



IN THE SUPREME COURT OF JUDICATURE

CLAIM NO. 2013 HCV 06026

BETWEEN PAYMASTER JAMAICA LIMITED APPLICANT
AND POSTAL CORPORATION OF JAMAICA RESPONDENT

Douglas Leys Q.C., Hugh Wildman and Simone Tenant instructed by Leys Smith Attorneys at Law for Claimant.

Nicole Foster-Pusey Q.C. and Sashane Newby for respondent instructed by Director of State Proceedings

Judicial Review- Application for Leave – Public Sector procurement regulations 2008- whether procurement contract - whether alternate remedies available – whether legitimate expectation.

Heard: 12th, 13th, 14th November, 2013

Coram: BATTIS J.

[1] This judgment was delivered orally on the 14th November 2013. I am grateful to the parties for supplying their joint note of the judgment with the assistance of which I am able to issue it in this written format.

[2] Let me first express my appreciation to counsel for their well structured and presented submissions. This of course is to be expected given the calibre of the representation before me in this matter.

[3] The Applicant seeks leave to apply for Judicial Review of the decision of the Respondent to enter into discussions and award a contract to GKPS/Bill Express for the provision of bill collection services. This engagement it says follows an unlawful termination of a contract for the self-same services, with the Applicant. The Applicant also seeks interim injunctive relief.

- [4] It is common ground at this stage of the proceedings that the Applicant need only satisfy the court that it has an arguable case or as some courts have expressed it; a case with a realistic prospect of success and which is not subject to any discretionary bar such as delay or an alternative remedy. **Sharma v Brown Antoine [2006] UK PC 57: [2007] 1 WLR 780.** It is I believe well established that the bar is not to be set too high lest injustice results.
- [5] Having had the benefit of full legal submissions, I am firmly of the view that leave ought not to be granted in this case. My reasons will be shortly stated.
- [6] The pith and substance of the Applicant's case concerns the Regulations and the Rules related to public sector procurement. The Applicant argued that the Regulations apply to the contract under consideration. It is submitted that the Respondent acted in breach of the Regulations. When after wrongfully terminating the Applicant's contract, it negotiated and awarded a contract to GKPS/Bill Express. There are also allegations of bias and bad faith in the process. These however are premised on the applicability of the Regulations to the self-same contract.
- [7] There is no doubt in my mind that the Respondent is a public entity and carries out public functions. The fact that it is a private company is not decisive of the issue. See **Robinson v NIC HCV 4652 of 2010 (delivered 14 February 2013)** and the cases referred to therein at paragraphs 42-45. Contrary to the submissions of the learned Solicitor General, it is certainly arguable that when contracting to facilitate the provision of public services, the Respondent is carrying out a public duty. That fact however is not determinative of the issue before me. The issue is whether the Public Sector Procurement Regulations can arguably be said to apply to the contractual relationship under consideration.

[8] The preamble to the Regulations clearly sets out the purpose of those Regulations:

“ And whereas it is considered desirable to more stringently regulate the procurement of general services, goods and works by making the duty to observe procurement procedures legally enforceable and subject to penal sanction so as to promote the objectives of –

- a. Maximizing economy and efficiency in public procurement;*
- b. Fostering and encouraging participation in public sector procurement proceedings;*
- c. Promoting competition among prospective contractors for the supply of general services, goods and works;*
- d. Providing for the fair and equitable treatment of all prospective contractors;*
- e. Promoting integrity of, and fairness and public confidence in, the public sector procurement process, and*
- f. Achieving transparency in the procedures relating to procurement.”*

[9] Regulation 3 states that *“these Regulations govern public sector procurement in Jamaica and are applicable to all procurement of goods, works, services and other activities carried out by the Government of Jamaica”* Exclusions are listed in Regulation 4; and in Regulation 5 it is stated that *“these Regulations do not apply to the tendering and other procurement activities in relation to contracts that are below the approval threshold lawfully prescribed from time to time including special thresholds prescribed for specific entities.”*

[10] The Regulations set out rather elaborate and detailed procurement procedures and it seems to me that procurement is the focus of the legislation.

