

**A REGIONAL SERVICES LTD v. SECRETARY –
CENTRAL TENDER BOARD AND THREE OTHERS**

**B HIGH COURT OF TANZANIA
AT DAR ES SALAAM
(Mapigano, J.)**

C MISCELLANEOUS CIVIL CAUSE No. 67 OF 1998

D *Administrative Law – Judicial review – Procedure – Preliminary Objection not raised at the hearing of the application for leave to apply for prerogative orders – Whether the objection may be raised subsequently against the application for the orders.*

E *Judicial Review – Acts amenable to judicial review – Complaint arising from contract – Relationship between applicant and respondent being contractual – Whether acts arising from that relationship are amenable to judicial review.*

F *Natural Justice – Right to be heard – Tender awarded to applicant and then the award process is unilaterally terminated – Whether applicant was entitled to a hearing before termination.*

G *Natural Justice – rule against bias – Deputy Minister stating in Parliament that tender was improperly awarded to applicant and a fresh tender will be floated to award it to another person in a more transparent manner – Whether the statement creates bias against the applicant in the fresh tender process.*

H The applicant was awarded a tender to design, print and supply national identity cards pursuant to the provisions of the Registration and Identification of Persons Act 1986. But before a formal agreement was signed the applicant received a letter informing that the Government had decided to terminate the process. A Deputy Minister then made a statement in Parliament explaining that the process had been cancelled because the Government was dissatisfied with the procedure used to award the tender to the applicant and directed that the tender be re-floated in a more transparent manner. **I** This explanation conflicted with the one given subsequently by the second respondent

A in response to the applicant's request. Some five months or so later the first respondent floated a fresh tender which, it was stated in court, was manifestly designed to exclude the applicant from bidding for it. The applicant came to court to challenge, by judicial review, both the cancellation of the original tender and the re-floated tender. Leave to apply was granted without opposition from the Attorney General. When the main application came up for hearing, a Preliminary Objection was raised by the respondents, arguing that because the relationship between the parties was contractual, the matter was not amenable to judicial review. The applicant countered that it was improper to raise the objection now, and that it should have been raised by the Attorney General at the hearing of the application for leave to apply for judicial review. **C**

Held: (i) It is permissible for the court at the hearing of the substantive cause to go into the question whether the matter is amenable to judicial review because the application for leave to apply is basically *ex-parte*, the joinder of the Attorney General being virtually pro-forma, and the principal respondents have had no opportunity of being heard on that question; **D**

(ii) In floating and awarding the tender, and in the subsequent termination, the respondents were performing public duties; their actions, therefore, are amenable to judicial review; **E**

(iii) The decision to terminate the award process was bound to adversely affect the interests of the applicant, was shocking and distressing, and went contrary to the applicant's legitimate expectations, entitling the applicant to the right to be heard; **F**

(iv) The allegation that the applicant was privy to and partly responsible for the alleged flawed procedure to award the tender was a serious one to which the applicant was not given an opportunity to reply; this was a clear denial of natural justice; **G**

(v) From the statement of the Deputy Minister in Parliament, the decision to terminate the award process was clearly intended to exclude the applicant from the re-floated tender and the first respondent was blamed for allegedly making a mess of the first tender process; the first respondent, therefore, was bound to be heavily biased against the applicant in relation to the re-floated tender; **H**

(vi) Termination of the award process and the re-floated tender are quashed by *certiorari* and the third respondent is directed by *mandamus* to finalise the award process of the original tender or to terminate it in accordance with the law. **I**

A **Application granted**

Cases referred to:

- (1) *Courtney and Fairbairn Ltd v. Tolaini Brothers. (Hotels) Ltd and another* [1975] 1 W.L.R. 297
- (2) *Lausa Alfan Salum and Others v. Minister for Lands, Housing and Urban Development and another* [1992] T.L.R. 293
- (3) *Mobrama Gold Corporation v. Attorney General and another*, HC-DSM-Miscellaneous Civil Case Number 42 of 1995 (unreported)
- (4) *Ridge v. Baldwin* [1964] 2 All ER 66
- (5) *Ndegwa v. Nairobi Liquor Licensing Authority* [1957] EA 709

D Statutory provision referred to:

Registration and Identification of Persons Act 1986

Mr Mujulizi, for the Applicant

E *Mr Ngwembe*, for the Respondents

RULING

(Delivered 17 December 1999)

F

Mapigano, J.: This is an application for prerogative Orders. The circumstances which attend the application are set out in the affidavit made by Sharif Mohamed Mubago who describes himself as the local representative of the applicant. In substance, his depositions are as follows:

In 1995 the Government through the Central Tender Board advertised tender number 26 of 1995/96 for the design, printing and supply of National Identity Cards. The making of identity cards and issuing them to persons residing in Tanzania was the requirement of the law, namely the Registration and Identification of Persons Act 1986. The applicant submitted its bid and was awarded the tender in June 1997. By a letter dated 20 June 1997 annexure "RSL", the third

respondent notified the applicant of the decision of the Central Tender Board and intimated the Government's intention to enter into contract with the applicant subject to successful negotiations.

