

**IN THE HIGH COURT OF ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(Commercial Jurisdiction)**

2011/HPC/0327

BETWEEN:

**ZAMBIA INSIDE LIMITED
PLAINTIFF
AND
ELECTORAL COMMISSION OF ZAMBIA
DEFENDANT**

**Before the Hon. Mr. Justice Nigel K. Mutuna this 29th day of
June 2012**

For the Plaintiff: Ms. M. Mukuka of Ellis & Company

For the Defendant: Mrs. T. Lungu - Legal Counsel

JUDGMENT

Cases referred to:

- 1) *Elias-Vs-George Sahely & Co. (Barbados) Ltd (1982)3 ALL ER page 801***
- 2) *British Steel Corp-Vs-Cleveland Bridge and Engineering Co. Ltd. (1984) 1ALL ER 504***
- 3) *Prudential Assurance Co. Ltd-Vs-Mount Eden Land Co. Ltd. (1917) 1 E.G.L.n page 37***
- 4) *May-Vs-Butcher (reported in A Case-book on Contract , 7th edition, by J.C. Smith and J.A.C. Thomas page 75)***
- 5) *Winn-Vs-Bull (reported in A Case book on Contract, 7th edition, by J.C. Smith and J.A.C. Thomas page 81)***

Other authorities referred to:

- 1. *The Public Procurement Act No. 12 of 2008***

2. ***Chitty on Contracts, volume 1, 29th edition***
3. ***Halsbury's Laws of England, Vol.9, 4th edition***
4. ***A Case book on Contract, 7th edition, by J.C. Smith and A.C. Thomas***
5. ***Black's Law Dictionary, Eighth Edition, by Bryan A Garner***

The Plaintiff, Zambia Inside Limited commenced this action on 7th June, 2011 against the Defendant, Electoral Commission of Zambia. The action is by way of writ of summons and statement of claim in which the endorsement is for the following relief, that is to say:

" (i) the sum of K2,200,000,000-00 being damages for breach of contract
(ii) alternatively an order for specific performance of the contract
(iii) interest on the amount found due at the Commercial Bank lending rate
from 3rd November 2010 to date of payment
(iv) any other relief the court deems fit
(v) costs of and incidental to this application"

The Defendant's response was by of memorandum of appearance and defence filed on 20th July, 2011.

The facts of the case as they are revealed by the pleading are that on 11th May, 2010, the Defendant informed the Plaintiff that it had awarded it a contract for print media placements and agency services. Subsequently, by letter dated 13th September, 2010, the Defendant informed the Plaintiff that the contract awarded on 11th May, 2010 had been suspended for purposes of allowing the Anti-Corruption Commission (ACC) conduct an audit on alleged malpractices in the placement of an earlier contract between the two parties in the year 2008. The consideration that the Plaintiff realized from the said

earlier contract was in the sum of K2,200,000,000-00, hence the Plaintiff's claim in the like sum in respect of this dispute.

By a letter dated 3rd November, 2010 the Defendant informed the Plaintiff that it was cancelling the contract awarded to it.

The Plaintiff has contended that the Defendant intentionally cancelled the valid contract despite the Plaintiff meeting all its obligations under the contract. It was contended further that as a consequence of the said act the Plaintiff has suffered damages and loss of business.

The Defendant contended that it did award a tender for media placements and agency services to the Plaintiff. It however denied that the same constituted a valid contract as stipulated by Sections 52 and 54 of **The Public Procurement Act** No.12 of 2008. It contended further that the proposed contract was not finalized by the parties because the award of the tender was cancelled due to investigations by ACC.

The Defendant went on to contend that the Plaintiff did not meet any of its obligations on the award of the contract because the Defendant did not produce any certificate to confirm that works had been done and completed under the contract. It was also contended that the Plaintiff is not entitled to the relief sought.

The matter came up for trial on 30th May, 2012 and the parties called a witness each. PW was Nadia Mbumwae, whilst DW was Bwalya Ntambo.

The evidence of PW was that sometime in May, 2010 the Plaintiff was awarded a contract for print media placement and agency services by the Defendant. This was by way of letter dated 10th May, 2010 which letter she testified constituted an acceptance of the Plaintiff's offer and as such the parties had a valid contract. She went on to testify that on 13th September,

2010, the Defendant informed the Plaintiff that the contract was suspended for purposes of allowing ACC carry out investigations in respect of an earlier contract between the two parties. Further that, on 3rd November, 2010 the Defendant wrote to the Plaintiff cancelling the contract without justifiable cause.

