

IN THE HIGH COURT OF BOTSWANA
HELD AT LOBATSE

CASE NO. MAHLB 000180 OF 2006

In the matter between:

**UNISPEC HOLDINGS (PTY) LTD
PERFECTO SIGNS (PTY) LTD
FAST FIX (PTY) LTD
JOPLIN (PTY) LTD**

**1ST APPLICANT
2ND APPLICANT
3RD APPLICANT
4TH APPLICANT**

and

GABORONE CITY COUNCIL

RESPONDENT

**Mr. K.P. Gaoboi for the Applicants
Mr. K.N. Monthe for the Respondent**

J U D G M E N T

Tafa Ag.J.

This is an application which was filed on urgency for an order in the following terms:

“A *Rule Nisi* do issue returnable on 19th May 2006 calling upon the Respondent to show cause, if any, why:

1. The Respondent should not be interdicted from terminating the contracts it has with the Applicants for street pole advertising executed by the parties on 7th July 2005 on the basis of the reason(s) stated in the letter written by the Respondent and dated 15th March 2006;
2. Alternatively to 1 above, that the Respondent be and is directed and required to continue to perform all of its obligations in terms of the agreements concluded between it and the Applicants dated 7th July 2005.
3. Directing the Respondent to bear the costs of this application.

On the 7th day of June 2006, the matter came before me and I made the following order:

“1. The Rules of Court as regards notices, form, time limits and such other formalities as may be necessary are hereby dispensed with to enable this application to be heard as one urgent.

1.1 A *Rule Nisi* does hereby issue returnable on 19th May 2006 calling upon the Respondent to show cause, if any, why:

1.1.1 the Respondent should not be interdicted from terminating the contracts it has with the Applicants for street pole advertising executed by the parties on 7th July 2005 on the basis of the reason(s) stated in the letter written by the Respondent and dated 15th March 2006;

1.1.2 alternatively to 1.1.1 above, that the Respondent be and it is directed and required to continue to perform all its obligations in terms of the agreements concluded between it and the Applicants dated 7th July 2005 (annexure “C” to the Founding Affidavit).

2. The provisions of paragraphs 1.1.1 alternatively those of 1.1.2 above operate as an interim order with immediate effect pending the outcome of the *Rule Nisi* above referred to.
3. Directing the Respondent to bear the costs of this application.”

On the 19th May 2006, the matter came before my brother Dingake J. At the request of the applicants Attorney the matter was postponed to 7th June 2006 to enable the said attorney to study and respond to the respondent’s points *in limine*. The Rule was accordingly extended to the 7th June 2006.

On the return day, the matter was again postponed at the request of Counsel on both sides to the 28th June 2006. The Rule was thus extended to 28th June 2006.

The urgency that had originally characterised the application has thus been overtaken by events. The matter was fully argued after filing of all necessary affidavits on a day for argued matters in the normal way. I shall for this reason not address the question whether or not the matter is urgent. At any rate, I am of the view that it was when it was originally filed.

The matter was accordingly argued before me on the 28th June 2006 and I reserved judgment and ordered that the Rule Nisi shall remain in existence until judgment was delivered. I now proceed to deliver the said judgment.

The four applicants, jointly launched an application in terms of the draft order whose contents appear above. In support of the joint application, the applicants filed one affidavit sworn to by their respective managing directors.

The deponents gave as their reasons for deposing to a single affidavit that;

1. The issues for determination by the Court arise from similar facts and circumstances.

2. The dispute between the parties hereto relates to various contracts that the applicants had with the respondent which contracts were similarly worded.

3. The issue regarded an intended termination of the said contracts by the respondent which is based on the same reason(s) in respect of all the applicants thereto.

This procedure however uncommon, is nonetheless appropriate. In their affidavits, the applicants aver that they each have a contract with the respondent for street advertising. Such contracts were executed by the parties hereto on 7th July 2005. Similar contract documents were issued in respect of all the applicants hereto.

