CHINA JIANGXI INTERNATIONAL ECONOMIC
AND TECHNICAL COOPERATION CO, LTD
versus
MINISTER OF LANDS, AGRICULTURE, WATER, CLIMATE
& RURAL RESETTLEMENT N.O
and
PERMANENT SECRETARY IN THE MINISTRY OF LANDS, AGRICULTURE,
WATER, CLIMATE & RURAL RESETTLEMENT N.O
and
MINISTRY OF LANDS, AGRICULTURE, WATER, CLIMATE
& RURAL RESETTLEMENT
and
ZIMBABWE NATIONAL WATER AUTHORITY
and
PROCUREMENT REGULATORY AUTHORITY OF ZIMBABWE
and
CHINA NANCHANG ENGINEERING (PVT) LTD

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 7, 9, 10 October 2019 and 13 November, 2019

Urgent Chamber Application

TST Dzvetero with T Dzvetero and P Patisani, applicant's legal practioner
T. Mutomba, for the 1st, 2nd and 3rd respondent
J. Dondo with E Nyakunika, for the 4th respondent
G. Dzitiro with S Mutumbwa, for the 6th respondent

CHITAPI J: The large volume of paperwork mostly filed by the applicant and the sixth respondents are not necessary to induce a favourable outcome in their favour, as most of it is not relevant to the issues which arise for determination in this urgent application. It is important that before pleading a cause of action or defence in any dispute, counsel carries out necessary research on and identifies the dispute and the law relative thereto. Thereafter counsel should consider the necessary and material evidence to plead the cause of action or defence as the case may be. If

unsure on how to go about the case, counsel may be advised to seek advice on evidence from a more seasoned advocate or counsel. Picking every bit of material from counsel's client file and bunching the same in an application should be avoided because not only does the unnecessary and immaterial documentation and depositions cloud the real issues, but the court or judge is greatly inconvenienced by having to plough through irrelevant and immaterial evidential matter and sifting through it for relevance. The result is a delayed judgment because the court or judge spends a lot of time winnowing through the morass of documents just thrown into an application without relevance.

I must at once record that l do accept that in application proceedings, the applicant's claim stands or falls on the founding affidavit. *Vide Yunus Ahmed* v *Docking Station Safaris (Pvt) Ltd t/a CC Sales* SC 70/18; *Bushu* v *GMB & Ors* HH 326/17. As stated by MATANDA-MOYO J in ….. at page 3 of the cyclostyled judgment, thus, -

> "… it is trite that all facts and the basis of seeking a relief must be established in the founding affidavit. See also *Litty Bar and Bottle Store (Pty) Ltd* v *ABC Gara… (Pty) Ltd & Ors* 1974 (4) SA 362 (T), *Pountas Trustees* v *Labanas* 1924 WLD 67, *Austerlands (Pvt) Ltd* v *Trade and Investment Bank & Ors* SC 92/05."

However the above rule does not justify the bunching and inclusion of every conceivable document in the founding or opposing affidavit. Only documents and facts which are evidentially relevant to the establishment of the claim or defence as the case may be need be included. The court or judge ultimately decides a case on the basis of relevant evidence as it may relate to the issue for determination. I cannot over emphasize that counsel should before putting pen to paper to draft the founding affidavit identify the cause of action, the elements of that cause of action and the evidence available to prove the elements of the cause of action. Lastly, the relief sought and its competence must be clearly understood and set out. Sometimes in preparing the application, it may be helpful to reflect first on the relief sought and its preconditions then consider that relief as a guide to determining facts which must be pleaded. Evidence gathering is then embarked upon followed by drafting the necessary affidavit. The same process must apply *mutatis mutandis* with the drafting of the opposing affidavit. In this regard Mrs *Dzitiro* for the sixth respondent made issue with the applicant's papers which she attacked as not being in sync and unpaginated. Whilst the criticism was somewhat justified, the sixth respondents did not fare any better in its papers by

pleading at length to every matter raised by the applicant notwithstanding lack of relevance. Counsel should do better in future as they risk compromising their client's cases or defences by a failure to plead to the point.

In this application, the applicant seeks the following relief as set out in its draft order:

"Terms of final order sought.

