



IN THE HIGH COURT OF SIERRA LEONE
(COMMERCIAL AND ADMIRALTY DIVISION)
FAST TRACK COMMERCIAL COURT

FTCC 300/16 2016 G. NO.03

BETWEEN:

GENKEY SOLUTIONS B.V. ———— APPLICANT

AND

NATIONAL CIVIL REGISTRATION AUTHORITY —— RESPONDENT

REPRESENTATION:

Brima Koroma Esq — Counsel for the PlaintiffApplicant

O.I. Kanu Esq — Counsel for the Defendant/ Respondent
Sullay Katta Esq

BEFORE THE HON. MRS. JUSTICE AMY J. WRIGHT J
RULING DELIVERED ON THE 29TH DAY OF APRIL 2017

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THE APPLICATION

The matter was commenced by way of an Originating Notice of Motion dated 31st October 2016 for and on behalf of the Applicant with its supporting Affidavit sworn to by Michael Viano a Representative of the Applicant and the exhibits attached thereto and the Supplemental Affidavit of Siman Alie-Mans Conteh one of the Solicitors of the Applicant praying for the following Orders;-,

1. An Interim Injunction against the Respondent restraining them from entering into and dealing in any manner whatsoever with a certain Party for the supply of Registration Kits.
2. An Injunction against the Respondent restraining them from a variety of activities pending the hearing and determination of the matter as placed before the Independent Procurement Review Panel.
3. An Injunction against the Respondent restraining them from a variety of activities pending the hearing and determination of the intended Judicial Review against the Respondent.
4. An Injunction against the Respondent restraining the Respondent from certain activities and the disposal or not thereof of certain documents relating to the Applicant and the entire procurement process.

There was no Affidavit-in-Opposition filed for and on behalf of the Respondent.

FACTS OF THE CASE

The Respondent, sometime in July 2016 invited the Applicant and Three (3) other Parties to participate in a process referred to as "Restrictive Bidding" for the procurement and supply of Registration equipment and materials.

The Applicant became engaged in the bidding process and other requirements of the Respondent and in August 2016, the Respondent by letter invited the Applicant to a Post Qualification Examination which took place on the 10th September 2016.

After the Post Qualification Examination, the Respondent on the 26th of September 2016 in reply to the Applicant's letter of the 22nd September 2016, informed the Applicant that another Party who was not invited to participate in the "Restrictive Bidding" process, nor chosen by the Respondent's Technical Experts under the 3 stages of Price Evaluation, Technical Evaluation and Preliminary Examination and Assessment of Qualifications, had been awarded the contract for the procurement and supply of the registration equipment and material as required by the Respondent.

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The Applicant thereafter addressed a letter to the Respondent pointing out several issues they considered anomalies in the process of awarding the contract to another Party, but got no response to the Applicant, nor did Solicitors acting for and/ on behalf of the Applicant receive a response to its "official complaint" of 30th September 2016.

The Applicant further wrote to the Respondent's Independent Procurement Review Panel on the 13th and 18th October 2016 respectively, but received no response from this body.

THE ISSUES TO BE DETERMINED

The Applicant is claiming that the Respondent did not act strictly according to the provisions of The Public Procurement Act 2004, The Public Procurement Regulations 2006 and The National Civil Registration Authority Act 2016 and by awarding the procurement and supply contract to a Party that was not part of the bidding process, the Respondents conduct is unlawful. Can this said unlawful conduct warrant the granting of Injunctions against the Respondent.

The Respondent claims the "Res" which is the subject-matter of this Application no longer exists. If even this is so, without an Affidavit-in-Opposition or evidence to back up this submission should the Applicant not be able to have the matter brought before the Independent Procurement Review Panel or the Courts for a Judicial Review?

SUBMISSIONS BY BOTH COUNSELS

B. Koroma Esq. Counsel for the Applicant

Counsel said he was relying on the entirety of both of the Affidavits in support of the Application but more particularly to paragraphs 2-31 of the Affidavit of Michael Viano and was making the Application pursuant to O.35 r.1 of the HCR 2007.

Counsel submitted that the Applicant was invited with three (3) other Parties to enter into what is known as 'Restrictive Bidding". He held that the Applicant was the most successful Party and won the Bid as the Applicant's system was the most responsive and his price the lowest amongst the other three (3) Parties engaged in the "Restrictive Bidding" and after the Applicant had won the Bid, the Respondent contracted with another Party that was never part of the initial restrictive bidding process to provide the goods and services.

Counsel held that this Party that the Respondent had proceeded to contract with, lacked the required technical competence and experience for the contract as set out by the criteria provided by the Respondent.

Counsel added that Exhibit "SAMC 1" which is a letter addressed to the Applicant, the Respondent made several admissions therein tantamount to wrongdoing in respect of the "Res" of this action.

He said the Court had to grant the Injunctions as prayed for as the Respondent was in the process of executing a contract with another Party in clear violation of the provisions of the Respondent's governing Act.

