REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-MOT-GEN-2019/00432

In the matter between:

ABB NAMIBIA (PTY) LTD	**APPLICANT**
and	
THE CENTRAL PROCUREMENT BOARD OF NAMIBIA	**1ST RESPONDENT**
THE MINISTER OF FINANCE	**2ND RESPONDENT**
HYOSUNG HEAVY INDUSTRIES CORPORATION	**3RD RESPONDENT**
POSCO DAEWOOD CORPORATION	**4TH RESPONDENT**
AND FURTHER RESPONDENTS	

Neutral Citation: *ABB Namibia Ltd v Central Procurement Board of Namibia* (HC-MD-CIV-MOT-GEN-2019/000432) [2021] NAHCMD 398 (6 September 2021).

CORAM: MASUKU, J

Heard: **16 February 2021**
Delivered: **6 September 2021**

Flynote: Review Application – The importance of discovery in applications of this nature- Legislation – Public Procurement Act – Internal remedies in terms of

Regulation 38 and Section 59 of the Act – Conflict of interest – being a judge in your own cause- Reconsideration of tender awards by the Central Public Procurement Board

Summary: This is an application for review which stems from an application for a tender bid. The tender bid entailed the procurement of designing, testing, delivering, and commissioning of power transformers for Nampower. The applicant being a tenderer was disqualified together with two other tenderers. The tender was granted by to the 3rd respondent herein.

Aggrieved by the disqualification and the award to the 3rd respondent, the applicant launched this application for review. The disqualification was as a result of the applicants' alleged deviation from schedule A that related to the Clarifications and Deviations by the Transformer Expert. The applicant then filed an application for reconsideration of the decision purportedly in terms of section 59 of the Public Procurement Act read with Regulation 38, which was dismissed by the 1st respondent.

Amongst the applicants' grounds for review related to a member of the Bid Evaluation Committee (BEC) who was conflicted and failed to disclose such conflict. The applicant stood firm in its position that the decision to disqualify the applicant was as a result of an abdication by the 1st respondent allowing the administration to dictate what the decision should be.

The 1st respondent, of course taking the opposite view, contended that the applicant failed to exhaust internal remedies provided for in the Act. The court in turn held as follows:

Held: that discovery is the Alpha and Omega of a proper review because the documents, tape recordings and material maintained during administrative purposes are essential in assisting parties when mounting their case and the court in determining applications for review.

Held that: When a respondent is required to discover documents, they must observe utmost good faith in the discovery process.

Held further that: in law it is incorrect for a party to make a review application before the same panel in this instance which came to the decision sought to be challenged. The applicant was in the wrong for addressing the application for review in terms of s 59 to the 1st respondent. Equally the 1st respondent had no power to issue the decision which stemmed from such application.

Held that: the court referred to the matter of *Msomi v Abrahams NO and another* 1981 (2) SA 256 (N) at 260 F – 261 B where it was held that, the courts will not hold that a person aggrieved by a reviewable irregularity or illegality is precluded from approaching the court until he has first exhausted his remedies by appealing to such domestic tribunal as may be available to him.

Held further that: the applicant was not compelled by the Act to first resort to the review provided before approaching this court, as the words employed in s 59 are permissive and not mandatory.

Held that: the matter of *Radial Truss Industries v Chairperson of the Central Procurement Board of Namibia* properly dealt with regulation 38 whereby it was held that what this regulation impermissibly creates a right for a bidder to request the board or public entity to 'reconsider' its selection for the award within the standstill period.

Held further that: Regulation 38 gave the 1st respondent powers not conferred upon it by the Act – in so far as the 1st respondent makes a decision, be it to award or disqualify a bidder, it thereby fully and finally exercises its function in terms of the Act and cannot reopen the issue to consider it.

Held: that where there is a conflict of interest in a matter and a party is privy thereto such conflict must be disclosed from the on onset.

Held further that: The English case *Ex Parte Pinochet* lays down a fundamental principle that a man may not be a judge in his own cause, this having two similar identical implications. First, if a judge is a party to the litigation or has financial or proprietary interest in its outcome then he is indeed sitting as a judge in his or her own cause. Second, where a judge is not a party in its outcome but in some other way his conduct or behaviour may give rise to a suspicion that he is not impartial, for example because of his friendship with a party.

Held that: the conflict of interest that arouse in this matter fits in the latter category laid out above. Mr. Mulongeni had a conflict of interest that he did not disclose.

Held further that: In *Pinochete* (supra) public confidence in the administration of justice requires that the judge must withdraw from the case or, if he fails to disclose his interest and sits in judgment upon it, the decision cannot stand.

Held: that policy needs to be set in place by the Minister of Finance regarding the potentially conflicting roles which people might have in the procurement arena. This is to say that it is worrisome that an individual who holds a senior position in a company may be appointed as a member of the BEC but on other occasions, the company in question becomes a tenderer before the 1st respondent.

The court in turn found that the involvement of the conflicted member served to poison all the proceedings and the decision that was arrived at as a result the decision was declared unlawful and invalid and of no force or effect.

ORDER

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1. The decisions rendered by the First Respondent dated 25 April 2019, 27 June 2019 and 18 September 2019, respectively, regarding the award of the Procurement of Designing, Manufacturing, Testing, Delivering, Installing and Commissioning of Power Transformers Contract No. G/oib/cpbn-07/2018 to the Third Respondent, be and are hereby reviewed and set aside.

2. The First Respondent is ordered to pay the costs of this application consequent upon the employment of one instructing and one instructed legal practitioner.
3. The matter is removed from the roll and is regarded as finalised.

JUDGMENT

MASUKU J:

Introduction

[1] In October 2018, the 1st respondent, issued a notice calling for bids for the procurement, designing, testing, delivering, installing and commissioning of power transformers. These transformers were for Nampower.

[2] Various tenderers, both within and without Namibia submitted their bids. The applicant, ABB Namibia Ltd, was one of those tenderers. After the entire process was completed, the 1st respondent awarded the said tender to the 3rd respondent, Hyosung Heavy Industries Corporation. The applicant was, during the process, disqualified on grounds that need not be traversed at this juncture.