That you should show cause to this Honourable court why a final order should not be made in following terms:-

1. The provisional order be and is hereby confirmed.
2. The decisions and processes of the respondents to initiate and proceed with procurement proceedings relating to the Silverstroom Dam Construction Procurement reference DWD/02/19 as contained in the minutes dated 19 September 2019 be declared null and void and are hereby suspended.
3. The procurement proceedings relating to the Silverstroom Dam Construction Procurement reference DWD/02/19 be and are hereby suspended pending the determination to finality of the applicant's challenge.
4. Respondents be and are hereby interdicted from proceeding with any procurement processes relating to the Silverstroom Dam Construciton Procurement reference DWD/02/19 pending the determination to finality of the applicant's challenge.

Interim relief granted

Pending the return date, the applicants be and are hereby granted the following interim relief:

1. Respondents be and are hereby compelled to immediately furnish and deliver upon the applicant sufficient calculation of security costs, banking and payment details for the procuring entity to enable the applicant to prosecute its challenge in terms of sections 73, 74 and 76 of the Public Procurement and Disposal of Public Assets Act [*Chapter 22:23*].
2. Respondents be and are hereby ordered to take all necessary steps to facilitate the due process to be followed in the challenge process being lodged by the applicant.
3. The *dies induciae* governing the challenge and application for review of procurement proceedings in terms of sections 73, 74 and 76 of the Public Procurement and Disposal of Public Assets Act [*Chapter 22:23*] (The Act) operating against the applicant be and is

hereby suspended and only in operation from the date that the applicant is furnished with the sufficient calculation of security costs, banking and payment details for the procuring entity.

4. Respondents be and are hereby interdicted from proceeding with the signing of the contract, handover / takeover of the construction site or any other procurement processes relating to the Silverstroom Dam Construction Procurement reference DWD/02/19."

The applicant's papers comprised 431 pages. It will become apparent that the application did not have to be that bulky and it was quite a task to go through the documentation. Unfortunately, the judge as a public officer simply has to contend with what is placed before him or her and make head or tail of what the parties dispute really is. I was reminded of the remarks which l made in the case *Wilfred Takaona Mapfumo* v *S* HH 564/16 where on page 3 of the cyclostyled judgment, thus –

> "In this application the applicant's papers present a serious indictment upon the judicial officers' patience. The indignation to simply dismiss the application for want of form beckons on the easy way out of the medley, hotch potch or mutton stew with mixed vegetable dish presented by applicant's papers. A judges' function is to dispense justice and even where the papers before a judge present a dog's breakfast, the judge is required to consider the mixed grill and not just dismiss the matter out of hand. See *Mwanyisa* v *Jumbo & Ors* HH 3/10 per MAKARAU JP (as she then was)."

The background to the application is straightforward. The matter concerns the State and the public interest in that at the centre of the dispute is the award of a tender for the construction of Silverstroam Dam under Procurement Reference Number DWD/02/19. The proposed dam is meant to be constructed within the Centenary area. The dam construction is a national project for the public good and economic development of the country. Delays in implementation be they bureaucratic or however caused affect the public. So, the question to be addressed and which the parties should have focused upon was, 'so what is the problem and if identified what should be done about it to lawfully get it out of the way so that the project gets off the ground?"

The first respondent as the procuring entity in regard to the tender for the dam construction appointed the fourth respondent as its point person, representative and engineer. The applicant was a losing bidder in the tender and bid process. The sixth respondent was the winner. When the initial application was filed, the applicant did not cite the sixth respondent. The fourth respondent in its

opposing papers took issue with the non joinder of the winning bidder. The fourth respondent in taking issue with the non joinder aforesaid averred that the omission rendered the application totally defective and that the application should on that basis be dismissed. The fourth respondent's point in this regard was not well taken because in terms of rule 87 (1) of the High Court rules, 1971, a misjoinder or non joinder of any party in a cause or matter does not defeat that cause or matter. The court will determine the issues and questions which arise in so far they affect the parties who have been cited. That is what the rule provides. The fourth respondent in any event had no brief to represent the winning bidder. Further, the court had power under subrule (2) of rule 87 on its own motion or on application to order a joinder of any party whose presence it considered necessary to ensure that all matters to the dispute are effectually and finally determined. This point *in limine* was however not persisted in by Mr *Dondo* for the fourth respondent following the application by the sixth respondent to be joined in the proceedings. I granted the application for joinder. For the avoidance of doubt the sixth respondent's application for joinder was made and granted under case no. HC8212/19. To the extent that Mr *Dondo* did not formally abandon the point on non joinder albeit noting that the sixth respondent had become a player, I must determine that the point was not well taken and it stands dismissed.

