the plaintiff notifying it that it had won the tender to supply a refurbished excavator and Frond end loader. Two questions arise. Firstly, why did he notify the plaintiff that it had won the tender before full council had held a meeting to pass the recommendation as a resolution? Secondly, why did he tell the plaintiff that it had won the tender to supply refurbished machinery? These queries or questions show that the then town clerk was not conducting himself properly in the discharge of his duties. This is worsened by the fact that he was in attendance at the full council meeting which was later held on 21 July 2011 which adopted the recommendations of the procurement committee/board which stated that the plaintiff was to supply brand new equipment. When the adoption of the recommendation was made, he knew that he had

already notified the plaintiff that it had won the tender to supply refurbished equipment, but he did not inform the council. Obviously that is a sign that he knew that what he had done was improper. This is further evidenced by the fact that after full council had passed the resolution to award the tender to the plaintiff, he did not write a letter notifying the plaintiff about it as he was supposed to do as per procedure.

The critical question now is, is the defendant bound by the irregular conduct of its employee, the town clerk who told the plaintiff that it had won the tender to supply refurbished machinery when in fact it wanted to be supplied with brand new machinery? The plaintiff's counsel, Mr *Zhuwarara* submitted that by virtue of the Turquand rule the defendant is bound. I must point out from the onset that the Turquand rule is a principle of company law. In terms of the Turquand rule if a party transacts with a company only to later discover that the director lacked the authority to bind the company, the company may be forced to honour the transaction if the transaction was completed in good faith by the other party. The rule is based on the English case of *Royal British Bank* v *Turquand* 1856 119 ER 886, wherein it was held that people transacting with a company are entitled to assume that internal company rules have been complied with even if they are not. The exceptions to this rule are, firstly, if the outsider was aware of the fact that the internal requirements and procedures have not been complied with (In other words, he acted in bad faith). Secondly, if the circumstances under which the contract was concluded on behalf of the company were suspicious.

Mr *Zhuwarara* went on to cite the case of *Potchefstroom se Stadsraad* v *Kotze* 1960 (3) SA 616 AA at 621 B-C. The case involved a municipality. The Turquand rule was held to be applicable to municipalities. In that case the Town Clerk just like in this case had written a letter to the respondent cancelling the lease agreement between the municipality and the respondent when the municipality had not authorised the cancellation of the lease agreement. The municipality was now demanding money for rent from the respondent and a dispute arose as the respondent refused to pay saying that the lease agreement had been cancelled. The court held that:

> "A municipality in the normal exercise of its functions, necessarily concludes contracts with members of the public. It would be unbusiness like if the respondent had been duly bound when he received the town clerk's letter to make enquiries to ensure that the town clerk was in fact authorised by the town council to convey the cancellation."

Applying the law to the present case, Mr *Zhuwarara* submitted that the internal workings of council are not known to the plaintiff and as such there is a presumption of

regularity in the adherence to council procedures which makes it impossible for the defendant to escape liability on the basis that Mr. Tanyanyiwa had not been authorised by the defendant to write the letter that he wrote on 6 July 2011.

To begin with, with all due respect, I am not in agreement with the reasoning in the *Potchefstroom se Stadsraad* case that the Turquand rule is applicable to municipalities. I see no basis for saying that. Municipalities and companies are different entities. In terms of s 131 of the Urban Councils Act [*Chapter29:15*], a town clerk is an employee of the defendant (municipality) and his duties are outlined in s 136. These involve the administration of council, managing operations and property of council, supervise the activities of council employees and any other duties that maybe assigned to him by the council. The Act does not give the town clerk powers to take over the functions of council when it comes to procurement issues and make binding decisions on its behalf. The Act has provisions which deal with how goods and services are procured and those provisions are worded in peremptory terms as they use the words 'shall' and 'shall not'. In terms of s 210 (1) every municipal council shall appoint a procurement board which is responsible for arranging tenders and for making recommendations to council in regard to the acceptance of tenders and the procurement of goods, materials and services.

In terms of s 210 (4):

> "A municipal council shall not procure any goods, materials, or services unless its municipal procurement board has made recommendations to the council thereon and the council has considered such recommendations." (My emphasis)

I do not believe that a town clerk's actions have the power to override the wording of the provisions that is peremptory. Therefore the letter of Mr. G. Tanyanyiwa which was written on 6 July 2011 before the full council meeting had been held on 21 July 2011, notifying the plaintiff that it had won the tender to supply refurbished machinery is therefore of no force and consequence. It does not bind the defendant. So the contract that was purportedly entered into by and between the plaintiff and the defendant pursuant to the letter which was written by G. Tanyanyiwa is a nullity.