In terms of the aforesaid contracts;

- Each of the applicants is conferred with a sole and exclusive right within a particular area zoned by the respondent (there being four zoned areas) within Gaborone City to the supply, erection and maintenance of street pole advertisement:
- The Respondent is in turn, entitled to payment of a rental fee of P15.00 per month per pole payable in quarterly arrears. This payment is due irrespective of whether an advertising frame fixed to a street pole carries an advertising message or not.

In practice, the applicants rent some advertising space from the respondent and in turn let such space out to third parties for a fee. The contracts were to endure for a period of two years respectively with an option to renew.

Sometime in the month of March 2006, each one of the applicants received a letter from the respondent purporting to terminate the contract each of the applicants had with it. The reason for termination of the said contracts was stated to be that the award of the respective contracts to the applicants was done by the Town Planning Committee instead of the Finance and General Purpose Committee and this was against Council internal procedures. As will be seen later, this reason was to be abandoned and other reasons assigned for the purported termination.

The applicants sought legal advice from their Attorneys of record who informed the respondent in writing, that, the applicants rejected the purported repudiation.

The respondent does not deny that the parties entered into a contract with one another as alleged. However, it is the validity of such contracts that the respondent contests. The respondent contends that the purported contracts were null and void owing to the fact that certain mandatory provisions of the Town Council Regulations had not been complied with by the respondent in the awarding of the contracts. As a result of non observance of such mandatory provisions of the law, the contracts were illegal, so argues the respondent.

I shall revert to this argument in due course. In addition to the above argument, the respondent contends that the applicants have failed to allege and prove that they have *locus standi* to sue and be sued. They have failed to demonstrate that the respondent has legal capacity to be sued either.

The respondent sought to argue that the application is not urgent and for that reason alone, it should be dismissed. As observed earlier on, I am of the view that this argument has been overtaken by events. This is so because the parties have had ample opportunity to file all necessary affidavits herein. The matter was then fully argued as if it were an ordinary application. This argument is therefore dismissed as being devoid of merit.

In my judgment, the issues for determination in this matter are the following:

- (1) Have the applicants established on a preponderance of probabilities that they have legal capacity to sue?
- (2) Have they established on a balance of probabilities that the respondent has legal capacity to be sued.
- (3) Were the contracts awarded in violation of some statute and if so, what is the effect of such violation.

In my view, if I were to find that the applicants have fallen short of establishing that they have legal capacity to sue or that the respondent has capacity to be sued, then I need not look further into whether or not the contracts were awarded illegally.

To this end, I shall first interrogate the question of *locus standi in judicio*. In other words, have the applicants on the papers filed, established that they possess the necessary legal personality to litigate.

Locus standi which in English translates to “place of standing” simply means in law, the right to bring an action or to be heard in a given forum. It includes the right to be sued. See ***Black’s Law Dictionary seventh edition page 952 by Gardner***.

All the applicants are juristic persons. They are described in the founding affidavit as:

“...private companies with limited liability (limited by share capital) duly incorporated in terms of the company laws of the Republic of Botswana.”

In ***Cooling Services v. Church Council of the Full Gospel Tabernacle*** 1955(3) S.A. 541 at 543, a case that was cited with approval by Walia J. in ***Chantal v. Mater Spei College*** 2003(2) BLR 348, a case relied upon by Mr. Monthe, is the following exposition of the law:

“I consider it to be necessary for the plaintiff to make in his declaration the averments required, not only to show that he has locus standi, but also that the defendant has.

No doubt, this will be presumed where the parties are natural persons and there is nothing to indicate lack of capacity, but if there is a departure from this or a party is not prima facie qualified to litigate, the necessary authority to sue or be sued must be disclosed.”

In my judgment, the present case can easily be distinguished from the case cited *supra*.

In the first place, the case of ***Cooling Services*** *supra*, was dealing with a church which is a society as opposed to a company registered under the Companies Act. It is trite that a body corporate is a juristic person with rights and obligations similar in many respects to those of natural persons. These rights include the right of the company to sue and be sued. These rights arise *ex lege* i.e. by operation of the law. See ***section 20(2) of the Companies Act Cap 42:01***.