It is also important to record that to all intents and purposes, the fourth respondent as averred by it was a peripheral player and agent for the first respondent. I say so because it stated in its papers that it acted in an advisory capacity to the first respondent Ministry. In paragraph 3 of its opposing affidavit, the deponent stated as follows:

> "**3 Ad paragraph 2: 1 – 2 – 1**
>
> The fourth respondent's position is that of engineer. It gave certain recommendations to adjudicating authority after evaluation of all bids. The respondent has no direct influence on any of the respondents and it has nothing to do with the failure by applicant to comply with the law. Had applicant taken appropriate steps soon after 11 September, 2019 when applicant became aware of the failure of its bids, the issues that applicant now raises would have been avoided."

The fourth respondent notwithstanding its expressed passive role in the circumstances giving rise to the dispute has surprisingly strenuously opposed the application. One would have expected it to simply deny any wrongdoing and to offer to abide the decision of the court. The fourth respondents' purportedly expressed disinterest on the matter is not borne by the position it

has taken on the papers which it has filed. It averred that the applicant had no cause to seek from anyone the assessment of the amount of security costs to deposit with the first applicant since the amount is provided for in s 73 (4) of the Public Procurement and Disposal of Public Assets Act [*Chapter 22:23*] as read with s 44 (1) of the Regulations S.I 5/2018. The fourth respondent also averred that the Act and Regulations did not provide for condonation for non-compliance with the provisions of the Act and regulations. The fourth respondent took the position that the applicant's challenge to the decision of the first respondent to award the tender to the sixth respondent was a nullity on account of non-payment of the security deposit which must accompany the challenge. The fourth respondent also challenged the urgency of the matter. I have summarized the fourth respondent's position in its opposing papers to show that its sustained opposition to the application was not consistent with the stance of a disinterested party but with the position of a very interested party.

To continue with the summary of the background facts and omitting the nitty gritties of the bidding processes as averred in para(s) 2.1-2.10 of the founding affidavit, the applicant avers that it was notified that its bid had been unsuccessful by letter authored by the second respondent. The applicant's attention was drawn to the provisions of s 67 of the Public Procurement and Disposal of Public Assets Act. Section 67 falls under Part IX of the Act and part IX is headed TRANSPARENCY AND INTEGRITY which in essence underlines that in the tender and bidding process, there should be transparency of the process to maintain its integrity. Section 67 provides as follows:

> "67 Information to be given to rejected bidders
>
> (1) A procuring entity shall upon request, inform a bidder, promptly and in writing, of the reason for the rejection of the bidder's application to pre-qualify, or of the bidder's bid or quotation.
> (2) Where a rejected bidder requests information during the fourteen-day period referred to in section 55(2) or 60(14), that period shall be extended until the information has been provided.
> (3) In responding to a request for information by a rejected bidder, the procuring entity shall –
> (a) inform the bidder of the stage at which the bidder's application, bid or quotation was rejected;
> and
> (b) provide brief details of any material deviation, reservation or omission leading to the rejection;
> and

(c) Where appropriate, state that although the bid or quotation was substantially responsive, it failed to offer the best value for money or lowest price or failed to achieve the highest score;

but the procuring entity shall not provide details of any other bids, proposals or quotations other than information that is publicly available from bid opening or published notices."