Pursuant to the said letter, the applicants mobilized and put in place all the necessary documentation, systems and other requirements as specified by the third respondent, in readiness for negotiations, and then carried on the negotiations with the Government. In January 1998 a Draft Agreement was initiated and the second respondent was the person who did so on behalf of the Government.

But the agreement never came to be executed. To the applicant's surprise, and without warning or notice of any kind, the applicant received a letter on 16 June 1998 by which the second respondent informed him that the Government had decided to terminate the negotiations. It is the applicant's allegation that the letter did not give reasons for such decision. Next, there was a statement made by the Deputy Minister for Home Affairs in Parliament on 23 June 1998, when answering a question on behalf of his Minister, which reads as follows:

After floating the tender, a total of 27 tenderers submitted their bids, out of which 11 bidders pre-qualified and finally one going by the name of RSL of West Indies was appointed to do the job. However, the Government was not satisfied with the procedure used to appoint the awarded contractor and the Government was left with no alternative but to direct my ministry to re-float the tender in a more transparent manner and to get another contractor. In compliance with the Government directive, my ministry has set new procedures for calling another tender for the project. As soon as another contractor with sufficient qualifications is appointed and all other procedural matters being completed, the work will commence immediately.

But in reply to the applicant's request for the reasons for the cancellation of the award, the second respondent wrote a letter on 3 July 1998 Annexure "RSL6", giving completely different reasons from those stated by the Deputy Minister. The letter is in the following terms:

As pointed out in our earlier letter ref. number 657 Volume 1/16 of 16 June 1998, the Government could not continue with the finalisation of the

A award process as it became more than obvious that the new project package had greatly varied from the original package that had been used to give the provisional green light to negotiate with RSL. For example:

- B (i) The price of the ID for aliens had risen from USD 100 to USD 1 200. The second bidder had it at USD 500, hence the need to get him also to improve the respective offer.
- C (ii) The overall costs had escalated from USD 64 million as tendered in 1995 to USD 127million. It was not easy just to ignore this bigger jump even if we had the justifications. Other bidders would have taken this as an issue for an objection.

This decision is said to have been taken by the cabinet.

D In November 1998 the first respondent floated tender number 22 of 1998/99, vide annexure "RSL7", and it is stated that the said re-floated tender is manifestly designed to exclude the applicant from bidding for it. Upon several grounds, the cancellation of the original tender and propriety of the re-floated tender are impugned

E in this application. An Order of *certiorari* is sought to quash the letter of the second respondent dated 3 July 1998 as well as the re-floated tender. An order of Prohibition is sought to prohibit the first,

F second and third respondents from interfering with the award process of the original tender or awarding the same to any other person other than in accordance with the terms and conditions of the tender. And an order of *Mandamus* is sought to direct the third respondent to

G finalise the award process of the original tender or, alternatively, terminate the award process in accordance with the law.

H The respondents have raised a point of law, which is essentially a Preliminary Objection, that the subject-matter of this application is not amenable to judicial review. It is contended on their behalf that the relationship between the parties was contractual, because the tender process would eventually have given rise to a procurement contract. It is accordingly submitted that the applicant should have

I sued on the contract.

A In reply, counsel for the applicant points out that when Mrs. Macha appeared for the Attorney General on 2 February 1999 she did not oppose the application for leave to apply for the prerogative reliefs. It is his contention that it is now too late to raise the point.

B In the alternative, the applicant meets the preliminary point by first pointing out that the respondents are wavering between two opinions. They start with the contention that there existed a contractual relationship between the parties, but later in argument they urge the point that the parties were still negotiating, and that what the Government

C did was to terminate the negotiations. In regard to the later argument, reference is made to the decision of the Court of Appeal of England in the case of *courtney and Fairbairn Ltd v. Tolaini Brothers (Hotels) Ltd and another* (1), where it was held that the law does not recognize

D a contract to negotiate.

E Secondly, it is submitted that since the respondents were discharging a statutory duty, as the making of identity cards and issuing them to persons residing in Tanzania was the requirement of the statute, the exercise of that power is subject to judicial review. Several authorities have been cited in support of that proposition, including the decision of our Court of Appeal in the case of *Lausa Alfian Salum and Others v. Minister for Lands, Housing and Urban Development and another*

F , (2), where the court subscribed to the view that:

G Any action of a public official done in official capacity is challengeable on the ground of illegality, irrationality and procedural impropriety. By way of an application for judicial review; and a passage in Lewis, C's book, **Judicial Remedies in Public Law** (1992) Sweet and Maxwell, London, at page 31, namely, that:

H Bodies performing public duties or exercising powers that could be characterized as public may be subject to judicial review, even though the powers are not statutory or prerogative. Given the wide or disparate range of bodies that operate in the administrative landscape, and given a revitalized approach on the part of the courts to judicial

I review and the need to control potential abuses of power, a large

A number of non-statutory bodies might well be brought within the ambit of public law and judicial review.

