THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL APPEAL No. 0059 OF 2021

LOCAL GOVERNMENT FINANCE COMMISSION …… APPELLANT

VERSUS

CRADDLE COMMUNICATIONS LIMITED …… RESPONDENT

Before: Hon Justice Stephen Mubiru.

JUDGMENT

a) Proceedings in the court below;

The respondent, a printing and publishing company, sued the appellant for recovery of shs. 6,500,000/= general damages for breach of contract, interest and costs. The respondent's case was that appellant placed an order with the respondent to publish its organisational profile in the respondent's publications; "The Government Handbook" and "The East African Governments Handbook" at the cost of shs. 6,500,000/= The respondent duly published the appellant's organisational profile in the two handbooks but the appellant failed or refused to pay for the service, hence the suit. In her written statement of defence, the appellant denied having placed the order. The appellant contended that the respondent never complied with the procurement processes and therefore had no contract with the appellant.

Testifying as P.W.1, the respondent's director M. Robert Nyangabyaki stated that it was sometime during the year 2012 when following a proposal letter and several engagements he had with various officials of the appellant, that on 6th December, 2012 the appellant's Director of Finance and Administration, a one Mr. Jim Ashaba-Aheebwa, on behalf of the appellant, executed a contract with the respondent for publication of the appellant's organisational profile, on two full coloured pages of "The East African Governments Handbook" at the agreed cost of shs. 6,500,000/= This was evidenced by an order form, endorsed "to pay when funds are available," and corresponding invoice tendered in evidence as exhibits. Although the laws on procurement were not followed, the respondent duly published the profile but the appellant refused to pay for the service.

Testifying as D.W.1, the appellant's Director of Finance and Administration, Mr. Jim Ashaba-Aheebwa stated that the appellant is a government entity financed with funds drawn from the consolidated fund. Its procurement processes are subject to *The Public procurement and Disposal Act* and *The Public Finance Act*. Although the appellant expressed interest in publishing its organisational profile in "The East African Governments Handbook," it never confirmed the order. It is the reason that the order form relied upon by the respondent does not specify the number of copies to be printed nor the information that is to be published. It was a mere expression of intent to contract later wen funds were available. Although he was the one responsible for proof reading and confirming material to be published, the respondent never sought his prior approval of the content to be published. The respondent never delivered to the appellant any of the published material. It is non court that this witness first saw a copy of the printed material in the handbook.

In his final submissions, counsel for the respondent argued that the order form dated 5th December, 2012 constituted the contract between the parties. It was initiated by P.W.1 approaching D.W.1 and the latter committed the appellant to the contract. A party dealing with a company is not bound to ensure that all its internal regulations leading to the contract had been complied with. The appellant's Director of Finance and Administration had ostensible authority to bind the appellant. P.W.1 waived the requirement to pay 50% of the charge upon the placing of the order and permitted the appellant to pay when funds would be available. The contract was that confirmed upon execution of the order form. The respondent proceeded to perform its part of the bargain. The appellant could not plead illegality to avoid paying for a service it had enjoyed. It was the duty of the appellant to comply with *The Public Procurement and Disposal of Assets Act*. The respondent was thus entitled to the agreed contract price with interest and costs.

In her final submissions, counsel for the appellant argued that the order form could not constitute a contract since it was devoid of terms. There was no evidence to show that the appellant provided the information that was published. D.W.1 saw the published material for the first time when a copy of the handbook was produced in court. The respondent cannot rely on the indoor management rule when it had previous dealings with the appellant by virtue of which it became aware of the internal processes. This was an invitation to treat since the order was never confirmed. Consequently the appellant was never offered a service and is not liable to pay.

In her judgment delivered on 5th November, 2019 the learned trial Magistrate found that the respondent had waived the requirement of payment of 50% to be made at the placing of the order. A contract came into existence upon the signing of the order form. It is clear that the respondent never followed the procurement process laid down by *The Public Procurement and Disposal of Assets Act*. However in *Finishing Touches Limited v. Attorney General, H.C.C.S No. 144 of 2010* it was held that the Act imposes duties on the procuring entity and not on the public. It would be unjust for the appellant to rely on the statute after a service was rendered to it, in order to avoid payment. The appellant contracted the respondent and the services rendered were in accordance with the contract. It would be unjust for the appellant to rely on its own failure to comply with the procurement processes in order to deny the respondent payment. The respondent was therefore entitled to recovery of the contract price of shs. 6,500,000/= which was to carry interest at the rate of 24% per annum from the time the cause of action arose until payment in full. The respondent was further awarded general damages of shs. 2,000,000/= which was to carry interest at the rate of 10% per annum from the date of judgment until payment in full, and the cost of the suit.