Assuming that the Turquand rule is applicable to municipalities as was held in the *Potchefstroom se Stadsraad* case, it would not be proper to hold the municipality bound by the actions of a town clerk because a town clerk is not a functionary of the municipality but an employee. A councillor instead would bind the municipality because a council is run by councillors, not by its employees. I would equate a councillor to a director of a company. In

terms of the Turquand rule, an employee of a company does not bind the company if he purports to act on behalf of the company. So in the present case even assuming that the tender notice was properly advertised, the letter that was written by the then town clerk, Mr. G. Tanyanyiwa would not bind the defendant because he had no authority to enter into contracts on behalf of the defendant as he was not a councillor, but just an employee.

In any case even if the Turquand rule was applicable and even if the defendant as a municipality was bound by the actions of its town clerk, looking at the circumstances of this case, I would make a finding that the parties did not enter into a valid contract. I say this because this is a contract which is supposed to be based on a tender notice which should have been properly advertised in terms of the Procurement Act and the Urban Councils Act. Section 211 (2) of the Urban Councils Act states that before entering into a contract for the execution of any work for the council or the supply of any goods or materials to the council, the council shall call for tenders, by notice posted at the office of the council and advertised in two issues of a newspaper. The plaintiff was not able to produce the revised tender notice CH.05/11 which it said it responded to. Since the defendant was disputing its existence, the plaintiff ought to have produced it to show that the contract which was entered into was entered into in compliance with the law. The only tender notice that was produced is the one referenced 05/11with a closing date for the submission of tenders of 31 May 2011 which the defendant is saying it is the only one it flighted in the Herald Newspaper.

The plaintiff's tender documents were submitted to the defendant's registry section on 9 June 2011 according to the date stamp on them. They were submitted way out of time, after the deadline of 31 May 2011. To make matters worse they only bear the date stamp, but bear no name of the registry person who received them. Mary Mukonyora even queried their authenticity on this basis alone. I also query their authenticity. It is my conclusion that these tender documents were submitted on the basis of a non-existent tender notice. On this basis alone, any contract that flowed from it is a nullity as it has no leg to stand on. Clearly, the circumstances under which the contract was concluded are suspicious. This is even worsened by the fact that G. Tanyanyiwa as the town clerk *mero motu* wrote a letter to the plaintiff well before full council had passed the resolution that the tender be awarded to the plaintiff. To make matters worse, contrary to the recommendations of the procurement board, he said that the plaintiff had won a tender to supply refurbished machinery. What this shows is that both Darlington Chirara, the director of the plaintiff and G. Tanyanyiwa, the town clerk were

probably acting in connivance and were probably involved in underhand dealings because their actions are highly suspicious.

In light of the foregoing, I thus make a finding that there was never a contract between the plaintiff and the defendant. Having concluded that there was never a contract between the parties, I will therefore not go on to deal with the issues of novation of the contract. The defendant's second witness, Mr George Makunde had said in his evidence that if it is held that the defendant is bound by the letter which was written by the then town clerk, Mr. G. Tanyanyiwa then that contract was novated by what the parties agreed upon in the meeting of 17 September 2013 (exh 20) that the plaintiff was to supply a brand new excavator and front end loader. Novation is the substitution of a new contract for an old one. The new agreement extinguishes the rights and obligations that were in effect under the old agreement. Since no contract was entered into in the first place, there is no novation to talk about.

Disposition

Since there was never a contract between the parties, the plaintiff is not entitled to payment of the remaining balance of US$119 300-00 that it is claiming. The plaintiff is entitled to collect its machinery from the plaintiff. In respect of the counter-claim, the plaintiff in reconvention (the municipality) is entitled to a refund of US$140 000-00 being the money it paid as deposit of the purchase price. Since there was no contract between the parties, I cannot order the defendant in reconvention (Upset Investments (Private) Limited) to deliver a brand new excavator and a brand new front end-loader. Consequently the plaintiff in reconvention cannot be entitled to any damages for breach of contract or any storage charges. In any case the plaintiff in reconvention did not lead any evidence to prove its claim for US$20-00 per day for storage charges. On costs of suit, the defendant prayed that the plaintiff's claim be dismissed with costs on a higher scale, but I see no justification for the award of such costs.

In the result, I order as follows:

1. The plaintiff's claim is dismissed.
2. The plaintiff pays to the defendant US$140, 000-00 being the refund of the deposit paid by the defendant towards the purchase of the Excavator and Front End Loader.
3. The plaintiff pays to the defendant costs of suit.

Kachere Legal Practice, plaintiff's legal practitioners
Matsikidze and Mucheche, defendant's legal practitioners