It is also important to refer to the provisions of s 55(2) and 60(14) referred to in s 67. Section 55(2) speaks to bid award validity. In so far as the provisions may relate to this application it must be noted, that the contract between the procuring entity and the contractor shall not be signed before the expiry of 14 days from the date of the award of the procurement contract. The 14 days period is the period given to losing bidders to challenge the awarded in terms of s 55(1). The provisions of s 60(14) on the other hand apply in relation to negotiations which the procuring entity engages in with the bid winner as provided for in s 60(2). The result of negotiations on contractual terms must be disclosed to shortlisted losing bidders who are given a window of 14 days from the date of the disclosure to allow them to file any objections they might wish to raise. For the purposes of this application, I note that s 67 (2) provides that where a rejected bidder requests for information referred to in ss 55(2) and 60(14) and it is not provided for within the 14 day period, such period shall be extended until the information sought has been provided. The applicant admits that it received notification that its bid had failed on 11 September, 2019. It is accepted that the 14 day period within which the applicant could file a valid objection was 1 October, 2019.

The paper trial shows that by letter dated 13 September, 2019 addressed to the procurement entity, the third respondent herein, the applicant through its legal practitioners acting in terms of the provisions of s 67 requested for information on reasons why its bid was unsuccessful. The legal practitioners pointed out to the provisions of s 67(3). The letter listed *inter alia,* some documents which the applicant required to enable it to file an objection in terms of s 73 of the Act. The letter requesting that the information requested for be provided within 48 hours. It is to be further noted that in terms of the provisions of s 73(3) and (4) if a challenge is made after the award of the procurement contract, such challenge will only be entertained if the challenge is accompanied by a security deposit. For the avoidance of doubt, s 73 (3) and (4) of the Act read as follows:

"**73 Challenge to Procurement Proceedings**

1. ……...
2. ……..

3. where notice of the award of a contract has been issued, a challenge may be lodged only within the fourteen-day period referred to in section 55(2) or 60(14)
4. when lodging the written notice, the bidder deposits with the procuring entity a sum of money in the prescribed amount by way of security for costs.
5. ……"

It is common cause that the applicant was not favoured with a substantive response to its letter of 13 September, 2019 as aforesaid. In short, the information sought was not provided for. The second respondent writing on behalf of the procuring entity responded to the letter by applicants legal practitioners as follows:

> "RE: SILVERSTROOM DAM BID PROCUREMENT
> REF: REQUEST IN TERMS OF SECTION 67 OF THE PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS ACT (CHAPTER 22:23) BY CHINA JIANGXI INTERMATIONAL ECONOMIC & TECHNICAL CORPORATION CO. LTD
>
> Reference is made to the above subject and your letter dated 13th September, 2019, the contents of which have been duly noted. We wish to advise that the matter is receiving due consideration.
>
> Yours faithfully
>
> R J Chitsiko
> SECRETARY FOR LANDS, AGRICULTURE, WATER, CLIMATE
> AND RURAL RESETTLEMENT"

The applicant averred that the second respondent did not live to his promise to substantively address the applicant's letter of 13 September, 2019. The applicant wrote a follow up letter on 26 September 2019. Therein, the applicant protested that its letter dated 13 September, 2019 had not been addressed. Additionally, the applicant protested that the third respondent had handed over the site of the dam to the sixth respondent despite the *moratorium* on the taking of any further steps post the awarding of the tender to allow for objections to be dealt with. The applicant attached a copy of minutes of the site handover prepared by the fourth respondent. The site handover ceremony was held on 19 September, 2019. The minutes were signed by the fourth and sixth respondents on 29 September, 2019. The fourth and sixth respondents did not deny the authenticity of the minutes. At the hearing when I enquired of Mr *Dondo* whether the fourth respondent had in fact handed over the site to the sixth respondent, counsel did not provide an unequivocal answer. He prevaricated. He then submitted after conferring with the fourth

respondent's representatives that there was no official handover as such but that the site meeting was done in anticipation of the contract signing. However, the minutes do not speak to a preparatory meeting but a site handover. There are worrying issues arising from the minutes which were captured under item 9.0 (other issues). It is convenient to quote the minutes in this respect: It is stated thus:

"**9.0 Other Issues**

- The Chairperson said that in terms of the contract, the contractor will be issued with an order to commence works. (own underlining)
- ZINWA acknowledged receiving an advance claim from the Contractor, which they said was being processed.
- The Contractor was advised to identify a suitable quarry site, of which the Engineer would confirm the suitability of the quarry stones for use in the works. "

From a reading of the minutes as a whole and item 9.0 in particular, the only factually supportable inference to be drawn is that there was already a contract in existence and advance claims for payment on the contract had been submitted and were being processed. If I am right to hold so, the contract if it exists, would clearly be a nullity as in terms of s 67(2), the *moratorium* for objections to be filed was still in place. One can only hope that no contract was signed in contravention of the provisions of the law which provides for conditions precedent to be satisfied before a contract can be signed between the contractor or award winner and the procurement entity.