Section 20(2) of the Companies Act Cap 42:01 provides that –

“From the date of incorporation, the subscribers to the memorandum, together with such other persons as may from time to time also become members of the company, shall be a body corporate by the name contained in the memorandum, capable of exercising all the functions of an incorporated company, and having perpetual succession, but with such liability on the part of the members to contribute to the assets of the company in the event of it being wound up as is mentioned in this Act.” (underling mine)

Admittedly, the applicants' *locus standi* would have been placed beyond doubt by the filing of their respective certificates of incorporation. However, I am satisfied from the Resolutions of the respective applicants and the Powers of Attorney arising therefrom that the applicants have established on a balance of probabilities that they are duly registered in accordance with the company laws of the Republic of Botswana. There is no evidence before me that they may be suffering from one form of legal disability or the other. I accept therefore that as juristic persons, they have the necessary *locus standi*.

The respondents point *in limine* with regard to the applicants' *locus standi* is therefore dismissed as being unmeritorious.

The next issue is whether the applicants have alleged and established to the satisfaction of this Court that the Respondent has *locus standi* to be sued. The respondent has argued through Mr. Monthe and I must say, very forcefully, that, the applicants have failed to aver that the respondent has *locus standi* to be sued.

Mr. Gaoboi on the other hand, has argued that Regulation 5 of the Town Council Regulations establishes Gaborone City Council as a body corporate capable of suing and being sued in its own name. He contends further, that the applicants' affidavit clearly and correctly identifies the Act under which the Council is established (see paragraph 4 of the founding affidavit).

The correct position however, is that the respondent is described in the founding affidavit simply as – “Gaborone City Council, a local municipality established by the Township Act” There is no doubt in my mind that this description is not perfect. However, I do not understand why Mr. Monthe is raising the issue of *locus standi* of the respondent at all. I say so because, in this very matter, the respondent has filed what is entitled “counter application”, and annexed to the affidavit in support of the counter application is the respondents’ answering affidavit.

In the said affidavit in support of the counter application, the respondent is described thus –

“The respondent being a local authority duly instituted and established in terms of the Townships Act together with the Town Council Regulations thereto, with capacity to sue and be sued under its name and as such being a body corporate governed by both the Principal Act and the regulation thereto. I am advised by respondent’s attorneys of record and therefore verily believe.” (emphasis added)

It is apparent from the above quoted passage that whilst the respondent has gone beyond the applicants in describing itself, it, nonetheless has still omitted to mention the Chapter of the Laws of Botswana establishing it. What is significant though, is that the respondent is described as being capable of suing and being sued.

In my view, there is evidence before me in the form of the respondent's counter application that the respondent has *locus standi* to sue or be sued. In so holding, I am mindful of the judgment of Corduff J in the case of ***Evangelical Lutheran Church of Southern Africa v. Robison and Another*** 1979-80 BLR 413 at 316 to the effect that no applicant can rely on affidavits or resolutions filed in earlier proceedings which are not now before the court.

In *casu*, the paragraph I have quoted earlier above, is in respect of a counter claim in these very proceedings and I am therefore entitled to hold that the papers before me do disclose that the respondent has locus standi and I so find. This then means the respondent's argument with respect to locus standi of the parties is dismissed in its entirety. I make this finding being fully aware that the burden of proving that he is entitled to a relief rests upon an applicant and falls to be discharged upon a balance of probabilities. At any rate, Town Council Regulations provide at Regulation 5 that "A Council shall be a body corporate having the name by which it is established and capable of suing and being sued under the said name." *Locus standi* is thus conferred by law.

Having put to rest the technical points raised by the respondent in this matter, I wish to now proceed to evaluate the parties' respective arguments on the merits.

It is contended on behalf of the respondent that Town Council Regulations S1.31.2000 stipulate that certain specific formalities should be satisfied before a contract of the

present kind can become lawfully binding between the respondent Council and any third party. The said pre-requisites include the following:

- that the contract should be embodied in a formal document – Reg. 41(c)
- that the Council shall first call for tenders by notice in the Gazette – Reg. 44(1)
- that the contract shall be signed on behalf of the respondent Council by the Town Clerk together with either the Mayor or the Chairman of the Committee concerned – Reg. 50

It is contended further that all the above stated Regulations use the imperative word “shall”. Consequently (so goes the argument), to the extent that the contracts entered into between the parties hereto fail to comply with the mandatory provisions of the Townships Act, such contracts are invalid and cannot be enforced.