[3] It suffices, though, to mention that the applicant cries foul both at its disqualification, and consequently, on the award of the tender to the 3rd respondent. In exercise of its rights in terms of the law, the applicant brought an application seeking to have reviewed and set aside the decisions made by the 1st respondent, leading to and including the decision to award the tender to the 3rd respondent.

The parties

[4] The applicant, as mentioned above, is ABB Namibia (Pty) Ltd, a private company duly incorporated and registered in terms of the company laws of this Republic. Its place of business is situate at 58 Industria Road, Lafrenz, Windhoek.

[5] The 1st respondent is the Central Public Procurement Board of Namibia, a juristic person established in terms of the provisions of s 8 of the Public Procurement Act, No. 15 of 2015, ('the Act'). Its place of business is situate at Mandume Part, 1 Teinert Street, Windhoek.

[6] The 3rd respondent is the Minister of Finance, who has been cited in his official capacity. He is duly represented by the Office of the Government Attorney, 2nd Floor, Sanlam Centre, Independence Avenue, Windhoek.

[7] The other respondents are tenderers who participated in the above tender and save for the 3rd respondents, fell along the wayside. They were cited and served with the application and none of them filed any papers in opposition. For that reason, it is unnecessary, for purposes of this judgment to describe them.

[8] It will be seen that at the end of the day, there are basically two protagonists in the ring, trading incessant blows with the sole purpose of knocking the other out, as soon as possible after the contest was declared. These are the applicant and the 1st respondent. Even the Minister did not seek to join the fray, thus leading to the ineluctable conclusion that the other respondents are content with abiding by the decision of the court, whichever way it may go.

Background

[9] As intimated earlier above, the bone of contention in this matter revolves around the awarding of the tender described elsewhere above. The applicant threw its hat in the ring, so to speak. Its tender was priced at N$65,048,673.00 whereas that of the 3rd respondent was priced at N$91,711,522.00. On 25 April 2019, the 1st respondent disqualified all the other bidders, excluding the 3rd respondent.

[10] The applicant's bid was, according to the decision made and communicated to the applicant, disqualified because it had 'one major deviation from Schedule A as per the Clarifications and Deviations by the Transformer Expert: The Bidder offered an on-load Tap Changer from MR, but the vacutap range rather than the oiltap range as required.'

[11] Dissatisfied by the disqualification and the award of the tender to the 3rd respondent, the applicant approached the court on urgency, essentially seeking relief in two parts. The first was interdictory relief, in terms of which it sought an order interdicting the 1st respondent from implementing its decision to award the tender to the 3rd respondent, pending the review of the decisions made by the 1st respondent.

[12] It would seem that sense prevailed for the reason that the parties reached consensus regarding the interdictory relief. The 1st respondent, upon advice, undertook not to implement its decision, pending the main review. Another aspect of part A was a prayer for the service of the application and related documents to those respondents based outside the jurisdiction of this court via electronic mail or facsimile on addresses that were furnished in the notice of motion. This prayer was not opposed and those respondents thus affected were accordingly served in that manner.

[13] It then becomes clear that what remains for determination, is the determination of the main review as intimated to be part B of the notice of motion. It is to that aspect that I presently turn.

The grounds of review

[14] It has been stated above that the main reason for the applicant's disqualification was that it had, instead of offering the oil tap changer that was prescribed, offered the vacuum tap range. This, the 1st respondent considered to be a major deviation from the prescribed requirements contained in the tender documents.

[15] The applicant contends that in view of the attitude of the 1st respondent to its offer of the vacuum tap, it contacted the supplier in Germany, which was the only one approved from whom the bidders, were in the tender documents, obliged to source the tap changer. This was Maschinenfabrick Reinhausen (MR) Germany.

[16] It would appear, as a matter of necessity, that I now venture into unfamiliar territory, but this seems common cause between the parties. There are two types of on-load changers, namely, the oil tap and the vacuum tap. The former uses an oil filled chamber to regulate the output voltage of the transformer, whereas the vacuum tap uses a vacuum within the chamber to regulate the output voltage of the transformer. The tender documents specified an oil tap type changer that would be able to perform 150 000 free operations.

[17] It is the applicant's case that the information it received from the sole supplier, upon receiving the requirement above, was that it does not manufacture an oil tap changer capable of performing 150 000 free operations. The manufacturer further stated that only a vacuum tap changer was capable of performing 150 000 free operations as required. The applicant was thus offered by the manufacturer the vacuum tap changer, which is the only one that could meet the 150 000 maintenance free requirement.

[18] It is the applicant's case that both tap changers are precisely the same equipment except that the one arcing takes place in oil, while the other, in a vacuum type. Upon being disqualified for offering a wrong tap changer, it is the applicant's case that it made enquiries from the manufacturer, which stated in no uncertain terms that none of its oil tap changers are able to perform the 150 000 free maintenance operations and that only the vacuum type is capable of meeting that requirement.

[19] It is the applicant's contention that with the information captured above, emanating from the manufacturer, it would have been impossible even for the 3rd respondent, which was eventually awarded the tender contract, to have provided an oil tap changer that meets the specifications because it is simply not in existence. In view of this development, the applicant filed an application for a reconsideration of

the decision to disqualify it in terms of s 59 of the Act. This application, was by letter dated 17 July 2019, refused.

[20] Upon receiving notice of the award of the tender to the 3rd respondent on 18 September, 2019, the applicant states that all dissatisfied bidders were called upon to file an application for review within the 7 day stand-still period but it did not do so as it had already filed its review application previously as recounted above. It contends that it had already exhausted its internal remedies at that stage.

[21] The applicant contends that the decision of 18 September, referred to above, is a violation of its constitutional rights, including the right to a fair hearing in terms of Art 12 and fair and reasonable administrative action in terms of Art 18 of the Constitution. The 1st respondent is accused of failing to properly apply its mind to the matter and to appreciate the anomaly in the bid and to assess the correct technical specifications. It thus failed to apply the same standard to all bidders, further complained the applicant.

