

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT

Case no: A 247/2011

In the matter between:

CENTANI INVESTMENT CC

APPLICANT

and

NAMIBIAN PORTS AUTHORITY (NAMPORT)

1ST RESPONDENT

DAMEN SHIPYARDS CAPE TOWN (PTY) LTD

2ND RESPONDENT

Neutral citation: *Centani Investment CC v Namibian Ports Authority (NAMPORT) & another* (A 247/2011) [2013] NAHCMD 235 (05 August 2013)

Coram: UEITELE, J

Heard: 13 NOVEMBER 2012

Delivered: 05 AUGUST 2013

Flynote

Administrative law - Administrative action - Review of - Discretion of court - Court may decline to set aside invalid administrative act - Role of effluxion of time and considerations of practicality.

Administrative law – Review - Setting aside of award of tender - Consequences - Such to be fully considered – Interest of all parties to be considered - In casu, award not set aside, despite imperfect administrative process.

Summary:

The Namibia Ports Authority is a juristic person established by section 2 of the Namibian Ports Authority Act, 1994. The Authority invited tenders under Tender No 079/2011 for the 'supply and delivery of a second hand or existing new Tug for the Port of Walvis Bay. The unsuccessful tenderer (Centani) sought the review of the decision to award the contract to its competitor (Damen Shipyards Cape Town (Pty) Ltd.

The Court found that the recommendation (to award the tender to the second respondent) to the executive committee and to the board is not the recommendation of the tender committee but the recommendation of two individuals (retired captain van der Meer and Mr van Rhyn) who are not provided for in the procurement policy of the first respondent. The Court further argued that it should not be forgotten that the power and authority to source goods and service are vested in the board. Section 10 of the Act empowers the board to establish committees and to assign the performance of identified functions to those committees. The board accepted a procurement policy and in terms of that policy established a tender committee to advise it as regards the acquisition of goods and services. So the board can only act on the recommendations of the tender committee and the executive committee.

Held, that the procedures followed in awarding the tender to the second respondent were irregular and unlawful.

Held, further, that as a matter of public interest in the finality of administrative decisions and the exercise of administrative functions, considerations of pragmatism and practicality might in an appropriate case compel the court to exercise its discretion to decline to set aside an invalid administrative act.

Held, further, that in appropriate circumstances, a court should be innovative and use its discretion as a tool 'for avoiding or minimising injustice'. Courts should not shy away from carefully fashioning orders which meet the demands of justice and equity.

ORDER

1. That the applicant's application to file additional affidavits is dismissed with costs;
2. That the award of the tender to the second respondent is unlawful and irregular, but is not set aside;
3. That the applicant is granted leave to institute an action for damages against the first respondent as a result of the first respondent's infringement of the applicant's right to fair administrative action as envisaged in Article 18 of the Namibian Constitution;
4. That the first respondent must pay the applicant's costs (save the cost referred to in paragraph 1 of this order) of the review application, which costs include the costs of one instructing and one instructed counsel.

JUDGMENT

UEITELE J:

A Introduction

[1] On 7 March 2011, the Namibia Ports Authority (I will, in this judgment, refer to this company as the first respondent) invited tenders under Tender No 079/2011 for the 'supply and delivery of a second hand or existing new Tug for the Port of Walvis Bay.' The closing date for the submission of tenders was 28 March 2011.

[2] A total of eight companies, which include Centani Investment CC (I will, in this judgment, refer to this close corporation as the applicant), submitted tenders to the first respondent. On 24 August 2011, the first respondent's Board of Directors resolved to award the tender (i.e. Tender No 079/2011, I will, in this judgment, refer to Tender

079/2011 as the tender) to Damen Shipyards Cape Town (Pty) Ltd. (I will in this judgment refer to this company as the second respondent).

[3] The applicant is aggrieved by the fact that the tender was awarded to the second respondent. It (i.e. applicant) as a result of its grief approached this court on a notice of motion (initially on an urgent basis) for this court to, amongst others, issue an order in the following terms:

- '1. The first and second respondents ("the respondents") are to show cause why:
 - 1.1 the decision taken by the Board of the first respondent on 24th August 2011 to award to the second respondent Tender No 079/2011 for the supply and delivery of a second hand/existing new tug boat should not be reviewed and set aside;
 - 1.2 the decision of the Board of the first respondent not to accept the recommendations of its Tender Committee that Tender No 079/2011 be awarded to the applicant should not be set aside;
 - 1.3 an order should not be made that Tender No 079/2011 should be awarded to the applicant.'