In summation, the respondent contends that whereas the regulations require that the tender should have been advertised in the Government Gazette in addition to publication in any other newspaper, in the present case, the tender was advertised in the Botswana Guardian Newspaper, the Gazette Newspaper and the Voice Newspaper only. Thus, the tender was not advertised in the Government Gazette. Failure to

advertise the tender in the Government Gazette renders the contract void (so goes the argument).

It is respondent's further contention that whereas the regulations require that any contract in which the Council is a party should bear the signatures of the City Clerk, and Mayor or the Chairman of the Committee concerned, in the present case, only the City Clerk signed.

I have read Statutory Instrument No. 31 of 2000. It reads thus;

“Townships Act (Cap 40:02) Town Council (Amendment) Regulations, 2000 (Published on 28th April, 2000) Amendment of Regulations.

Regulation

1. Citation
2. Insertion of Part III (A) to the Regulations

In exercise of the powers conferred on the Minister of Local Government, by section 9 of the Townships Act, the following Regulations are hereby made –

1. These Regulations may be cited as the Town Council (Amendment) Regulations 2000.
2. The Town Council Regulations are amended by inserting immediately after regulation 25, the following new part –

‘Part III (A) – Privilege of Immunity’

- 25 A. No civil or criminal proceedings may be instituted against a member of a Council for words spoken before, or written in a report to the Council or to a Committee thereof, or by reason of any matter brought by the member by petition, motion or otherwise.
- 25 B. A member of a Council is not liable for arrest –

(a) for any civil debt whilst going to, attending at or returning from a meeting of the Council or

(b) within the precincts of the Council while the Council or a Committee thereof is sitting

25 C. No process issued by any Court in the exercise of its jurisdiction

25 D. In this part,

‘Premises of the Council’ means the chamber”

As can be seen from the above, Statutory Instrument No. 31 of 2000 has no relevance to the case before Court. It deals exclusively with immunities and privileges of members of Council. Its citation by Counsel for the respondent remains a mystery to this Court. For this reason, no more shall be said of the said Statutory Instrument. Suffice it to say, it behoves Counsel to ensure that they do not take up the Court’s valuable time by referring to irrelevant legislation. It is the duty of Counsel to ensure that his/her submissions are to the point and not misleading in anyway. I have no doubt that, had Counsel taken time to read his written submissions, this grave mistake would have been noticed and obviated.

As a matter of fact, the relevant provisions of the Town Council Regulations applicable to this case are Regulations 41, 42, 43, 44 and 50 of the Town Council Regulations (Cap 40:02). They provide that;

41. Subject to regulation 38, if the liability of a Council under any contract for the supply of any goods or materials or the execution of any works or the provisions of any services, other than professional services, for or to the Council –

- (a) is not to exceed P200.00, the contract shall be in writing but the Council shall not, be required, before entering into it to invite any quotations;
 - (b) is to exceed P200.00 but not exceed P500.00, the contract shall be in writing and the Council shall not enter into it without inviting quotations; or
 - (c) is to exceed P500.00, the contract shall be embodied in a formal document approved by the Council and the Council shall not enter into it without inviting tenders.
44. Whenever a Council is required to invite tenders in terms of regulations 41 (c) it shall, in addition to any individual invitation it may issue, call for tenders by notice published in the Gazette and in a newspaper circulating in Botswana, which notice shall also be posted at the council's offices on a notice board prominently open to public inspection.
50. Contracts required by these Regulations to be in writing or to be embodied in a formal document shall be signed on behalf of council by the Mayor, or by the Chairman of the Committee concerned (if any) and by the Town Clerk."

I must mention here that Regulation 38 referred to in Regulation 41 has been repealed by Statutory Instrument 9 of 2003.