[11] The Oxford English dictionary defines “*procure*” as to “*obtain, acquire, get or secure*”. I think it is the right place to start although that definition was not relied on by either party. The Regulations do not define the word “*procure*”. They do however define “*procuring entity*”. In this regard there is no dispute that the Respondent clearly fits that bill. Where the parties differ is whether the contract under consideration can arguably be considered to be one involving “*public sector procurement*”. That phrase is defined in the Regulations as “*the acquisition of goods, works and services, by any method, using public funds by or on behalf of procuring entities for their use; and includes procurement by Government-approved authorities acting on behalf of the procuring entity*”.

[12] Manifestly, a procurement contract must involve acquisition by use of public funds by or on behalf of the procuring entity. In the contract under consideration the public sector entity is paid to act as the agent for the private sector entity when providing services. The services are provided to the members of the public. The public pays for those services out of which the public sector entity receives a fee or a commission. No doubt the public sector entity receives a benefit, that is, it is paid by the private sector entity and I suppose gets the benefit of persons who are attracted to use the facilities by reason of convenience. However, the public sector entity is not paying the private sector entity for that benefit.

[13] Mr. Leys, QC argued for a broad interpretation of procurement. However I believe it would do far too much damage to the word if this court were to construe a situation in which services are provided and paid for, as amounting to procurement by the provider of the services who is being paid.

[14] I hold therefore that the Public Sector Procurement Regulations are not applicable to the contract under consideration.

[15] It is convenient at this juncture to indicate that the application for leave fails on another ground related to the construction of the Regulations. This has to do with the availability of alternative remedies. The Civil Procedure Rules 2002, Part 56.3

(3) (d) makes it incumbent on the Applicant to state whether an alternative form of redress exists and if so why Judicial Review is more appropriate or why the alternative has not been pursued. The Applicant has argued that there is no viable alternative remedy because only the court can quash the unlawful act and restrain entry into the unlawful contract. Furthermore, because the Respondent does not accept that the contract falls within the Procurement Guidelines, it would be fruitless attempting to utilize the appellate procedure contained in these guidelines.

[16] The difficulty with those submissions, as attractive as they seem, is that the Applicant made no effort whatsoever to initiate the procedure for relief provided for in the statute. Regulations 29-33 set out an elaborate review and appeal process and provides that: *“a contractor or prospective contractor that claims to have suffered loss or injury due to a breach of these provisions by a procuring entity may seek review”*. True it is that Regulation 29 (2) (a) says that the election of method of procurement is not subject to review, however complaints of bias and nepotism are, as well as complaints of failure to disclose. It therefore could have been pursued on appeal.

[17] Furthermore, and perhaps more to the point of alternative relief, the legislature in the Regulations and the Handbook of Public Sector Procurement Procedures has clearly signalled that breaches or alleged breaches of procurement procedures ought not to prevent the public sector entity proceeding with a contract already entered into. In this regard also see also Regulations 39 and 40 which provide for criminal and civil relief by way of damages. The Regulations do not say, as they well might, that the impugned contract will be set aside and the wronged person reinstated or substituted. Even more clearly, the Handbook states in parenthesis that *“Complaints and Appeals will not automatically stop the contract award process”*. See Rule 2.5 of the Handbook under Complaints and Appeals. The Rules also state that *“If an aggrieved bidder fails to get adequate redress from the administrative review process, the final*

option is for Judicial Review". See also 2.5.5 of the Handbook where Judicial Review is expressly listed.