[4] For one or other reason the applicant did not proceed with the urgent application, but opted to proceed in the ordinary course. On 13 November 2012, the applicant gave notice that it will on an urgent basis apply to court for leave to file additional affidavits in the review application, that application was opposed. At the hearing the applicant abandoned its application to file additional affidavits and as a result I dismissed that application with costs. The first respondent on their part raised a point *in limine* namely that the applicants heads of arguments were filed late and that the review application should be struck from the roll as the applicant did not apply for the condonation of the late filling of the heads of arguments. After hearing arguments on the matter I, in terms of Rule 37(17) as amended, condoned the late filing of the heads of arguments.

[5] The first respondent is a juristic person established by section 2 of the Namibian Ports Authority Act, 1994¹ (I will, in this judgment refer to this Act as the Act). The functions and powers of the first respondent are set out in sections 14 and 15 of the Namibian Ports Authority Act, 1994. Section 10 of the Act provides as follows:

'10 Committees of the board

(1) The board may from time to time establish any committee to perform, subject to such conditions as the board may stipulate, such functions of the board as the board may assign to it.

(2) The board may appoint as member of a committee established under subsection (1) any person, whether he or she is a director or not.'

[6] On 25 April 2006, the first respondent approved a procurement policy. Clause 1 of the policy sets out the objectives of the policy. Clause 5 of the policy establishes a Tender Committee. Clause 6 of the tender policy amongst others read as follows:

'6. Purpose of the Tender Committee

The Tender Committee shall:

6.1 Oversee the procurement activities of Namport in accordance with approved policies, financial principles and audit requirements and furthermore take all reasonable steps to ensure that the correct procedures are followed throughout Namport and report any serious transgressions of these procedures to the Managing Director for his or her immediate action.

6.2 ...

6.8 recommend the award of the tender in accordance with the delegation framework.'

[7] In the affidavit deposed to on behalf of the first respondent the process of acquiring goods or services for and on behalf of the first respondent is set out as follows:

¹Act No 2 of 1994.

- (a) Once the first respondent has established that it requires goods or services, a tender will be issued (by the tender committee) inviting suppliers to tender for such goods or services. Once the tenders have been received, the first respondent's relevant line management will assess all the tenders and make a representation to the tender committee.
- (b) The tender committee then scrutinizes the presentations made by the line management, and it in turn makes recommendations to the first respondent's executive committee. The executive committee also assesses the recommendations made by the tender committee to it and then makes recommendations to the first respondent's board of directors (I will in this judgment refer to the board of directors as the board). The board then makes a final decision as to how and to whom to award the tender.

B Process followed in the award of Tender No 079/2011

[8] Having set out the brief introduction I will now turn to how the tender was dealt with and awarded. As I have indicated above, the first respondent (through the Tender Committee) invited tenders on 7 March 2011 and the closing date for the submission of the tenders was 28 March 2011. I have also indicated above that in all eight tenderers submitted their tenders to the first respondent.

[9] The relevant department (the Marine Department) (line management as respondent refers to it) evaluated and assessed the tenders submitted (the officials who signed off the line management's recommendations are, a certain captain Mussa Mundia and a certain Mr Anton van Rhyn). The department then made its recommendations, to the tender committee. The tender committee, at a meeting held on 20 April 2011 raised certain queries and made certain comments. The queries and comments were send back to the department. The department addressed the queries and comments made by the tender committee and resubmitted the tender to the tender committee, which considered it at its meeting held on 27 April 2011. (The officials who signed off the line management's recommendations were the same official as the ones who signed it off for the meeting of 20 April 2011, namely Captain Mundia and Mr van Rhyn, but the minutes of the meeting of the tender committee meeting of 27 April 2007 indicate that the presentation to the tender committee was done by Captain Mundia and Mr. John Guard).