b) <u>The grounds of appeal;</u>

The appellant was dissatisfied with the decision and appealed to this court on the following grounds, namely;

1. The learned trial Magistrate erred in law and in fact in holding that there was a contract between the plaintiff and the defendant whereas not.
2. The learned trial Magistrate erred in law and in fact when she held that the services procured by the defendant were done in accordance with the contract.
3. The learned trial Magistrate erred in law and in fact when she used her discretion injudiciously and awarded 24% interest rate which was manifestly high and excessive.

c) <u>The submissions of counsel for the appellant;</u>

Counsel for the appellant Ms. Nabaasa Charity, State Attorney, submitted regarding the first ground that there was no contract. Paragraph 3 (2) of the WSD challenged the procurement process having been undertaken. Exhibit P. Ex.11 is an order form specifying terms including payment of

50% as confirmation of the order. It was not confirmed. Mr. Ahebwa Ashaba of the appellant stated "when funds are available." The condition precedent was not satisfied. D.W.1 testified that they had treated as an intention to do business and he expected him to return for more information. At page 9 he stated that he never provided the photographs and no delivery was made.

Regarding the first ground; the respondent never supplied. At page 3 of the judgment is the finding. The plaint states that money was owed but the fat of supply is not pleaded. They did not specify the quantities that were supplied. They did not prove delivery of any goods. D.W.1 saw one copy of the handbook in court for the first time. Regarding the last ground; the interest was too high. At page 5 the award of interest was not explained. It should have been at court rate. She prayed that the court allows the appeal.

d) <u>The submissions of counsel for the respondent;</u>

Counsel for the respondent Mr. Saad Sseninde, submitted regarding the first ground that lack of confirmation was considered by the Magistrate. At page 7 of the record of proceedings, P.W.1 testified that they had no money at the time. The appellant witness asked the respondent witness to write it down; "to be paid when the funds are available." No evidence was led relating to public procurement. The condition to confirm the order was waived. It was by the respondent who waived it. This is at page 3 para 4 of the judgment. It was not a condition precedent anymore. The order form indicated the duties of the customer. The order form was signed by the Director Finance of the Commission and the Secretary of the Commission. Therefore there was a contract and the Magistrate came to the right conclusion.

Services were provided under the government handbook. It was an advert in a publication distributed all over East Africa exhibited as P. Ex.1. The information that was given was accurate. The profiles and faces in the advert were recognised by the appellant's witness. The service therefore was rendered. The interest awarded was based on the fact that it was a commercial transaction and this was the bank rate at the time. The magistrate was not at fault. The Magistrate considered the submissions of the parties before coming to that decision and since there is no fault, the appellate court should not intervene. He prayed that the appeal should be dismissed.

e) The decision;

This being a first appeal, this court is under an obligation to re-hear the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion (see in *Father Nanensio Begumisa and three Others v. Eric Tiberaga SCCA 17of 2000*; *[2004] KALR 236*). In a case of conflicting evidence the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions.

It is contended in the first ground of appeal that the learned trial Magistrate erred in law and in fact in holding that there was a contract between the plaintiff and the defendant whereas not. The appellant argues that there was no valid contract by reason of the procurement process not having been complied with. The respondent submits in response that it would be unjust for the appellant to rely on the statute after a service was rendered to it, in order to avoid payment.

In the first place, the appellant is a public body established by *The Local Government Finance Commission Act, 2003* that operates using funds originating from the Consolidated Fund. Under section 17 (5) of that Act, where its budget has been approved by Parliament, no expenditure which is not approved within the budget may be incurred by it in respect of the financial year in relation to which the budget was approved. Article 156 (1) of *The Constitution of the Republic of Uganda, 1995* provides that the heads of expenditure contained in the estimates, other than expenditure charged on the Consolidated Fund by the Constitution or any Act of Parliament, have to be included in a bill known as an Appropriation Bill which has to be introduced into Parliament to provide for the issue from the Consolidated Fund of the sums necessary to meet that expenditure and the appropriation of those sums for the purposes specified in the bill. Consequently, each financial year the budget caters for court judgments and Ministry of Justice settlements of actual or imminent litigation against the government. According to article 154 (1) of *The Constitution of the Republic of Uganda, 1995* no monies may be withdrawn from the Consolidated Fund except; - (a) to meet expenditure charged on the fund by the Constitution or by an Act of Parliament; or (b) where the issue of those monies has been authorised by an Appropriation Act or a

Supplementary Appropriation Act. Therefore the appellant is incapable of incurring expenditure that is not within its approved annual budget.