[22] It is important to mention that there is a dispute regarding the completeness of the record of proceedings. The applicant ended up filing an application in terms of rule 76(6), to compel the 1st respondent to discover certain documents that were considered relevant and pertinent to the matter. The issue served before me, the question being whether the documents to be provided pursuant to a demand for specific discovery must be on oath or not. The court held that the discovery must indeed be on oath.[1]

[23] The discovery that was ordered yielded new documents and information. As a result, the applicant, as it was entitled to, filed a supplementary affidavit in terms of rule 76(9). It captured further grounds for impugning the decisions under challenge as revealed in the newly discovered documents. I will deal with the discovery and the complaints about it raised by the applicant in reply.

[24] The first ground for review, raised by the applicant in its supplementary affidavit, relates to the presence and participation of one Mr. Ambrosius Mulongeni,

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an electric engineer. He, in terms of the documents, was appointed by the 1st respondent as part of the Bid Evaluation Committee (BEC), in respect of the tender under consideration.

[25] It is the applicant's case that Mr. Mulongeni is, or was a shareholder of an outfit going by the name Radial Truss Industries (Pty) Ltd. It is the applicant's case that it handed the said company over for legal action due to an unpaid debt owed to it. It was the applicant's contention that as a result of that development, its relationship with the said company and Mr. Mulongeni was acrimonious.

[26] The applicant complains that notwithstanding that sour relationship, Mr. Mulongeni did not disclose the conflict of interest he had in the deliberations pertaining to the applicant's bid when the bid served before the BEC. Neither, further contends the applicant, is any evidence that he recused himself from dealing with the applicant's bid. The documents discovered, to the contrary, reflect that Mr. Mulongeni actually played a pivotal part in the deliberations leading to the decision ultimately taken to disqualify the applicant and recommending, as the BEC did, that the tender contract be awarded to the 3rd respondent.

[27] The applicant further cries foul regarding its disqualification. It records that according to an email authored by a Ms. Rikket on 1 March 2019, it is clear that the applicant had passed the technical evaluation stage. Surprisingly, and after that stage had been passed, the applicant's bid was disqualified on technical grounds. It is the applicant's contention that this was done in order to enable the 3rd respondent, whose bid was for a much higher price, to be accepted as there would be no other bidder in the running and the significant difference in the prices offered by the two entities would not need to be explained.

[28] The applicant also points out that there is no scrap of paper that in any shape or form, reflects any decision by the 1st respondent to disqualify the applicant, or any other bidder, for that matter. It is argued that the 3rd respondent accordingly did not apply its mind to the issues before it. It simply executed the BEC's decisions lock, stock and barrel, as it were.

[29] It will be recalled that the applicant's position on the tap changers, was that whether the oil or vacuum tap changer was employed, was not a major deviation from the specifications. The applicant points out that the minutes subsequently discovered, show that a body called 'the Administration' decided that the issue of the vacutap was a major deviation. It is unclear who form this body or what their role in procurement matters is.

[30] It is accordingly the applicant's contention that the decision to disqualify the applicant was not made by the 1st respondent but was the result of an abdication by the 1st respondent, allowing, in the process, the 'administration' to dictate to it what the decision should be. For this reason, the applicant argued that the application for review should succeed.

[31] The applicant further contends that a reading of the minutes supplied by the 1st respondent does not indicate that the 1st respondent ever addressed its mind to the differences between an oil tap and a vacutap; the advantages and disadvantages of each as explained in the applicant's bid. The 1st respondent, in disqualifying the applicant's bid, so contends the applicant, operated under grave uncertainty and the decision to disqualify the applicant was based on incorrect assumptions or facts.

[32] Regarding the award of the tender to the 3rd respondent, the applicant takes the position that the 3rd respondent's bid did not comply with the Bid Data Sheet. It is the applicant's case that this should have seen the 3rd respondent's bid being disqualified without further ado. In this regard, although aware of the non-compliance, the 1st respondent deliberated on this issue in a bid to accommodate the 3rd respondent and adjusted the prices against the instruction to bidders to the contrary, and shifted the costs to Nampower.

[33] The applicant also pointed out other non-compliances by the 3rd respondent. One such non-compliance related to the 3rd respondent being allowed, as per resolution CPBN-03/22/2019,[2] to 'fix' the transformation ratio errors identified in the report. The applicant also complained that the 3rd respondent did not meet the

[2] Page 74 of the supplementary record.

minimum required number of maintenance free operations. No explanation or deviation was proffered and this was overlooked by the 1st respondent.

[34] The applicant further took issue with the size of the 3rd respondent's transformers. The expert pointed out that the said transformers were too big to fit onto the existing plinth. The 1st respondent, however, accepted an explanation to the effect that this could be rectified during the design stage, which the applicant contends, would be at a very high cost. More importantly, the applicant points out that Siemans' bid was disqualified on this very basis, namely, that the transformer it offered was too big.

[35] The applicant also pointed out that a reading of the minutes of the 1st respondent, shows that there was a number of persons who do not appear to have had any business attending meetings of the 1st respondent. Their role in the meetings was not explained. As such, it was the applicant's case that the meetings held were *ultra vires* the provisions of s 15 of the Act. In this connection, there was also no decision made to appoint the BEC and its appointment was thus irregular and *ultra vires*.

[36] Based on the aforegoing allegations, the applicant took the position that it was entitled to the relief sought. In this regard, the applicant contended that the decision to disqualify it was wrong. It was also of the view, for reasons canvassed above, that the award of the tender to the 3rd respondent was reviewable and liable therefor, to be set aside.

<u>The first respondent's case</u>

[37] The 1st respondent, as indicated earlier, filed an answering affidavit, in which in the first place, it took the court through a conducted tour of its legislative functions. The statutory functions and obligations of the 1st respondent are not contested terrain. The question is whether the 1st respondent dutifully complied with its statutory obligations. The applicant contends it did not.

[38] The first issue raised by the 1st respondent is that the applicant failed to exhaust the local or domestic remedies provided in the Act. This it was contended was the case because the applicant did not, as it was entitled to, file an application for review as envisaged in s 59 of the Act. Because of this failure, further contended the 1st respondent, the applicant should be non-suited and the whole application rendered *cadit quaestio*, i.e. the application is at an end.