PW also testified that between the months of May and September, 2010, the Plaintiff took instructions from the Defendant and executed works for which it was paid. She testified that the contract between the parties for the year 2008 was also concluded by way of a letter of award without a formal contract. The parties, she testified, therefore had an established way of dealing with each other without execution of formal contracts. PW ended by justifying the Plaintiff's claim of K2,200,000,000-00 by reference to the contract of 2008, which she alleged earned the Plaintiff the sum of K2,200,000.000.00.

Under cross examination, PW testified that the Plaintiff had had previous dealings with the Defendant in the years 2004, 2006 and 2008. She stated further that formal contract documents for the said dealings were signed but much later. The 2006 contract, she testified, was signed in the year 2010 whilst the 2008 contract was signed seven to eight months after the agreement was entered into.

As regards the position in respect of a formal contract, PW testified that the letter from the Defendant dated 11th May, 2010 was a contract. She stated further that there was no formal contract signed between the two parties and that after the letter of 11th May, 2010, the Defendant instructed the Plaintiff to place adverts in the print media on a number of occasions and paid for the instructions.

In re-examination, PW testified that after she received the letter dated 11th May, 2010 she went and saw DW who told her that the Plaintiff and Defendant could now renew their relationship. She ended by restating that the letter of 11th May, 2010 constituted a contract as it stated that the Plaintiff had been awarded a contract.

The Plaintiff proceeded to close its case.

DW, Bwalya Ntambo was the Secretary of the Defendant's Procurement Committee. Her evidence was as follows: her committee evaluated bids for print media tenders on 7th May, 2010 and decided to award the Plaintiff the contract; a notification to that effect was written to the Plaintiff on 11th May, 2010, which notification did not constitute a contract as it was merely a letter of intent which was subject to execution of the contract; the Defendant received information that the ACC was undertaking investigations against the Plaintiff with respect to fliers for 2008 Presidential results and constituency maps it circulated on behalf of the Defendant; as a consequence of this, a formal contract was not executed and the Defendant suspended the award of contract to the Plaintiff; subsequently, due to delay in the investigations, by ACC the Defendant cancelled the award of contract on 3rd November, 2010; and prior to the cancellation, the Plaintiff was given instructions by the Defendant to place some adverts in the print media and paid for the service.

Under cross examination, DW testified that the Plaintiff had had dealings with the Defendant prior to the year 2010. She stated in this respect that in 2004, the Plaintiff was engaged to advertise for the voter registration and in 2008 to advertise for the Presidential bye-elections. Whilst these contracts were running, the Plaintiff was engaged by the Defendant to run adverts that were not related to the said events.

DW went on to testify that the letter dated 11th May, 2010 related to adverts for continuing voter registration. She stated further that, the letter was merely a letter awarding the contract and that the Plaintiff was subsequently supposed to sign a contract. The letter of award she testified further, does not constitute a contract under **The Public Procurement Act** because prior to signing a contract the public is given an opportunity to petition the award of a contract.

As regards the instructions given to the Plaintiff between the letter of 11th May, 2010 and the cancellation of the award of contract, she testified that the instructions did not relate to continuing voter registration. She went on to clarify that the award of contract was cancelled because by the time the investigations by ACC were concluded the program on the continuing voter registration exercise had come to an end. Further that, the contract was awarded to D & C Saatchi and Saatchi who were already placing adverts in the electronic media for the program on the continuing voter registration.

In re-examination, DW restated that the letter of 11th May, 2010 was an intent to enter into contract and not a contract. She stated, in this respect that, the last paragraph of the letter required the Plaintiff to call on the Defendant to formally sign a contract. DW clarified further, that the instructions given to the Plaintiff after the letter of 11th May, 2010, did not relate to continuing voter registration but related to advertisement such as invitations for applications for employments.

The Defendant proceeded to close its case.

Following the close of the hearing, I directed the parties to file final submissions seven days apart. Pursuant to the said directive, the Plaintiff's advocate filed the final submission on 8th June, 2012, while the Defendant's advocate filed final submissions on 14th June, 2012.

In the Plaintiff's final submissions, Counsel for the Plaintiff Ms M Mukuka argued that the issue in contention was whether or not there was a binding contract between the parties. She argued in this respect that the relationship between the two parties is governed by **The Public Procurement Act** and that by Section 53 of the said Act, a contract can be consummated by placement of a written contract or by issue of a letter of bid acceptance. It was argued therefore, that a letter of bid is one of the forms which a contract can take under the Act. She argued further that, Section 54(2) sets out when a letter of bid acceptance may be written to a successful bidder. Such a letter she argued can only be written after a number of conditions have been satisfied. Therefore, such a letter can only be written once a contract has been awarded in accordance with the provisions of Section 54 of the Act.