Furthermore, section 32 (3) (a) of *The Public Finance Management Act, 3 of 2015* provides that money contained in the Consolidated Fund cannot be withdrawn except upon the authority of a warrant issued by the Minister, to the Accountant-General. The Minister may not issue such a warrant except where a grant of credit is issued by the Auditor-General in respect of; (a) statutory expenditure, during a financial year; and (b) for services to be rendered during a financial year where the funds are; - (i) authorised by an Appropriation Act or Supplementary Appropriation Act; or (ii) required for investment. Therefore, except for statutory expenditure, the Minister may only issue a warrant for expenditure that is authorised for the financial year during which the withdrawal is to take place by an Appropriation Act or a Supplementary Appropriation Act. No money can be withdrawn from this fund without the Parliament's approval. It was thus an oddity for the appellant's Director of Finance and Administration, Mr. Jim Ashaba-Aheebwa to have committed the appellant to pay "when funds are available," outside such a budgeting process and its approved expenditure for that financial year. There was no evidence before the trial Magistrate to show that this activity had been budgeted for during that financial year.

That aside, sections 2 (1) (a) (i) and 55 of *The Public Procurement and Disposal of Public Assets Act, 2003* subject all procurements involving expenditure of money originating from the Consolidated Fund and related special finances expended through the capital or recurrent budgets, whatever form these may take, to the provisions of the Act. Public procurement law regulates purchases by public sector bodies and certain utility sector bodies of contracts for goods, works and services. In principle, this law applies to the award of contracts for pecuniary interest that are concluded in writing between one or more procuring and disposing entities and one or more economic operators, that have as their object the execution of works, the supply of goods or the provision of services. The Act and Regulations made thereunder apply only where the estimated value of the regulated contract meets or exceeds certain thresholds.

Where the legislation applies, procuring and disposing entities must, in general, meet their contractual requirements for goods, works and services by means of an advertised competitive

contract award process that is based on objective, relevant and proportionate criteria. Selection criteria, including grounds for exclusion and the rules on the basis of which the procuring and disposing entity will determine qualified applicants that will be invited to participate in the competition, must be disclosed at the start of the process. Award criteria and their weightings must also be disclosed in the procurement documents. These laws regulate procurement as to promote the objectives of: (a) maximizing economy and efficiency in procurement; (b) fostering and encouraging participation in procurement proceedings by suppliers and contractors regardless of nationality, thereby promoting international trade; (c) promoting competition among suppliers and contractors for the supply of the subject matter of the procurement; (d) providing for the fair, equal and equitable treatment of all suppliers and contractors; (e) promoting the integrity of, and fairness and public confidence in, the procurement process; (f) achieving transparency in the procedures relating to procurement"

According to section 80 of *The Public Procurement and Disposal of Public Assets Act, 2003,* except as provided for in the Act or regulations made under the Act, a procuring and disposing entity is enjoined to use the open domestic bidding method, which is open to participation on equal terms by all providers through advertisement of the procurement or disposal opportunity. This method is used to obtain maximum possible competition and value for money. The procuring and disposing entities must treat bidders equally, without discrimination, and act in a transparent and proportionate manner.

Generally, when the open domestic bidding method is adopted, the procuring and disposing entity must: (i) advertise the contract by means of publication of a contract notice, describing the requirements and inviting expressions of interest within given timescales; (ii) determine whether an economic operator that has expressed an interest has the necessary legal and financial standing and the relevant technical and professional ability to perform the contract; (iii) invite a shortlist of qualified economic operators, selected on the basis of objective and non-discriminatory rules and criteria, to submit tenders or carry out negotiations before submitting tenders; (iv) evaluate the tenders submitted on the basis of pre-disclosed objective award criteria that must be linked to the subject matter of the contract, so as to determine the most economically advantageous tender (MEAT); (v) notify the contract award decision to all economic operators that have submitted a

tender, as well as those that have participated in earlier stages of the competition in certain cases; (vi) observe the standstill period of a minimum of ten clear calendar days, during which time the contract cannot be concluded; (vii) conclude the contract only after the expiry of the standstill period (if there is no legal challenge to the contract award decision before then); and (iii) advertise the contract award. All tenders that meet the qualitative criteria must be evaluated and the contract awarded to the bidder with the most economically advantageous tender. Only restricted negotiations are permitted (see Regulation 219 of *The Public Procurement and Disposal of Public Assets Regulations, 70 of 2003*). There was no evidence before the Magistrate to show that this procurement method was used.