[39] Regarding the merits, the 1st respondent took the position that there was no merit to the application. As such, all the bases on which the decisions in question were sought to be impugned, were rejected out of hand by the 1st respondent. The 1st respondent took the position that the tender documents were clear as to what was required and the applicant failed to pass the test so to speak in relation to the tap changers. In this regard, the applicant, against the specified tap changers, insisted on supplying a different type of tap changers.

[40] It is the 1st respondent's case that the applicant applied for a reconsideration in terms of s 55(5) of the Act, read with regulation 38(2)(c). When the application for reconsideration was rejected, the applicant had an option to apply in terms of s 59, for review. It would appear the 1st respondent contends, the applicant did not avail itself for the second bite to the cherry as it were.

[41] The 1st respondent maintains that the applicant's bid failed at the technical evaluation stage. Regarding the question whether the 3rd respondent would have been able to provide a product compliant with the specifications, it was the 1st respondent's case that this was an issue to be dealt with by Nampower and not the 1st respondent.

[42] Regarding the supplementary affidavit filed by the applicant in terms of the rules, it was the 1st respondent's case that the BEC members were duly appointed by resolution CPBN-04/2018.[3] I am of the view that the allegation of the irregular appointment of the members of the BEC, has been fully met by admissible evidence in this case and there would, all things being equal, no further reason to deal with the issue as the judgment unfolds.

[3] P 825 of the record of proceedings.

[43] Regarding the appointment of Mr. Mulongeni, the 1st respondent stated that the latter applied to be a member of the BEC and that he stated in his declaration of interest that he was not conflicted. The 1st respondent further stated that in any event, the decisions of the 1st respondent are made by unanimous vote.

[44] The 1st respondent further stated that Mr. Mulongeni did not fall within any of the prohibited categories of persons who are mentioned in s 26(8) of the Act and as such, there was nothing untoward with his involvement in this particular matter. The 1st respondent accused the applicant of 'clutching at straws to try and draw out any sort of irregularities.' It remains to be seen whether this accusation will survive scrutiny at the end of the day.

[45] Regarding the tap changers, the 1st respondent contends that this was not an issue that served before the BEC. It further denies that the applicant passed the technical evaluation stage. Its case is that the applicant was disqualified because it failed to comply with the tender schedule. A denial was recorded in relation to the allegation that the 1st respondent failed to apply its mind properly to the question of awarding the tender to the 3rd respondent.

[46] It is worth pointing out that in the main, a reading of the 1st respondent's answering affidavit shows that the 1st respondent did not join issue regarding some of the allegations traversed by the applicant in its two sets of affidavits, namely, the founding and the supplementary affidavits. A large portion of the issues raised by the applicant, accordingly remain uncontroverted. It is plain in law that in those cases, the version deposed to by the applicant should accordingly stand.

Determination

[47] Having dealt with the main issues covered in the different sets of affidavits in broad strokes, it is necessary that I embark on a determination of the issues that arise. Before dealing with those issues, I find it necessary to throw a word of caution regarding the duty of a party in the position of the 1st respondent when it comes to discovery.

Discovery

[48] It goes without saying and needs no further emphasis that discovery is a very important process in matters of review. It might well be regarded as the Alpha and Omega of a proper review. This is because the documents and tape recording or other material maintained during administrative processes are key in assisting the parties, including the respondents, in mounting their respective cases. By the same token, the court derives a lot of assistance, direction and insight into the correctness, fairness, propriety or otherwise of the decisions made and which have, for one or other reason, been brought to court for determination.

[49] In this case, the applicant has cried foul because there are many documents it sought, which might have assisted its case and above all, the proper determination of the case, that were not produced by the 1st respondent. I gained the distinct impression that the record keeping by the 1st respondent, is not at the required standard. Parties in the 1st respondent's position have to ensure that all the processes, including correspondence, meetings, conferences and other activities that take place in relation to tenders, are properly and fully recorded and properly and meticulously maintained.

[50] More importantly, these documents must be discovered during the discovery process. In this regard, the 1st respondent must observe *uberimma fides* i.e. utmost good faith. This process must be undertaken with seriousness, a great presence of mind, honesty and completeness. No relevant scrap of paper, document or recording, must be omitted, even if at the end, the documents or recordings discovered serve to perforate the 1st respondent's case beyond repair.

[51] The 1st respondent must not yield to the tempting sense of self-preservation and thus not discover or timeously discover relevant documents. I do not want to read a lot from the previous interlocutory application in which the 1st respondent was hell bent on making the relevant documents available but not under oath. This is telling as the applicant justifiably complains that the 1st respondent, for the first time, attached documents to its answering affidavit that had not been discovered at all.

[52] This is gravely wrong, unfair and totally unbecoming of an entity of this stature. As a result of these documents being attached to the answering affidavit, well after the discovery process was completed, it placed the applicant at an extreme disadvantage as it did not, at that juncture, have the right or opportunity, to properly deal with those belatedly attached documents. This may lead to the ineluctable conclusion that the 1st respondent was not willing to disclose all the relevant documents for nefarious reasons, in stark response to the sense of self-preservation.

[53] Strictly speaking, the court should not have regard for documents which were subject to discovery but were not so discovered and which the 1st respondent, without any condonation, leave or any explanation whatsoever, unilaterally attached to its answering affidavit. This is unfair and improper and the refusal to have regard to these, especially where they favour the respondent, must be the proper expression of the court's disapproval of piecemeal discovery.

[54] It is my fervent hope that this court will not, at any other time, need to make any such comments regarding discovery by the 1st respondent. Parties should not be left with the uncanny feeling that the 1st respondent is avoiding meeting its procedural and statutory obligations of full and proper discovery, which at the end, renders the review process meaningful. Full transparency and accountability, are non-negotiable imperatives in this regard.