Counsel went on to argue that the letter confirming an award of contract is a binding contract and that a written contract is signed merely to finalize and confirm the contract already awarded. She argued that the contention by the Defendant that since the parties did not execute a contract in terms of the Act negatives the existence of a binding contract between the parties is the exception rather than the rule. In articulating the said argument counsel drew my attention to **Chitty on Contract**, Vol 1, 29th edition. She went on to demonstrate the various instances where a contract will be taken to have been concluded by reference to the cases **of Elias-Vs-George Sahely & Co. (Barbados) Ltd.(1), British Steel Corp-Vs-Cleveland Bridge & Engineering Co.Ltd.(2) Prudential Assurance Co. Ltd-Vs-Mount Eden Land Co. Ltd.(3) & Halsbury Laws of England**, 4th edn Volume 9. It was also argued that the manner in which the Defendant cancelled the contract contravened the provisions of sections 65 to 67 of the Act. Counsel ended her submissions by highlighting the evidence tendered by the witnesses.

In her submissions Counsel for the Defendant Mrs. T. Lungu began by defining what constitutes a contract in terms of Section 3 of the Act. She argued further that, by Section 52(3) of the Act a decision to award a contract by the approvals authority does not constitute a contract. The said section she argued, stipulates that an award to tender is not a contract because after the award of contract there is need to enter into a formal contract. Counsel went on to distinguish between a solicitation document pursuant to section 54(1) as opposed to the format a contract should take in accordance with Section 55(1).

Counsel ended her submissions by summarizing the evidence tendered.

I have considered the pleading, evidence and final submissions tendered in this matter. The determination of this matter hinges on the interpretation of the effect of the letter dated 11th May, 2010, from the Defendant to the Plaintiff. The said letter is at page 1 of the Plaintiff's bundle of documents and I have reproduced it hereunder for ease of reference. The full text of the letter states as follows:

"EC/71/3/1

11th May 2010

Managing Director
Zambian Inside
P.O. Box 35208
LUSAKA

Dear Sir

RE: **CONTRACT AWARD - TENDER FOR PRINT MEDIA PLACEMENTS AND AGENCY SERVICES**

Following the conclusion of the tendering process for the above tender. I am pleased to inform you that the Electoral Commission Procurement Committee at its meeting held on 7th May 2010 approved and awarded you the contract for print media placements and agency services.

Kindly make arrangements to visit the Commission offices for contract finalization

Yours faithfully

D.N. KALALE

DIRECTOR

ELECTORAL COMMISSION OF ZAMBIA”

The Plaintiff has argued that the said letter, in and of itself, constitutes a contract while the Defendant has argued that the letter was merely an intention to enter into a contract and was subject to execution of a formal contract.

The position of the law as to what constitutes a valid and enforceable contract was aptly summed up in the case of **May and Butcher Vs. R (4)** by Viscount Dunedin, quoting from **A Casebook on Contract** at page 75 as follows:

“To be a good contract there must be a concluded bargain, and a concluded contract is one which settles everything that is necessary to be settled and leaves nothing to be settled by agreement between the parties.”

The question I therefore have to ask in relation to the letter of 11th May, 2010 is, did it conclude the bargain between the parties? The answer lies in the last paragraph of the letter which states as follows:

“Kindly make arrangements to visit the Commission Offices for contract finalization”

The said passage clearly indicates that there was one more step to be taken by the parties, which is finalization of the contract. The evidence of both PW and DW is that no formal contract was finalized. In fact, PW insisted that the letter is in itself a contract. I find that the letter is not a binding contract because it was clearly subject to conclusion or finalization of the contract. My findings is fortified by the holding in the case of **Winn Vs. Bull (5)** which is reproduced at page 81 of **A Casebook on Contract** where it was held that where parties agree in writing that up to a certain point the terms shall be terms of a contract, there is no contract if such terms are not reduced to a formal contract. The foregoing holding arose from facts similar to the facts in this case. They are as follows:

“The Defendant agreed in writing with the Plaintiff to take a lease of a house for a certain term at a certain rent, “subject to the preparation and approval of a formal contract”. No other contract was ever entered into between the parties. The Plaintiff brought an action for specific performance.”

The foregoing facts are clearly similar to the facts in this case and therefore one can understand why the court held as it did.

In arriving at the findings I have made in the preceding paragraph, I have also considered the provisions of **The Public Procurement Act**. Section 3 of the said Act states as follows:

“This Act applies to all procurement carried out by procuring entities using public funds, except as otherwise provided under subsection (2).”