The alternative is restricted domestic bidding where bids are obtained by direct invitation without open advertisement (see section 82 of *The Public Procurement and Disposal of Public Assets Act, 2003*). Under this procedure, the procuring and disposing entity considers applications from interested parties and invites a minimum of three qualified applicants to submit tenders, determined based on objective and non-discriminatory rules and criteria (see Part V of *The Public Procurement and Disposal of Public Assets Regulations, 70 of 2003*). The contract is awarded to the bidder who has submitted the most economically advantageous tender. Only restricted negotiations are permitted (see Regulation 219 of *The Public Procurement and Disposal of Public Assets Regulations, 70 of 2003*). There was no evidence before the Magistrate to show that this procurement method was used.

Competitive procedure without prior publication is permitted in certain limited and narrowly defined circumstances. These include where there is extreme urgency not attributable to the procurement or disposal entity, and where the requirement can only be met by a particular economic operator due to technical reasons or the existence of exclusive rights (see Regulation 110 of *The Public Procurement and Disposal of Public Assets Regulations, 70 of 2003*). There was no evidence before the Magistrate to show that this procurement was undertaken in a situation of disaster, catastrophe, war or an act of God; or a situation where life or the quality of life or environment could be seriously compromised; or the condition or quality of goods, equipment, buildings or publicly owned capital goods could seriously deteriorate unless action was urgently

and necessarily taken to maintain them in their actual value or usefulness; or an investment project was seriously delayed for want of minor items.

Finally, the direct procurement method is a sole source procurement method used where exceptional circumstances prevent the use of competition (see section 85 of *The Public Procurement and Disposal of Public Assets Act, 2003*). Sole sourcing takes place when only one supplier for the required item is available, whereas with single sourcing a particular supplier is purposefully chosen by the procuring and disposing entity, even when other suppliers are available. It includes a contracts entered into without a competitive process, based on a justification that only one known source exists or that only one single supplier can fulfil the requirements. This is adopted where there is need for compatibility with existing works, services or supplies or for continuity from an existing provider (see Regulation 112 of *The Public Procurement and Disposal of Public Assets Regulations, 70 of 2003*). Circumstances leading a procuring and disposing entity to select this method of procurement may include, for example, its need for a specific consultant firm where a number of firms are available to perform the work.

In such a case, the procuring and disposing entity can demonstrate a rational basis for selecting a single vendor or provider because of specific factors such as past experience with a particular issue, familiarity with specific procuring and disposing entity operations, experience with similar projects at other procuring and disposing entities or at other levels of government, demonstrated expertise, or capacity and willingness to respond to the situation. Procurement by this method must be documented in the procurement record by an explanation of: (i) the unique nature of the requirement; (ii) the basis upon which it was determined that there is only one known vendor or provider able to meet the need, i.e., the steps taken to identify potential competitors; and (iii) the basis upon which the agency determined the cost to be reasonable, i.e., a "fair market price" that could be anticipated had normal competitive conditions existed, and how that conclusion was reached. Still there was no evidence before the Magistrate to show that this procurement method was used in the instant case.

The choice of procurement procedure is considered an important factor in the procurement process as it can have a significant impact on corrupt tendencies in the procurement process. In light of the

principle of open procurement, it would be difficult to justify the direct award of a contract by a procuring and disposing entity without some form of public process. By implication, section 2 (1) (a) (i) read together with section 95 (1) (c) and (d) of *The Public Procurement and Disposal of Public Assets Act, 2003* prohibit the use of public procurement methods not included in the law. A contract is impliedly prohibited where the court does not find express words of prohibition, but is convinced of prohibition by interpreting the language in the statute (see *Melliss v. Shirley Local Board of Health (1885) 16 Q.B.D. 446*). The question whether a statute impliedly prohibits the contract in question is one of public policy. In the absence of any real competition, the execution of public works, the procurement of goods, or the delivery of services become more costly for the public purse and bring to light a significant derailment of resources. Where the core of the contract is the mischief expressly forbidden by the statutory regulation, illegality will be found. For example in *Buffalo City Metropolitan Municipality v. Asla Construction (Pty) Limited 2019 (4) SA 331* the Constitutional Court of South Africa declared void an agreement that was concluded without a lawful tender.