[55] In closing, it bears repeating that the objects of the Act, as encapsulated in s 2 of the Act include the promotion of accountability, transparency and efficiency. All these imperatives are heavily implicated in the full and proper discovery of the review record. To depart from the paths of virtue mentioned above, is totally unforgivable and subverts in material ways the manifest intention of the Legislature in enacting the Act.

Exhaustion of local remedies

[56] As previously stated, the 1st respondent took the point that the applicant did not exhaust the local remedies made available to it in the Act before approaching this court on review. In particular, the 1st respondent contended that the applicant did not follow the provisions of s 59(4) of the Act and instead only filed an application for reconsideration in terms of Regulation 38. The applicant, for its part, contends that it complied with the provisions in question 59(4).

[57] In contending compliance, the applicant refers to an undated letter it authored. The letter was addressed to the 1st respondent, for the attention of Mr. Swartz, the deponent to the answering affidavit.[4] The letter states that the review filed is in terms of s 59 of the Act. It is unnecessary to state the basis of the application for 'review' as stated in the said letter, save to mention that part of the argument advanced by the applicant was that the provision of the vacuum tap changer was not a major deviation, considering the information given by the manufacturer.

[58] It is common cause that the 1st respondent did not uphold the said review, but dismissed it. It is after that process that the applicant then approached this court on review. It should, perhaps be stated, for the sake of completeness, that the applicant's letter, besides making reference to s55 of the Act also made reference to Reg. 38. I shall now quote the two provisions in a quest to decide whether the 1st respondent's point of law *in limine* has any merit.

[59] Section 59 read as follows:

'(1) A bidder or supplier may, as prescribed, apply to the Review Panel for review of a decision or an action taken –

(a) by the Board; or
(b) by a public entity,
for the award of a procurement contract.'

[60] Regulation 38(2)(c), on the other hand, reads as follows:

[4] Letter at p. 652 of the record.

'In addition to other details referred to in subsection (4) of section 55 of the Act, the notice referred to in subsection (1) must inform the bidders –

(a) . . .

(b) . . .

(c) that a bidder who intends to request a public entity to reconsider its selection for the award to apply for the review of the selection for the award within the standstill period;'

[61] It is clear that the applicant, in this matter addressed the letter to the 1st respondent and stated that it did so in terms of s59 of the Act. Section 59(1), on the other hand, is clear that the review must be made to the Review Panel. It follows as a matter of law that it is incorrect for a party to make this application for review to the 1st respondent.

[62] It would appear to me that the applicant erred in addressing the application for review in terms of s59 to the 1st respondent. By the same token, the 1st respondent was incorrect in entertaining the application for 'review'. It clearly had no right or power to consider the application, filed as it was, according to the applicant's letter, in terms of s 59 of the Act. That being the case, the 1st respondent equally had no power to issue the decision that it did, namely, dismissing the purported review or reconsideration.

[63] It being a body empowered by the Act to carry out some functions in terms of the Act, the 1st respondent should have properly advised the applicant that it was barking the wrong tree by approaching it, which it did not do. It left the applicant with the impression and satisfaction that it had filed a review in terms of the s59 of the Act, which was dismissed, hence the approach to the court.

[64] I am of the considered view that both parties were in error in so far as the letter of the law was concerned. That being said, I am of the view that it is disingenuous of the 1st respondent, having entertained the application for review, or reconsideration, to later turn around and allege that no application was filed in terms

of the Act and seek at the same time to profit from what appears to have been a misunderstanding of the Act by both parties at the time.

[65] I will, in due course, deal with the issue of the provisions of regulation 38. Before I do so however, it is, in my view important to consider the language employed by the legislature in s 59 and in that connection, to consider whether the applicant fell foul of the provisions of the Act by not approaching the Review Panel proper as mentioned in the said provision.

[66] This enquiry, is, in my considered view necessary when proper regard is had to case law in this jurisdiction on the proper approach to the doctrine of exhaustion of local remedies. In *Naholo,*[5] Tötemeyer AJ, reasoned as follows regarding the exhaustion of local remedies:

'Under the common law, the mere existence of an internal remedy was not, by itself, sufficient to defer to judicial review until the remedy has been exhausted. Judicial review would in general only be deferred where the relevant statutory or contractual provision, properly construed, required that the internal remedies be exhausted first.'

[67] Subsequent cases on this point, did not part company with the views expressed in *Naholo.* Ueitele J had occasion in *Tjirovi*[6] and in *Tjiriange*[7]to confirm the correctness of the law as adumbrated in *Naholo.* In *Tjiriange,* the learned Judge expressed himself thus:

'[29] Hoexter acknowledges that the right to seek judicial review might be suspended or deferred until the complainant has exhausted domestic remedies which might have been created by the governing legislation. Hoexter, however, furthermore recognises that this is not automatic as was stated by De Wet J in the matter of *Golube v Oosthuizen and Another* that: "The mere fact that the Legislature has provided an extra-judicial review or appeal is not sufficient to imply an intention that recourse to a Court of law should be barred until the aggrieved person has exhausted his statutory remedies.

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[5] *National Union of Namibian Workers v Naholo* 2006 (2) NR 658 at 680, para 60.
[6] *Tjirovi v Minister of Land Resettlement* (HC-MD-CIV-MOT-REV-2017/00086 [2018] NAHCMD 56 (19 March 2018).
[7] *Tjiriange v Kambazembi* (A 164/2015) [NAHCMD 59 (24 February 2017).

[30] In *Msomi v Abrahams NO*[8] *and Another*, Page J said:

"It is clear on the authorities that the Courts will not hold that a person aggrieved by a reviewable irregularity or illegality is precluded from approaching the Courts until he has first exhausted his remedies by appealing to such domestic tribunal as may be available to him, if this is a necessary implication of the statute or contract concerned . . . The implication of the ouster of the Court's jurisdiction must be a necessary one before it will be held to exist: for there is always a strong presumption against a statute being construed to oust the jurisdiction of the Court completely . . . The mere fact that a statute provides an extra-judicial remedy in the form of domestic appeal or similar relief does not give rise to such a necessary implication; in the absence of further conclusive implications to the contrary, it will be considered that such extra-judicial relief was intended to constitute an alternative to, and not a replacement for, review by the Courts.'