Sullay Katta Esq Counsel for the Respondent-Reply to the Application

Counsel submitted that the Application should not be countenanced by the Court as the "Res" which is the subject-matter of the Application is no longer in existence.
He said the Biometric Kits which is the subject-matter of this action has been delivered and part-payment for same effected by the Respondent.

Counsel said the Court cannot act in vacuum as there was no action before this Court, thus the Application dated 31st October 2016 filed for and on behalf of the Applicant should be struck-off.

B. Koroma Esq Counsel for the Applicant Response to the Reply of the Respondent's Reply to the Application.

Counsel submitted that the Respondent did not file any papers opposing the Application as according to him, any evidence supporting or opposing any Application should come before the Court by way of an Affidavit.

Counsel said, his Learned Colleague's assertion that the "Res' is no longer in existence is incorrect as the Application is for the granting of several Injunctions which are not limited to the mere execution of a contract for which only part-payment has been made, but deals with the entire Registration exercise.

Counsel held that the matter they are before the Court for is not just one event, but a continuos process, encompassing the whole registration exercise and was challenging the Respondent to prove that indeed the "Res" was extant.
He said, the portion that touches and concerns the Applicant is ongoing.

Counsel said as far as he was concerned, the Respondent was acting in "bad faith" and "mala fides" by filing preliminary objections to the Application and seeking to strike out the Application for a variety of frivolous reasons when in Exhibit "SAMC 1" the Applicant admitted to its lapses and non-compliance.

Counsel pleaded with the Court not to strike out the Application as there is no proof that the "Res" is non-existent nor is there any legal basis for the Respondent to call for the Application to be struck off.

THE JUDGE'S CONSIDERATIONS AND REASONING

The Applicant in this case, a limited liability company has canvassed for several Injunctions against the Respondent who is a Public Authority albeit a corporate entity.

Injunctions are generally granted when a direct, continuing and sometimes malicious injury is being committed against the Applicant, they can also be granted when a wilful act is being committed against the Applicant with the full knowledge that the act is likely to injure another Party or with reckless disregard of the consequences.

An Injunction will command an act which is deemed to be contrary to equity, justice and good conscience.

An Injunction can be applied for and granted by the Courts before the commencement of the proceedings/action proper and before a final decision is handed down; this is to enable the Courts or the Statutory Authority to objectively consider the issues that will be placed before it, this was held in ***NATIONAL COMMERCIAL BANK JAMAICA LTD V OLINT CORPORATION LTD 1 WLR 1405*** and may grant the Orders in the interest of justice.

Injunctive Reliefs are purely discretional but are granted in the interest of fairness equity and justice.

In the famous case of ***AMERICAN CYANAMID COMPANY LTD V ETHICON LTD 1975 AC 396*** it was held that if damages will be an adequate remedy for the Plaintiff, then there is no reason to interfere with the Respondent's freedom of actions/operations by the grant of an Injunction. On the other hand however, if there is a serious issue to be decided and the Plaintiff could be prejudiced by the acts or omissions of the Respondent pending a trial, or in this instance, a review, and the Undertaking as to Damages would provide the Respondent with an adequate remedy if it turns out that freedom of action should not be restrained, then an Injunction should ordinarily be granted. The guidelines in this famous case are primarily to Applications where the facts are in dispute and not the law.

In this instant case, the respondent is a Public Authority albeit a corporate entity, thus the issue of public interest cannot and shall not be overlooked.

In ***SMITH V ILEA 1978 1 ALL ER 44*** it was held that the public interest is a legitimate factor to be considered in assessing where the balance of convenience lies. The Court must and in this instant case does take cognisance of the fact that the Respondent is a Public Authority serving the national interest and providing registration services to the public in general as per its governing Act.

The Respondent herein came into the matter by default as the Application made by the Applicant was Ex Parte, but did not comply with O 35 R 1 (6) of the HCR 2007 which provides that ***"a Respondent who desires to oppose the Application shall file an Affidavit-in-Opposition"*** but chose to oppose the said Application *"viva voce"* in only two short paragraphs without adducing any evidence whatsoever to the submissions in the said "viva voce" Application.

In ***WOODFORD V SMITH 1970 1 WLR 806*** it was held that "***if there is plainly no defence to the claim and the only object in raising a defence is delay, an Injunction should be granted."***

Furthermore, in ***OFFICIAL CUSTODIAN FOR CHARITIES V MACKEY 1985 CH DIV 168*** it was held that where the Defendant has not raised any arguable defence thus there is no serious question to be tried, an Injunction should in general be granted.