It turns out in the instant case that the respondent solicited for a contract without complying with any of the potentially applicable procurement processes. Obtaining a contract in a manner expressly or impliedly forbidden by statute renders the contract illegal. A contract will be considered illegal at its formation when it is incapable of performance without an illegal act. It is a contract which either involves the commission of an illegal act, or which in some other way is contrary to public policy and hence unenforceable. For example in *David Taylor & Son v. Barnett Trading Co [1953] 1 Lloyd's Rep. 181* Barnett Trading agreed to sell David Taylor Irish steak for delivery between April and July for a set price. At the date the contract was entered into, an order was in force preventing the buying or selling of meat over a certain price (which the contract exceeded). When Barnett Trading did not make delivery, Mr Taylor claimed damages. At first instance, the arbitrators ordered that Barnett Trading pay Mr Taylor compensation for non-delivery. On appeal, the Court of Appeal held that the contract had been illegal at its formation due to the provision of set prices that exceeded the legal limits and accordingly set aside the award as it was based on an illegal contract.

Similarly in *Anderson Ltd v. Daniel [1924] 1 KB 138, The Fertiliser Act, 1906* required every person that sold for use as a fertiliser on any soil that had been subject to an artificial process, to provide the purchaser with an invoice stating the respective percentages of certain chemicals. The court held that the effect of noncompliance did not merely render the vendor liable to pay a penalty, but made the sale illegal and precluded the vendor for suing for the price of the contract. On the other hand, the general rule is that parties who are aware of the illegal performance of the contract cannot enforce any terms of the contract (see *Ashmore, Benson, Pease & Co Ltd v A V Dawson Ltd [1973] 1 WLR 828*).

It was argued for the respondent that the decision in *Finishing Touches Limited v. Attorney General, H.C.C.S No. 144 of 2010* where by reason of the fact the there was insufficient time to go through the formal procedures of awarding a government contract, the plaintiff who had rendered services without a formal contract, succeeded in a suit for recovery of the contract price, was correctly applied to this case. I find that case distinguishable because unlike in the instant case, the procurement was in a situation of emergency. The court found that although there was a failure on the part of the defendants to advertise or apply an open bidding procedure, however it was apparent that the public officials who were duty bound to comply with the Act, applied a restricted bidding process which is also permitted by the Act. The Contracts Committee had found that there was satisfaction and value for money according to the evaluation carried out retrospectively. There was in that case substantial compliance with the purpose of the Act in ensuring the application of fair, competitive, transparent, non-discriminatory and value for money procurement and disposal standards and practices when a few firms selected by the defendants' servants cooperated and formed a consortium with the plaintiff as a front. In the instant case there was no attempt made at all at either process.

It was argued further that the appellant having obtained benefit of the services, it would be unjust not to pay. A claim in unjust enrichment will not be permitted where granting it would have the same effect as enforcing an unenforceable contract (see *Dimond v. Lovell [2002] 1 AC 384 and Wilson v. First County Trust Ltd (No 2) [2004] 1 AC 816*). The contract in question belongs to the class which the Act intends to prohibit. It is settled law that any contract which is prohibited by statute, either expressly or by implication, is illegal, void and unenforceable (see *Phoenix General*

Insurance Co of Greece SA v. Halvanon Insurance Co Ltd [1988] QB 216, at 268 and *Yango Pastoral Co. Pty Ltd v. First Chicago Australia Ltd (1978) 139 C.L.R. 410, at p. 413*). Where conduct is determined to be illegal or contrary to public policy, it is generally held to be unenforceable. An illegal contract prevents claims based on a contract when a party seeks to enforce an agreement which the law prohibits. The illegality operates primarily as a defence to legal claims. Courts will not assist a claimant to recover a benefit from their own wrongdoing. It was therefore erroneous for the trial Magistrate to have entered judgment for the respondent. This ground of appeal succeeds and since it id dispositive of the appeal, it is unnecessary to consider the rest of the grounds.

Accordingly the appeal succeeds. Consequently the judgment of the court below is hereby set aside. Instead judgment is entered dismissing the suit with costs to the appellant. The costs of the appeal as well are awarded to the appellant.

Delivered electronically this 28th February, 2022

……Stephen Mubiru……..
Stephen Mubiru
Judge,
28th February, 2022.