[68] It is now necessary, having had regard to the illumination provided by the authorities, to decide what the proper construction of the relevant provision should be in this matter. It is important in this regard to have regard to the nomenclature employed by the legislature. It is clear that the legislature chose, in its wisdom, to employ the use of the word 'may' in s59, which is permissive and not mandatory.

[69] In the premises, I come to the considered view that the applicant was not compelled by the Act to first resort to the review proper, provided in s 59 of the Act, before approaching the court. As indicated, the language used by the provision is not peremptory and there is thus no bar to the applicant from approaching this court without having filed a review before the Review Panel. For that reason, I am of the considered view that the point of law *in limine* should fail.

[70] Having said that, it is perhaps important to mention that although the language employed in the provision is permissive, it is, as a matter of logic and good practice and having regard to the technical nature of the issues that sometimes arise in the procurement industry, the best policy is to first have recourse to the review jurisdiction of the Review Panel as it might be considered that the legislature created the Review Panel, among other matters, in order to lighten the burden of the courts by creating the internal remedy.

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[8] *Msomi v Abrahams NO and Another* 1981 (2) SA 256 (N) at 260F – 261 B

Regulation 38

[71] It is now opportune, as I had earlier intimated, to have regard to Regulation 38. I will do so very briefly. It is important that I mention that I deal with this provision merely for the sake of completeness and only to the extent that it may be necessary to do so. I say so for the reason that the finding on exhaustion of remedies above is strictly speaking exhaustive of the key issue in this matter.

[72] Since the provision is mentioned in the papers, I find it prudent to have regard to it in a cursory manner. This provision has recently become the subject of judicial comment, interpretation and determination. In a judgment, hot from the oven, as it were, Angula DJP, with his usual characteristic perceptiveness and legal incisiveness dealt with the powers of review provided in s 59, considered in *tandem* with the regulation in issue, which provides for a 'reconsideration'.[9] As a matter of note, it would seem that the judgment concerned Mr. Mulongeni's company, Radial Truss (Pty) Ltd.

[73] At para [36] to [38], the learned DJP reasoned as follows:

'[36] It is further significant to note that s 55(4) stipulates that the successful bidder and other bidders must be advised about the successful bidder that he or she has been selected for the award; and in respect of the unsuccessful bidders that they be advised about the name and address of the successful bidder's name and address and the price of the contract. What Regulation 38(2)(c) then impermissibly does is to create a right for a bidder to request the board or a public entity to 'reconsider' its selection for the award within the standstill period. That is not provided for in s 55(4). This in my judgment, and on the *Moodley* authority, amounts to impermissibly using Regulation 38 to enlarge the meaning of s 55 which was not provided for and not envisaged by the Legislature. If the Legislature intended to create such a right for a bidder it would have done so in s 55(4). If the Legislature intended to create such right for a bidder it would have done so in s 55(4) and in clear and unambiguous language. (Emphasis added).

[9] *Radial Truss Industries (Pty) Ltd v Chairperson of the Central Procurement Board of Namibia* (HC-MD-CIV-MOT-GEN-2021/00255) [2021] NAHCMD 380 (24 August 2021).

[37] In the light of the foregoing conclusion, I do not agree with Ms. Shifotoka's submission that Regulation 38 merely "gives flesh to s 55 in the sense that it provides the procedure to be followed by the Board". In my judgment Regulation 38 creates a substantive right for an unsuccessful bidder, which was not provided by the Legislature in s 55(4). I agree with Mr. Corbett that the Legislature intended that any challenge to the board's notice of selection of an award must be made by way of review in terms of s 55(5) and that that review is to be determined by the Review panel appointed by the minister in terms of s 58.

[38] Applying the above principles referred to earlier in this judgment to the facts of the present matter, I am of the view that the interpretation contended for by the respondents' leads to absurdity whereby the board would be in a position to review its own decisions. The interpretation proffered by the respondents is clearly not objective but is subjective and self-serving. The effect of such an interpretation leads to an 'insensible result' and 'anomaly' but it also offends against the well-established principle namely that one should not be a judge in one's own cause.'

[74] I am in unqualified agreement with the sentiments expressed, together with the conclusion of the learned DJP. In the matter before the DJP, as in the present case, the 1st respondent acted on the probably honest but mistaken belief that it can 'reconsider' its own decisions. This is what the DJP found fell foul of the provisions of the Act and he held that Regulation 38, was *ultra vires,* in that it gave the 1st respondent power not conferred upon it by the Act. This thus puts paid to any argument that seeks to invoke the provisions of the regulation whether from the viewpoint of the applicant or the respondents.

[75] The judgment makes it very plain, and correctly so, in my considered view, that once the 1st respondent has performed its function in terms of the Act and has made a decision, whether to make an award, or to disqualify a bidder, as the case may be, it thereby fully and finally exercises its functions in terms of the Act. It reserves no residual power or right to reopen the issue and reconsider it.

[76] I dare say that this may be so even if the 1st respondent genuinely and with the benefit of hindsight, apprehends that it erred in a major way in its decision that was communicated to both the successful and the unsuccessful bidders. In that

regard, the 1st respondent would be expected, as a good constitutional citizen, to disclose the error in its ways to the Review Panel, which may in its wisdom decide the proper manner in which to deal with the issue, having regard to the information that would have come to light. This approach is consistent with the judgment of the Supreme Court on self-review in *China State Engineering v Namibia Airports Company*.[10]

[77] I should perhaps, for the sake of completeness state that although Ms. Van der Westhuizen, for the applicant had not seen the DJP's judgment, which had not been delivered at the time, she submitted that 1st respondent could not have legally assumed jurisdiction to deal with the applicant's matter once it had been thrown out. As the DJP found, she was also of the view that the 1st respondent becomes *functus officio* once it has made a decision in relation to a tender properly placed before it.

[78] I now proceed to deal with the merits of the application for review, having disposed of the preliminary point of law raised by the 1st respondent. In this connection, I proceed straightway, to deal with the alleged conflict of Mr. Mulongeni.