B It is also submitted, in the further alternative, that even if the matter is to be held to be more contractual, legal redress can still be sought in public law, since there is an element of public law involved. The decision of this court in *Mobrama Gold Corporation Ltd v. Attorney General and another* (3), is relied upon.

C It may appear to be an uncommon practice that a respondent should raise such point at this stage. But it is permissible. In principle, the court can go into the question whether an applicant should pursue a remedy in private law at the hearing of the substantive cause. It makes good sense, because, as a rule, the application for leave to apply is D basically an *ex parte* one and in the majority of cases the principal respondents have no opportunity of being heard as regard the question whether the subject-matter of the cause is amenable to judicial review or whether there exists a *prima facie* case. And it has to be stressed E that on 2 February 1999 Mrs Macha appeared for the Attorney General only, and that the joinder of the Attorney General is virtually *pro-forma*.

F I entirely agree that there existed no valid and enforceable contract between the parties. The negotiations had not been finally concluded when the Government decided to re-float the tender. I cannot but also agree that in floating and awarding the tender, and in terminating the subsequent negotiations, the first, second and third respondents G were performing public duties. As their Lordships stated in the *Lausa Alfan Salum (2)* case, which decision is binding on this court, any action of a public official done in official capacity is impugnable by way of judicial review proceeding on the grounds of illegality, H irrationality and procedural impropriety. I must hold, therefore, that the application is entertainable.

I The allegation that the second respondent's letter which notified the applicant of the termination of the negotiations did not give the

reasons for the decision is denied by the respondents, and rightly so. In paragraph of that letter it is stated thus: A

The decision has been prompted by the current change of terms of reference from the original one as then submitted in the year 1995. For instance, the alteration of the well noted reduced population statistical data, have subsequently B necessitated the escalation of prices per identity card on aliens.

Quite clearly, a reason was given, and it is a different matter whether that reason was well based. C

Also controverted is the applicant's averment that the second respondent had no authority to act for the Ministry of Home Affairs or the Government in respect of the termination of the negotiations. In a counter-affidavit made by Mr Philo Nombo, on behalf of the D respondents, it is deposed in paragraph 10, that the second respondent was directed by the third respondent to notify the applicant of the said termination. I have believed Nombo's word.

E It is idle to deny that the reasons stated by the Deputy Minister in Parliament for the termination of the negotiations are in conflict with those given by the second respondent in his letter of 3 July 1998. This is admitted in Mr Nombo's counter-affidavit, and it is F pertinent and meaningful that the respondents have nothing to say in explanation of that disparity. In the circumstances, I should agree with counsel for the applicant that that disparity brings the *bona fides*, candour and veracity of the Government into question.

G The applicant describes the Central Tender Board as a Government body through which the procurement of goods and services by the Government is made. The applicant then puts forward the propositions that the Board is an independent executive agency; that the Cabinet H has no authority to review its decisions; and that if there was any serious irregularity in the tender process then it was only the Board which could terminate the process: with due respect, this argument is hardly tenable. There is simply no material before this court which I demonstrates that the Board enjoys such unfettered powers. I am,

A therefore, unable to sustain the argument that the Cabinet has no
power to review the decisions and acts of the Board and, if need be,
to terminate tender processes. There are other imputations of illegality,
stream over the pleadings and submissions of the applicant, with
B reference to the acts and decisions of the respondents. The problem,
however, is that they are presented in general terms and I have to
confess that I have failed to apprehend the essence of the illegalities
alleged. But as aforementioned, there are other grounds which are
C being canvassed by the applicant, and it seems to me that they are
not effectively resisted.

The first is failure on the part of the respondents to give the
applicant the opportunity of making its representations. As we have
D seen, there are two versions as to why the award process was terminated.
The first version is contained in the statement of the Deputy Minister
for Home Affairs; and the second is contained in the letter written
by the second respondent ten days later. The reasons given by the
E Deputy Minister for the cancellation of the process are pre-award,
while those given by the second respondent are post-award. In relation
to the subject at hand, I consider that the first version is more authoritative.
The main points of the Deputy Minister's speech were the allegation
F that the procedure used to appoint the applicant was shrouded in
some in transparency; and the decision of the Government to get
another contractor to do the job. Beyond question, there is an insinuation
in that speech that the applicant had a hand in the creation of the
G alleged flaw.