I have carefully read the memorandum of agreement between the applicants and the respondent. Whilst it is not specifically recorded what the contract price is, I have no doubt the total amount is well in excess of P500.00. This then brings the agreement within the provisions of Regulation 41. I say so because, the monthly rent is P15.00 per month per street pole. There are hundreds of street poles in each one of the zones referred to in the agreement. At any rate, it would seem on a reading of the papers before me, that, there is no dispute as to whether this is a contract falling within the purview of Regulation 41 and I so find.

The next question is whether there has been compliance with Regulation 41 and if not, what the effect of such non compliance is?

The respondent argues and this is conceded by the applicants, that contrary to the provisions of Regulation 41(1) the invitations for tender were not published in the Government Gazette. The contracts were not signed by the Mayor or Chairman of the Committee that awarded the tenders but by the City Clerk alone. In other words, there was one signatory on behalf of the Respondent as opposed to two as stipulated in the Regulation.

Since there is no dispute with regard to this contention, the question for consideration is whether the failure to advertise the tender in the Government Gazette and the absence of

the signature of the Mayor or the Chairman of the Committee that awarded the tender render the contracts void.

Mr. Monthe for the respondent argues that such omissions render the contracts void *abinitio* whilst Mr. Gaoboi argues the contrary.

I must observe here that there is no doubt that there was partial compliance with both Regulation 41 and Regulation 50. As regards Regulation 41, the tenders were published in three newspapers circulating widely in the country. The Regulation however, requires publication in one newspaper and the Government Gazette.

There is no doubt, the Government Gazette is the official mode of communication but did the Legislature intend that failure to publish in the Government Gazette would render a tender void despite it having been published in three widely circulated newspapers? I do not believe so.

Mr. Monthe has referred to the case of *Limpopo Safaris (Pty) Ltd v. Director of Wildlife and National Parks* 1996 BLR 441 where Nganunu J, (as he then was), considered and rejected a contention by the applicant that since the Director of Wildlife had in the past granted it a permit (albeit in contravention of the enabling statute) it (the applicant) had a legitimate expectation that such permit would be granted each time it was applied for.

As I understand it, the *ratio decidendi* of the case is that one cannot ground a legitimate expectation on an illegality. This case is distinguishable from the case under consideration for the following reasons:

Firstly, the Court in the *Limpopo Safaris* case *supra* was dealing with a situation where an applicant who did not qualify for a culling licence in the first place, had been granted one by default or in contravention of the statute that regulated the granting of such licence.

Secondly, in the *Limpopo Safaris* case *supra*, the permits so obtained had expired and the applicant was applying for new permits and sought to rely on the breach of the statute (in his favour) by the respondent to have new licences granted to him. It is for this reason that the Court held that to do so would be agreeing to the continued breach of the statute.

In the present case, the contracts that were entered into by and between the parties have not expired. In other words, the applicants are not asking that the respondent should be ordered to grant them a renewal of the contracts or to enter into new ones. What the applicants are seeking is that the Respondent be held to the contracts.

It is worth noting that whereas in the *Limpopo Safaris* case *supra*, the applicant did not qualify to be granted a licence in the first place owing to the fact that it did not own a game farm, there is no allegation that the applicants in *casu* did not qualify for the tenders which they won.

Again, in the *Limpopo Safaris* case *supra*, the requirement that the applicant's farms must have been designated game farms before a permit could be granted was a fundamental pre-requisite. In *casu*, the requirement for publication in the Government Gazette was in my view intended to provide maximum publicity to as wide a portion of the population as possible regard being had to the fact that the Gazette is published once every week without fail. In the event, the tenders were published in three, instead of one newspaper. I am satisfied that there was substantial compliance with the Act. This is so because there is no allegation that the publications did not reach as many people as they should. As a matter of fact, the fact that four unrelated companies were awarded contracts is testimony to the wide publicity that was generated by the advertisement.

I hold therefore that although there was a breach of the Regulation in so far as it calls for advertisement in the Government Gazette such breach was adequately ameliorated by publication in three instead of one newspaper.