In regard to the existence or otherwise of a contract already signed, I carefully considered the bulky opposing papers filed by the sixth respondent. The sixth respondent is coy on the point, yet the point is crucial and material. The sixth respondent did not as observed, deny the site handover. In para 12.5 of the opposing affidavit, it states as follows:

"12.5 If indeed the cite (sic) handover process was already carried out, then the applicant cannot seek to interdict that which has already occurred."

Such kind of pleading typifies a hide and seek approach. It is either the sixth respondent was handed over the site or not. There is no need for conjecture on a matter which would be within the personal knowledge of the sixth respondent.

The sixth respondent not surprisingly strenuously opposed the application on several other grounds as already indicated. It is reasonably expected that a tender bid winner will try all it can to protect its win. In doing so however, the bid winner must always be mindful that a failure to

follow laid down procedures will scuttle progress in the consummation of the win and the enjoyment of the relevant fruits which is the signing of the contract. Short cuts will derail and delay the process. During the hearing I tried to make the sixth respondent's counsel, Mrs *Dzitiro* address the pertinent issues which would inform whether the sixth respondent's opposition could be sustained.

I drew Mrs *Dzitiro'*s attention to the fact that the first, second and third respondents did not deny that the applicant sought information necessary to enable it to mount a challenge and that the second respondent did not and has not furnished the information. In the affidavit deposed to by the Honourable Minister of the third respondent, Ministry, the Minister attacked the urgency of the matter on the basis that the applicant wrongly perceived that it was being frustrated in its attempts to pay the statutory security costs. In paragraph 4 of the affidavit, it is stated

> "4. The 1st to 3rd respondents officials were in the process of trying to ensure that there is full compliance with law and administrative procedures in handling public funds. The step taken by the applicants was premature as the administrative remedies had neither been exhausted or were they completely denied. In this regard the urgency is only perceived by the applicants and yet there is no actual basis for urgency."

In the same affidavit, the first respondent or Minister of the third respondents then averred that the applicant's challenge was timeously filed on 1 October, 2019 but without payment of the statutory security fee which should have been deposited simultaneously. I must confess that I was unable to understand the paper trial. There is nowhere where the allegation is made that the costs should have been paid in a specific account. During the hearing, I invited Mr *Mutomba* to address me on the issue of where and how payment of security for costs was to be made. The information was not supplied. None of the parties directed me to the account to which payment was supposed to be made let alone to provide the name of the payee. The challenge was allegedly filed on the last day without the accompanying security for costs. One wonders as to why the objection was received on filing without the security deposits. There is also the admitted fact that the procurement entity admitted that the applicant did seek information on where payment was to be made.

In my reading of the documents, filed of record, what I found missing in the first, second and third respondent's affidavit was an account of the paper trail following the letter of the award of the tender to the sixth respondent. The bulkiness of the papers filed in the matter clearly cloud

the issues which are otherwise simple. The process of tender awards is very straight forward and can be loosely set out as flows:

(i) The bid winner is notified of the success of the bid.

(ii) Unsuccessful shortlisted bidders are notified that their bids were unsuccessful

(iii) A 14 day period should be allowed to pass before negotiations and contract signing.

(iv) The losing bidder may before filing an objection request for such information as provided for in the relevant Act. And such information must be provided or denied by the procurement entity.

(v) Where information sought has not been supplied. The 14 day period does not run or is stayed and will start to run from the date the information is supplied.

In this matter the applicant requested for information. The request was acknowledged by the second respondent who indicated that the matter was being attended to. Nothing further was said, a very unfortunate and unacceptable position. On the contrary and on a parallel level, site handovers were being carried out spearheaded by the fourth respondent despite the 14 day period still not having expired. The *bona fides* of the fourth and sixth respondents become questionable as the same with those of the second and third respondents. I leave out the Minister because there was no evidence placed before the court of his direct involvement in the tender process. He may well have been misled. The issues which will need to be answered are:

(a) whether the applicant was furnished with information which it requested of the third respondent acting through the second respondent, such information being one to which the applicant was statutorily entitled.