- [18] The position it seems to me may have been otherwise if there was a credible suggestion that the conduct of the public sector entity was *ultra vires*. Not in the sense of a wrongful mode of doing something it is entitled to do, but in the sense that it was doing something it had no authority to do. In this case there is no suggestion that the Respondent did not have authority to enter into the contract. The issue is whether it went about it in the correct way.
- [19] The policy of the legislation to prevent breaches of procurement rules automatically stopping the contract award process also impacts the attitude of the court when considering the grant of injunctive relief. The court should in the face of the provisions referred to above, be slow to stop or derail a contract award process already underway. Moreso when one considers the balance of convenience in a matter such as this. Damages would appear to be an adequate remedy as the value of the contract is known and the loss for failure to award the contract can be computed. On the other hand, the cost of delay in implementation the losses if for any reason the services required are not provided may bring incalculable dislocation and inconvenience to members of the public. Injunctive relief, in my view would therefore not be appropriate.
- [20] Also with respect to the question of available alternative remedies, the evidence reveals that the Contractor General has initiated an investigation of the matter. This Commission of Parliament is a specialized agency set up to investigate and act on the sort of allegations made by the Applicant. It seems to this Court that the Contractor General's remit is not limited to "*procurement contracts*". See the definition of "government contract" which includes an agreement entered into by a public body for "the supply of any goods or services". It seems that whether or not this contract is a contract for the procurement of services, the Applicant has an

alternative remedy in the Contractor General's investigation. The Applicant also has the possibility of civil action for any alleged breach of contract.

[21] This brings me to the collateral issues of wrongful termination, bias, nepotism and legitimate expectation. The Applicant contends (and I hope I do no injustice when I summarise the submissions thus) that notwithstanding the clear words of the contract, a 90 day notice ought not to have been issued as there is implied in every commercial contract a duty of good faith. This duty of good faith requires that at the very least the other party is given an opportunity to remedy the problem before a 90 day convenience notice is served.

[22] The cases cited in support of this legal proposition speak to an implied duty of honesty. "*Good faith*" as a term of art may connote fiduciary or other duties. Even if there is merit in the proposition, on the facts before me it is not arguable that the Respondent has been in breach of such a duty. This is because the issue relating to the unreconciled payments had been the subject of dialogue and written communication. The uncontradicted evidence is that in July 2013 the Respondent declined to enter into arrangements with the Applicant for the expressed reason that this matter was outstanding. In any event it is my view that the question whether or not there is breach of the contract is best dealt with by a trial court where evidence may be lead and tested in the usual manner.

[23] The suggestion of bias and nepotism will not be able to stand as grounds of Judicial Review on the facts of this case. Given that I have found that the Regulations do not apply, Regulation 36 (2) would not apply. The Applicant has as I have said an alternative remedy provided by the Contractor General's investigation.

[24] Mr. Hugh Wildman, in his usual clear and persuasive style, submitted that the Applicant had a legitimate expectation that its contract should be put to tender. He submitted that even if the contract does not fit into the four corners of the Regulations, the common law would on the facts of this case impose such a duty.

Counsel relied on **Chief Immigration Officer of British Virgin Islands (1995) 50 WIRI** as well as the **CCSU v. Min. for Civil Service [1984] 3 AER 935**. I would add as well observations on legitimate expectation in the decision of the Caribbean Court of Justice in **AG of Barbados v Jeffrey Joseph and Lennox Boyce CCJ Appeal No. CV2 of 2005**. The analysis of Pollard J in particular is recommended.

- [25] This area of legitimate expectation is still in its developmental stages. What however cannot be gainsaid is that for it to apply there has to be some conduct or representation by the State to give rise to an enforceable right. In the CCJ case it was the fact of entry into a treaty and its publicity. A justiciable right emerged even though the treaty had not been legislated into domestic law.
- [26] Mr. Wildman, absent the applicability of the Regulations, could point to nothing except a notional duty of fairness which could give rise to the alleged legitimate expectation. I do not regard as inherently unfair the decision by the Crown to contract with one person rather than another. Such a decision, taken on a commercial basis, may be made for a miscellany of reasons. It is precisely because the common law afforded no relief in such circumstances that the Contractor General's Act and the Regulations were passed. Parliament decided that those Regulations should apply to procurement contracts. The Applicant would wish by utilizing the device of legitimate expectation that this court extend its application to other types of contracts. I am satisfied that this would not be a legitimate extension of the common law. I do not see legitimate expectation as having any prospects of success for the Applicant.
- [27] In closing let me again express gratitude for the assistance provided. The Application for leave to apply for Judicial Review fails. There is no arguable case on the merits and hence no basis on which I can properly grant leave. The application is dismissed and I will hear submissions on costs.

Batts J.
14 November 2013