The Mulongeni factor

[79] Who is Mr. Ambrosius Mulongeni? Mr. Mulongeni, as stated earlier, is an electrical engineer. It is common cause that he was appointed by the 1st respondent to form part of the Bid Evaluation Committee ('BEC') in this particular tender. It also appears common cause that he participated in the decisions that were made in this matter, including the decision both to disqualify the applicant and to award the tender contract to the 3rd respondent.

[80] The bone of contention raised by the applicant is that Mr. Mulongeni is the Managing Director of an outfit known as Radial Truss Industries (Pty) Ltd. The applicant claims in its papers that it was owed some money by this entity and because of non-payment, it handed Radial Truss over to its legal practitioners to

[10] *China State Engineering v Namibia Airports Company* 2020(2) NR 343 (SC) 2020 NR p343

recover the money owed. The applicant states that its relationship with Mr. Mulongeni is thus an acrimonious one.

[81] The applicant further alleges that Mr. Mulongeni, on 12 October 2018, requested an extension of the deadline of the submission of bids and that he did so on behalf of a prospective bidder.[11] Considering his membership of the BEC, it would appear that such behaviour on his part, would be considered as unbecoming of a member of the BEC, which renders professional advice to the 1st respondent. I make no firm findings in this regard, although Mr. Mulongeni did not respond to the allegations.

[82] As intimated earlier in the judgment, the 1st respondent contends that Mr. Mulongeni signed the relevant documents signifying that he did not have any conflict of interest in the tender in question. The 1st respondent further contends that the decisions and recommendations made, were made by a collective and not by individuals. This must be understood to mean that even if Mr. Mulongeni did have an interest, he was not alone in making the decision and as such, his interest was drowned, for the lack of a better word, in the collective voice of the unconflicted members, who participated in the decision-making.

[83] It is worth noting that in spite of these serious allegations of a conflict of interest levelled against him, Mr. Mulongeni did not deem it fit to file an affidavit explaining and placing his version before court. There is no explanation from the 1st respondent as to why Mr. Mulongeni did not answer to the allegations standing tall against him and his integrity in relation to this tender. As matters stand, I am of the considered view that because the pointed allegations against Mr. Mulongeni stand unchallenged, they must be accepted as fact and I so hold.

[84] It is no answer for the 1st respondent to say that Mr. Mulongeni signed the relevant documents indicating that he has no conflict of interest. The fact of the matter is that the applicant raises a conflict which is live, namely, an acrimonious relationship between it and Mr. Mulongeni, as a result of a legal steps taken by the

[11] Page 1323 of the review record.

applicant against Mr. Mulongeni's company. This, he did not disclose to the members of the 1st respondent nor those of the BEC.

[85] It was the 1st respondent's contention, in the defence of Mr. Mulongeni that he did not fall within the prohibited degree of conflict stipulated in s 26(8) of the Act and thus his participation was not subject to allegations of a conflict of interest. The said provision relates to a member of the 1st respondent not being a member of the BEC, or the procurement committee or an accounting officer. With respect, this provision does not apply to the peculiar circumstances of this case, where Mr. Mulongeni had a conflict of interest and he did not disclose it.

[86] I therefor find for a fact that there was a conflict of interest in this matter which Mr. Mulongeni alone knew about and ought, in all fairness and propriety, to have disclosed at the time the processes were in motion to disqualify the applicant and to award the tender to the 3rd respondent. The fact that he had signed the conflict of interest documents means nothing when he is faced with a conflict that he alone knows about. It behoves him, as an honourable member of the BEC, with integrity, to disclose this.

[87] It is hard to imagine and accept that Mr. Mulongeni's conscience was not moved by the conflict in question. In this regard, it must be stated that disclosure of any interest is not a once off event. It is on-going process and the onus is on the conflicted person to disclose any conflict that may arise even as the processes prescribed by the Act are in motion.

[88] The next question that crops up is this – what is the effect of Mr. Mulongeni having sat and participated in the decisions that are sought to be impugned in this matter? The more compelling case relates to the conflict of interest regarding the applicant, as mentioned above. Was it proper for him to have sat and participated in any capacity and without disclosing the nature of his relationship with the applicant, which was a bidder? I think not.

[89] In *Liebenberg and Others v Brakpan Liquor Licensing Board and Another*[12] the court expressed itself as follows:

'Every person who undertakes to administer justice, whether he is a legal officer or is only for the occasion engaged in the work of deciding the rights of others, is disqualified if he has a bias which interferes with his impartiality; or if there are circumstances affecting him that might reasonably create a suspicion that he is not impartial . . . The impartiality after which the Courts strain may often in practice be unrealised without detection, but the ideal cannot be abandoned without irreparable injury to the standard hitherto applied in the administration of justice.'

[90] There is no doubt in my mind, especially in such a case, where Mr. Mulongeni did not, in any way, shape or form, attempt to disabuse the court's mind, that there was a disqualifying bias. His acrimonious relationship with the applicant, which the other members of the relevant committees did not and probably could not know about, had to be disclosed by Mr. Mulongeni and he did not do so, His failure to so disclose and yet participate in the decision-making which ultimately led to the decisions, poisons the entire process and as such, these decisions cannot be allowed to stand.

[91] Should any further authority be required to buttress this position, it is to be found in the well-known case of *Ex Parte Pinochet*[13]in which links between a judge who sat on appeal and one of the parties, Amnesty International, was not disclosed by the judge, who delivered the main judgment in the matter. It was thus alleged that the circumstances gave the appearance that the judge may have been biased against Senator Pinochet.

[92] In the course of the judgment, the following excerpts are important:[14]

'The fundamental principle is that a man may not be a judge in his own cause. This principle, as developed by the courts, has two very similar but not identical implications.

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[12] *Liebenberg and others v Brakpan Liquor Licensing Board and another* 1944 WLD 52 at 54-55.
[13] *R v Bow Street Metropolitan Stipendiary Magistrate and Other, Ex Parte Pinochet Ugarte* (No 2) [1991] 1 All ER 577
[14] *R v Bow Street Metropolitan Stipendiary Magistrate and Other, Ex Parte Pinochet Ugarte* (No 2) [1991] 1 All ER 577 at 586B – 586E.