I must add here that Mr. Monthe sought to rely also on the case of *Bangtoo Bros and Ors v. National Transport Commission and Ors* 1973(4) S.A. 667 at pg. 676 where the following dictum by Innes C.J. in the case of *Johannesburg Consolidated Investment Co. v. Johannesburg Town Council* 1903 T.S. 111 at page 115 was cited with approval;

“Whenever a public body has a duty imposed upon it by statute, and it disregards important provisions of the statute, or is guilty of gross irregularity or clear illegality in performance of the duty this court may be asked to

review the proceedings complained of and set aside or correct them ..., it is a right inherent in the court ...
(emphasis added)

It is implicit in the above quoted passage that not all provisions of a statute are important although the rule is that the statute must be considered in its entirety. Clearly, some provisions of a statute are less compelling than others. This brings me to the argument by the respondent that the absence of a signature of the Mayor or the Chairman of the relevant authority as required by Regulation 50 renders the contracts void *abinitio*.

In my judgment, the absence of a second signature alone is a procedural defect that would not render the contract void. After all, according to the respondent itself (paragraph 7 of Matenge's affidavit in the counter application);

“In due course of time, the tenders were evaluated and or adjudicated upon by the Town Planning Committee and the four applicants in these proceedings were recommended for approval and (sic) where indeed approved by the Town Planning Committee meeting of 7th June 2005”.

It is clear from the above that the political arm of Council namely the Town Planning Committee was involved in the evaluation and ultimate awarding of the tenders. In my view, the fact that the Chairman of the Committee did not sign the contract that was produced as a result of the Committees' approval of the tenders does not render the contracts void. I am of the firm view that when the legislature stipulated that the

signature of either a Chairman of the relevant Committee or the Mayor should be appended to all contracts falling under Regulation 41, its intention was to ensure that the political arm of Council is aware of all transactions falling within the provisions of the Regulation. In the present case, I am satisfied and indeed there is no allegation that the City Clerk acted without the knowledge and consent of the political component of Council when he signed the contracts. I hold therefore that there has been sufficient compliance with the provisions of Regulation 50.

I am fortified in this view by the words of Nganunu C.J. in the recent case of ***Gaborone City Council v. Daisy Loo (Pty) Ltd & Jeffrey Bookbinder*** Miscra No. 240/2005 (not reported) where he says at page 18:

“The second argument of the applicant in respect of the contract for Area D is that it was not signed on behalf of Council by its authorised officers i.e. the Mayor with the City Clerk or the Chairman of the Committee and the City Clerk as required by Regulation 50. This contract however, had, at least been awarded by the Committee, if such Committee had not been cheated by its officer, as earlier discussed. It had also been, embodied in a formal document except that it had then not been signed as mandated by the Regulation but had been signed by the Deputy City Clerk. It is clear however that this contract had been the subject of a tender award by the Committee. The procedural defects surrounding the conclusion of the contract alone would, in (sic) view, not render it void. But as shown the argument which I hold as wholly fatal to its existence is that it was induced by a most serious fraud perpetrated on the Committee by the Head of Department of Environmental Health.”

My understanding of the passage quoted *supra* is that the Honourable Chief Justice was of the view that had it not been for the fact that the contract was fraudulently obtained, he would have declared it binding on the parties notwithstanding its having been signed by an officer other than the ones stipulated in Regulation 50. I respectfully agree with and adopt the sentiments of Nganunu C.J.

In the premises, the counter application of the respondent falls to be and is hereby dismissed.

In conclusion, I make the following order:

The Rule Nisi issued by this Honourable Court on the 7th June 2006 is hereby confirmed in the following manner:

1. The respective contracts entered into by and between the applicants and the respondent on the 7th July 2005 are hereby declared to have been valid and binding on the parties.
2. Any purported repudiation of the said contracts by the respondent for the reasons stated in the letter written by the respondent and dated 15th March 2006 or subsequent reasons based on non observance of the Council Regulations is declared unlawful and of no legal force.

3. The respondent is ordered to pay the costs of this application
4. As the counter application was not argued, I make no order in respect thereof.

**DELIVERED IN OPEN COURT AT LOBATSE THIS 17TH DAY OF NOVEMBER,
2006.**

**A.B. TAFA
ACTING JUDGE**