It is common ground that the applicant was not afforded a hearing
before the Government took that drastic step. It is submitted on
behalf of the applicant, that an administrative decision of a public
H official, which is bound or likely to adversely affect the interests
of individuals, has to be taken after giving such individuals a reasonable
opportunity of being heard, and the decisions in *Ridge v. Baldwin*
(4), and *Ndegwa v. Nairobi Liquor Licencing Authority* (5), are
I cited in support. The respondents say nothing in reply to this submission,
and in my opinion, it is a submission I must sustain. There can be no

doubt that the decision to terminate the award process was bound to
adversely affect the interests of the applicant. There was also the
serious allegation that the applicant was privy to and partly responsible
for the alleged flawed procedure used to award the tender. In my
judgment, there was a clear denial of natural justice.

The second ground put forward is legitimate expectations. Basically,
the argument of the applicant is of the following nature; the respondents
had re-affirmed that the applicant was the winner and would enter
negotiations for terms of contract with the Government. The negotiations
C had been carried out and a final draft agreement had been initiated.
The applicant had prepared a feasibility study, engaged experts to
prepare technical and financial proposals, and all the great expenses
involved were incurred in compliance with conditions precedent stipulated
D by the respondents. Reference is made to the text under paragraph
81 of **Halsbury Laws of England** (4 ed) that in relation to judicial
review, it counts if a person has legitimate expectations of being
treated in a certain way by an administrative authority, even though
E he has no legal right in private law to receive such treatment. Again,
the respondents say nothing in reply, and I think it is a fair inference
that they are conceding the point. In truth it must be said that the
applicant was given a very severe treatment. I agree with the applicant
F that the decision to terminate the award process was not only shocking
and distressing but also went contrary to the applicant's legitimate
expectations.

The third ground is bias. This court is invited to deduce, from
what the Deputy Minister stated in Parliament, that the Cabinet had
adjudged the applicant unfit for the job; and that even if the applicant
were to bid for the re-floated tender the Board, having been blamed
for allegedly making a mess of the first tender process, was bound
to be heavily biased against it. The respondents do not deny that
they were obliged to act fairly, reasonably and properly in regard to
the re-floated tender. But they maintain that the re-floating of the
tender was devoid of bias. I must go with the applicants. The relevant
I words in the speech of the Deputy Minister are "(a) the Government

A was left with no alternative but to direct my ministry ... to get another contractor; and (b) As soon as another contractor ... is appointed ... the work will commence ...” The language is explicit. The makers of the decision to terminate the award process clearly meant to exclude the applicant from the re-floated tender. It is thus impossible to avoid the conclusion that tender number 22 of 12/99 was designed to keep out the applicant.

C In the final even and for all the reasons I have given, the application is granted with costs. The second respondent's letter of 16 June 1998 is quashed. The same with tender number 22 of 1998/99. The third respondent is directed to finalise the award process of the original tender or terminate it in accordance with the law.

MAHMOUD AMEIR MUHIDINI v. PEOPLE'S BANK OF ZANZIBAR AND TWO OTHERS

HIGH COURT OF ZANZIBAR
AT VUGA

(Umar Sadiq, J.)

CIVIL APPEAL No. 28 OF 1999

(From original decree in Case No. 52 of 1998)

Civil Practice and Procedure – Pleadings – Complaint – Amendment of complaint – Application for leave to amend complaint – When such application may be made.

A Regional Magistrate refused an application for leave to amend a complaint on the ground that the advocate was in possession of the complaint for a long time and did not care to file the application for leave to amend on mention dates but waited until the date fixed for hearing that he made the application. Aggrieved by the decision of the Magistrate, he appealed to the High Court of Zanzibar. The High Court considered the law applicable.

Held: (i) Both in law and equity an advocate is required to take proper steps at the earliest time to apply for leave to amend pleadings;

(ii) The advocate of the appellant was in possession of the complaint for a long time and was required to apply for leave to amend at the earliest possible time;

(iii) The delay in applying for leave to amend the complaint meant the advocate had elected to proceed on the complaint as originally drafted.

Appeal dismissed

Case referred to:

1. *British Indian General Insurance Company Ltd v. Parmar* [1966] EA 172

Statutory provisions referred to:

- (1) Transfer of Property Decree, sections 67(s)(a) and 69(1)
- (2) Laws of Zanzibar Chapter 8, Order 6, rule 17

JUDGMENT

(Dated 20 December 1999)

Umar Sadiq, J.: This is an appeal against the ruling and the decision of the Regional Magistrate in Civil Suit Number 77 of 1998 given on the 2 July 1998. The appellants in their memorandum filed seven grounds of appeal:

1. The Magistrate erred in facts and law and ought to have allowed the appellant to amend his complaint which had been prepared by a court official in ignorance of the facts and the law pertaining to mortgages.
2. The Magistrate erred in facts and law and ought to have agreed with the issues framed by the appellants as were consistent with the pleadings.