The Defendant is an entity that depends and relies on public funds for procurement of services such as those provided by the Plaintiff. As such the provisions of the Act are applicable to the Defendant.

As regards what constitutes a contract for the award of services, sections 52 (3), 54 and 55 are instructive on the issue. Section 52 (3) states as follows:

“ A decision to award a contract by the approval authority does not constitute a contract”.

The contents of the letter of 11th May, 2010 as I have found in the earlier part of this judgment, was merely a decision made to award the contract. As such as per section 52 (3) cited above, it does not constitute a contract. The arguments advanced by Counsel for the Plaintiff in this respect are therefore untenable.

Further section 54 is on procedure on award of contract and it states as follows:

“ (1) A solicitation document shall state the procedure for award of contract, which shall be:
(a) by placement of a written contract document or
(b) by issue of a letter of bid acceptance, which shall be

confirmed by a written contract.”

This provision indicates that in all cases there must be a contract document or written contract. Therefore a letter per se can not suffice which fact is confirmed by section 55 which states as follows:

“ (1) A contract shall use the appropriate standard document issued

by the Authority or any other document approved by the Authority.

(2) The type of contract shall be as determined by statutory instrument.”

The Plaintiff in civil matters bears the burden of proving its case. In this case I am of the considered view that the Plaintiff was obliged to lead evidence to show or prove that the letter of 11th May, 2010 is the contract as it complied with the provisions of section 55. No such evidence was led and in fact the reverse is what happened in that PW did state that no formal contract document was drawn up and insisted that the letter itself was the contact.

In arriving at the finding I have made in the preceding paragraphs I have considered the cases of ***Elias-Vs-George Sahely and Co.(Barbados) Ltd. (1)*** and ***British Steel Corp-Vs-Cleveland Bridge and Engineering Co. Ltd.(2)*** referred to me by Counsel for the Plaintiff. Although the facts in the former case are similar to the facts in this case, it is distinguished from this case because the reasons given by the Privy Council for findings that there was a valid contract are not present in this case. The reasons were firstly that the terms of sale for the land had been concluded and as such there was nothing further to negotiation, which is not the case in this matter. Secondly, parole evidence was found to be admissible in that case and was admitted, which is inadmissible in this case and neither has it been led.

As regards the ***British Steel Corp-Vs-Cleveland Bridge and Engineering Co. Limited(2)***, case it is to be distinguished from this case because the Plaintiff in that case sued for the value of the goods delivered to the Defendant based on the equitable relief of quantum merit. The Plaintiff did not as the Plaintiff in this case, sue for specific performance because it acknowledges that no contract was concluded. The court in that case held in this respect at page 505 as follows:

“Since the parties had ultimately been unable to reach final agreement on the price or other essential terms, the contract was eventually not entered into and therefore the work performed in anticipation of it was not referable to any contractual terms as to payment or performance.”

I have also considered and rejected the argument by the Plaintiff that the contract was partially performed by the parties because the Defendant gave instructions to the Plaintiff on it. The reason for my dismissing the argument is because DW clarified that the instructions given to the Plaintiff by the Defendant between May and November, 2010 when the offer was cancelled did not relate to continuing voter registration which was the subject matter of the award of contract.

Despite my findings in the preceding paragraphs I am compelled to comment on the Plaintiff’s prayer for specific performance. My finding is that even assuming that I had found that the parties had entered into a legally binding contract I would have been disinclined to order specific performance. My decision is based on the fact that the act sought to be specifically performed is not possible to achieve. The evidence of DW on this point was that the services for which the Plaintiff was to be engaged were for the continuing voter registration for the elections held in September 2011. This exercise is

no longer being conducted and indeed the elections for which the exercise was done have passed. Specific performance would therefore have been an inappropriate remedy to grant. My finding is fortified by the definition of the said remedy by ***Black's Law Dictionary***, which states at page 432 as follows:

“The rendering, as nearly as practicable, of a promised performance through a judgment or decree; specify, a court - ordered remedy that requires precise fulfillment of a legal or contractual obligation when monetary damages are inappropriate or inadequate ••• In essence, the remedy of specific performance enforces the execution of a contract according to its terms •••”

From the foregoing definition, it is clear that the remedy of specific performance requires the enforcement of a contract in accordance with its terms. This being the case, the enforcement sought must be attainable not as in this case where such enforcement would be impossible to attain.

By way of conclusion, I find that the Plaintiff's case lacks merit and I accordingly dismiss it with costs. The same are to be agreed in default taxed.

Leave to appeal is granted.

Delivered this 29th day of June 2012

**NIGEL K. MUTUNA
HIGH COURT JUDGE**