First, it may be applied literally: if a judge is in fact a party to the litigation or has financial or proprietary interest in its outcome then he is indeed sitting as a judge in his own cause. In that case, the mere fact that he is a party to the action or has financial or proprietary interest in its outcome is sufficient to cause his automatic disqualification. The second application of the principle is where a judge is not a party in its outcome but in some other way his conduct or behaviour may give rise to a suspicion that he is not impartial, for example because of his friendship with a party. This second type of case is not strictly speaking an application of the principle that a man must not be a judge in his own cause, since the judge will not normally be himself benefiting, but providing a benefit for another by failing to be impartial.'

[93] It would appear that the conduct of Mr. Mulongeni, would fall in the second category stated above, as he was not himself, or his company, a party to the tender processes. Reverting to *In Re Pinochet,* Lord Hope of Craighead, in the judgment proceeded as follows:

'As my noble and learned friend Lord Goff of Chieveley said in *Reg v Gough* [1993] A.C. 646, 661, the nature of the interest is such that public confidence in the administration of justice requires that the judge must withdraw from the case or, if he fails to disclose his interest and sits in judgment upon it, the decision cannot stand. It is no answer for the judge to say that he is in fact impartial and that he will abide by his judicial oath. The purpose of the disqualification is to preserve the administration of justice from any suspicion of impartiality. The disqualification does not follow automatically in the strict sense of the word, because the parties to the suit may waive the objection. But no further investigation is necessary and, if the interest is not disclosed, the consequence is inevitable. In practice the application of this rule is so well understood and so consistently observed that no case has arisen in the course of this century where a decision of the courts exercising a civil jurisdiction in any part of the United Kingdom has had to be set aside on the ground that there was a breach of it.' (Emphasis added).

[94] In the instant case, it is clear that Mr. Mulongeni was conflicted in the matter as it involved the applicant. He did not, as expected, volunteer the interest and disclose it. The consequences are thus inevitable that the decisions, in which he took part, his undisclosed conflict notwithstanding, cannot be allowed to stand. I

accordingly do not find it necessary, to deal with the other issues that the applicant raised in support of the application for review.

[95] It must be mentioned that principles of corporate governance, about which a lot has been said, require disclosure of interests one might have in decisions that are to be made. In this regard, it is necessary to once again revert to the objects of the Act, which include the promotion of integrity, accountability, transparency, fair dealing, informed decision-making and legality.

[96] It is thus important that all those who are involved in the procurement chain, i.e. in the process of filing, adjudicating and awarding tenders, should, regardless of the level of participation, have proper regard for the principles set out section 2(a) of the Act. These objects must constitute a constant beacon as they navigate the way through all tender processes. Persons who have an interest should disclose it without having to be confronted so that pureness and impartiality of the decisions is not compromised thereby.

[97] A lot of precious time and resources are wasted when people involved in procurement do not act appropriately. This affects the delivery of necessary goods and services to Namibians, not to mention the delay and costs associated with having to start some of these processes afresh. The lesson to be learnt is that hiding or hoarding a conflict of interest a person has in procurement, in the final analysis, is very costly to the taxpayer and to the proper administration of justice. It must thus be avoided at all costs, like a plague.

Observation

[98] It behoves me to mention one unsettling feature of this application. It relates to Mr. Mulongeni and the company, Radial Truss (Pty) Ltd, of which he is the managing director. As intimated above, he served as a member of the BEC and that is where he had a conflict of interest that he did not disclose. The judgement by Angula DJP involved Radial Truss, where the company made a bid and was initially awarded a tender, which the 1st respondent appeared to have revoked. This was set

aright by the Review Panel and endorsed by the court, per Angula DJP's judgment (*supra*).

[99] It would seem to me that a policy needs to be put in place by the Minister of Finance regarding the potentially conflicting roles that persons should not be allowed to play in the procurement chain. It is disturbing that a person, who holds a senior position in a company may be appointed as a member of the BEC but on other occasions, the company in which he or she holds a position becomes a tenderer before the very 1st respondent. In such circumstances, it would mean that that person hunts with the hounds today and runs with the hares tomorrow and this is unseemly.

[100] I am of the considered view that there must be a healthy distance that is observed in these matters so as to eliminate the very appearance of a possible bias or conflict of interest. The public must rest assured that tenders awarded are not laced with circumstances that suggest the appearance of impropriety.

Conclusion

[101] In view of the foregoing, I come to the conclusion that the involvement and participation of Mr. Mulongeni in the impugned decisions, served to poison all the proceedings and ultimately the decisions taken. Mr. Mulongeni's wrongful and detrimental participation culminated in the disqualification of the applicant and the awarding of the tender to the 3rd respondent. It matters not that the decisions of the 1st respondent were made collectively and unanimously by the members of the BEC as the participation of Mr. Mulongeni marred such decisions. All these decisions are thus declared unlawful and invalid and of no force or effect. They are accordingly set aside.

Costs

[102] The principle normally applicable to such matters, is that costs follow the event. In the premises, there is no reason suggested or apparent, that would require

a departure from that beaten track. The 1st respondent is thus ordered to pay the costs of this application.

Order

[103] The inevitable consequence of the findings and conclusions reached above is that the application for review must succeed. The following orders are thus granted:

1. The decisions rendered by the First Respondent dated 25 April 2019, 27 June 2019 and 18 September 2019, respectively, regarding the award of the Procurement of Designing, Manufacturing, Testing, Delivering, Installing and Commissioning of Power Transformers Contract No. G/oib/cpbn-07/2018 to the Third Respondent, be and are hereby reviewed and set aside.
2. The First Respondent is ordered to pay the costs of this application consequent upon the employment of one instructing and one instructed legal practitioner.
3. The matter is removed from the roll and is regarded as finalised.

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T.S. Masuku

Judge

APPEARANCES:

APPLICANT:	C. E. Van Der Westhuizen Instructed by: Ulrich Etzold (Etzold-Duvenhage)
1st RESPONDENT:	A. W. Boesak Instructed by Office of the Government Attorney