(b) whether the 14 day period was interrupted until the information sought had been filed

(c) whether the procurement entity through the fourth respondent, the contractor, entered a contract and the latter took over the site and if so, the validity of the contract and site handover.

(d) The validity of the purported objection filed by applicant on 1 October, 2019.

At the hearing of the application, I indicated to the parties that it was important to underscore that in an urgent application for a provisional order, the provisions of rule 246 (2) of the High Court rules should guide the parties. These proceedings were turned into a fully-fledged

application with answering and supplementary affidavits and heads of argument being filed. Arguments were made in the papers which address the final order sought. The purpose of an urgent application seeking a provisional order is to ask the court to preserve a state of affairs or the subject of the dispute to enable parties to properly and fully ventilate their positions and arguments on the return date. There is flexibility on when the full arguments can be ventilated because form 29 C which details the contents of a provisional order allows for anticipation of the return date. Where parties as in this case have filed all documents as would complete the sequence of pleadings in a normal application, it becomes a worthless exercise to order that further papers are filed before the return date. Parties who have filed all the documents should in my view then just request the court to determine the application and grant a final order if the application succeeds. I was not requested to do so. I must therefore proceed to consider whether the applicant made out a *prima facie* case for an interim interdict.

There can be no doubt that the manner in which the tender process post the award of the tender to the sixth respondent does not pass the considerations of openness and integrity. The validity of the post tender process is clearly not procedurally supportable. A losing bidder was not given information it sought. Counsel for the fourth and sixth respondents made much steam of the fact that the security for costs deposit is $150 000 as laid out in the relevant regulations. Even if that were so, the court was never told as to whom and how payment was to be effected. The first, second and third respondents did not assist in this regard. The filing of the purported objection appeared to have been a desperate attempt by a frustrated applicant who had been denied information sought within the 14 days. There will be arguments on the validity of the purported objection. Site handover was performed before the lapse of the objection period. A contract appears to have been signed and an advance claim made for payment. There clearly appears to have been a violation of the procedures attendant upon the procurement entity and contractor to observe and perform before the process is considered *perfecta*.

In my view, where a process has not been done in accordance with the law and an affected party comes to court for redress, the court cannot become complicit in violation of the law by upholding an objection to the urgency of a matter. This is so because to do so would be to allow a continued violation to continue being perpetrated without sanction. The tender involved in this matter is a public tender in which the people of Zimbabwe as a whole have an interest. Whilst the

country wishes for development and new investment, such must be carried out in conformity with the law.

The applicant has demonstrated a *prima facie* right to the interdict sought. Such right may be open to doubt. This is the minimum threshold which must be established where an interim interdict is sought. The applicant has shown that it will be prejudiced in its proprietary interests and rights to protection of the law which allows it to object to the tender process and have the objections determined in accordance with the law. The balance of convenience favours the grant of interim relief because *prima facie* there has been a violation of the law and if this is proved on a balance of probabilities on the return date, it must be corrected. The rule of law should be observed and respected. Tender processes should strictly comply with the law and public officials must ensure such compliance in order that projects especially of national character and importance do not face derailment through a calculated, willful or negligent conduct by public officials whose duty it is to observe and implement the law. Public officials must ensure that the rule book in tender processes in followed to the latter lest they are accused of corruption or criminal abuse of office. In this application, I find that a case for an interim interdict was established.

There will be an order for interim relief in terms of the draft provisional order. It is hoped that the request for information by the applicant is addressed and the objection process expeditiously dealt with. An open process which follows the law will safeguard the integrity of this tender and ensure its successful and early consummation.

Antonio and Dzvetero, applicant's legal Practitioners
Civil Division of Attorney General Office, 1st, 2nd & 3RD respondent's legal practitioners
Dondo and Partners, 4th respondent's legal practitioners
Mutumbwa Mugabe and Partners, 6th respondent's legal practitioners