Order 35 of the HCR 2007 provides for Applications for Interlocutory Injunctions and Interim Preservation of Property and O 35 R 8 further provides that ***"the Party requesting the Injunction should specify some irreparable damage or mischief which will be caused to the Plaintiff if he proceeds in the ordinary manner"***

The Public Procurement Act (No. 14) 2004 provides in Section 41-45 inclusive for what is known as "Restrictive Bidding" this activity can be undertaken (subject to the approval of the Procurement Committee) when the goods, works or services are only available from a limited number of Bidders and/or when the time and cost of considering a large number of Bids is disproportionate to the estimated value of the procurement.

I can safely conclude that the Respondent utilised Sect 41 (1) (a) of the aforementioned Act as the material and equipment required from the Applicant is to some extent specialised and thus capable of being provided by only a limited number of Bidders.

Sect 42 (1) further provides that if the Restrictive Bidding is employed pursuant to Sect 41 (a) then all known Suppliers capable of supplying the goods works or services **shall** be invited to bid.

I am thus at a loss as to why the 3rd Party who the Respondent eventually claims to have awarded the contract to was not invited to participate in the Restrictive Bidding process together with the Applicant and the other three (3) Parties/Bidders.

In Exhibit ' MV3' the Respondent stated the reasons why it chose the Applicant as follows: ***"you have been chosen to participate in this process as a result of your capacity and experience in the delivery of the aforesaid"***

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The Respondent went further to conduct what is known as a ***"Post Qualification Examination"*** with the Applicant and two other Parties who had also been invited to take part in the restrictive bidding and had qualified for this stage of the process which said exercise was carried out on the 31st of August 2016 in the case of the Applicant.

However, the Respondent by letter dated 26th September 2016 informed the Applicant that another Party named ***SMRT Co. Ltd*** has been selected for the supply and/or provision of the services and equipment it had invited the Applicant to take part in the Restrictive Bidding for.

Without prejudice to the any further action the parties here may chose to bring about, the Applicant is in my view, entitled to an acceptable explanation as to why its bid was not successful especially in light of the fact that the eventual award of the contract for the supply of the services and equipment was to a Party who had not been invited to participate in the Restrictive Bidding in July 2016, nor can SMRT Co Ltd be considered a late Bidder as The Public Procurement Act further provides that "**late bids will be rejected and returned unopened to Bidders**"

THE RULING

In this instant case, the Applicant has convinced this Court that there is need for an Injunction restraining the Respondent (at least for a period of time) from dealing with the 3rd Party known as SMRT Company Ltd. as the continued interaction with the said 3rd Party and the Respondent will cause hardship and financial loss on the Applicant as a result of the expenditure it had to undergo for the post qualification exercise and more importantly, any submissions made for a Judicial Review to the High Courts or to the Independent Procurement Review Panel would be an exercise in futility.

Even though the Respondent did not by law oppose the Application as required for by the HCR 2007, I will still order that the Applicant provides a written Undertaking from the Applicant to the Respondent to pay any damages that the Respondent may suffer as a result of the grant of the Orders as prayed for in the Application herein.

In light of the above, I HEREBY ORDER As Follows:

1. **An Injunction is hereby granted restraining the Respondent whether by itself, its Chief Registrar, Registration Officers, Directors, Managers, Servants, Privies, Attorneys or Agents howsoever otherwise from entering into negotiations, entering into Memorandum of Understandings, executing Contracts, permitting the supply and delivery of biometric registration kits, including custom civil registration software, power supply and related services for a civil registration exercise in the Republic**

of Sierra Leone pending the hearing of the complaint from the Applicant herein and decision of the Independent Procurement Review Panel.

2. In the event the Independent Procurement Review Panel fails to accept and hear the complaint from the Applicant, an Injunction is hereby granted restraining the Respondent whether by itself, its Chief Registrar, Registration Officers, Directors, Managers, Servants, Privies, Attorneys or Agents howsoever otherwise from entering into negotiations, entering into Memorandum of Understandings, executing contracts, permitting the supply and delivery of biometric registration kits, including custom civil registration software power supply and related services for a civil registration in the Republic of Sierra Leone pending the hearing and determination of the Judicial Review proceedings against the Respondent.

3. An Injunction is hereby granted restraining the Defendant whether by itself, its Chief Registrar, Registration Officers, Directors, Managers, Servants, Privies, Attorneys or Agents howsoever otherwise from copying, altering, deleting, destroying, or otherwise interfering with any or all of the Books, documents, accounts notes, memoranda, letters, files computers, computer files, disks, and any and all other records and documents of any kind whatsoever relating to the Applicant and the entire procurement process which are now in the Respondent's possession.

4. The Applicant shall forthwith produce and file an Undertaking as to the payment of damages the Respondent may suffer as a result of the Injunctions granted herein above.

5. The Applicant shall proceed within One (1) week of the date of this order to commence with whatever proceedings it may choose in the furtherance of this matter.

6. The Costs of this application assessed at Le. 5,000,000 to be borne by the Respondent.

29/04/17

Hon. Mrs. Justice Amy J. Wright
Judge Of The High Court Of
Sierra Leone

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