[10] The meeting of 27 April 2011 made a qualified (I say qualified in that the tender committee highlighted certain recommendations before the final award) recommendation to the executive committee. The tender committee's recommendations were tabled at a meeting of the executive committee held on 10 May 2011. At that meeting of 10 May 2011 the assessment of the tender was presented by Patrick Nawaseb, Captain Mundia and Mr. John Guard. The executive committee also had its own comments and queries. Comments and queries to which Captain Mundia replied. The executive committee after the explanation by Captain Mundia resolved that "*the 'paper'* (I presume this refers to the paper motivating the recommendations for the award of Tender 079/2011) *be amended and be resubmitted to it'*. The "paper" was amended and resubmitted to executive committee which considered it at its meeting held on 19 May 2011. At that meeting the executive committee resolved as follows:

'Resolution EXCO/60/2011.

IT WAS RESOLVED to award Tender 079/2011: Supply Delivery of a Second Hand or Existing New Tug for the Port of Walvis Bay, to Centani Investment Group to the tendered amount of N\$ 85 100 000-00 excluding VAT be and is hereby approved subject to Board approval.'

The line management was thereafter instructed to prepare a 'Board Paper'. The 'Board Paper' containing the assessment and the executive committee's recommendations was prepared and submitted to the Chief Executive Officer of the first respondent on 20 May 2011 for him to submit it to the first respondent's board.

[11] The executive committee's recommendations of the meeting of 19 May 2011 were not presented to the board. It appears that for one reason or the other the first respondent's Executive: Finance, a certain Mr Koot van der Merwe was not happy with the evaluation of the tender committee. Mr van der Merwe then sought and obtained the consent of the Chief Executive Officer and referred the evaluation and assessment of the tender to an outside consultant, a certain retired captain Mike van der Meer. Mr Raymond Visagie who deposed to the answering affidavit on behalf of the first respondent alleges that the referral of the evaluation of the tender to Mr van der Meer was sanctioned by the executive committee. I find this allegation of Mr Visagie to be improbable for the following reasons:

- (a) The executive committee's minutes of 10 May 2011 and 19 May 2011 do not reflect any such decision and there are no minutes of a meeting of the executive committee between 20 May 2011 and 22 May 2011 when Mr van der Meer submitted his report.
- (b) The executive committee's minutes of 19 May 2011 clearly reflects that it resolved to recommend the award of the tender to applicant.
- (c) On 26 May 2011 the executive committee held a meeting and in the minutes of that meeting the following is recorded: *'A paper was tabled and Alf explained that based on the concerns raised at the previous EXCO meeting, it was requested that a third party should scrutinize the evaluation. Captain Mike van der Meer was engaged and he submitted his report as per tabled appendix G'*. If the executive committee was the body that decided to recommend the appointment of a third party the minutes would clearly have reflected that fact. The minutes are silent as to who referred the matter to the third party and who appointed Captain van der Meer. In the answering affidavit Visagie admits that the referral and the appointment were done by Mr van der Merwe and Mr Uirab.

I therefore reject the suggestion that the executive committee sanctioned the appointment of Mr van der Meer to evaluate and assess the tender.

[12] On 22 May 2011, Mr van der Meer produced a report and presented it to the Chief Executive Officer. In that report Mr van der Meer recommended that the tender be awarded to the second respondent. Mr Visagie, (in the answering affidavit) alleges that the Chief Executive Officer and the Executive: Finance requested Mr Anton van Rhyn to review Mr van der Meer's report. Mr van Rhyn reviewed the (van der Meer) report and on 24 May 2011 authored a report. In his report Mr van Rhyn made the following recommendations:

'It is apparent that there have been some misinterpretation of the need for a Harbour/Tractor type tug in the original specifications of tender 079/2011. The tender did however indicate that the tug will be for the Port of Walvis Bay and that the Tractor type tug was indicated in the type of tugs required in the minimum specification. The type was however not clearly specified referring to the positioning of the propulsion system. Considering all of the above the following two options to be considered:

- a. Declare tender 079/2011 void and retender with clearly specified requirements in terms of the nature and the use of the tug specifically related to its propulsion systems.
- b. If a above is not feasible due to the urgency of the tug the following is recommended:
 - i. All offers highlighted in Table 2 above are disqualified for not meeting some of the minimum requirements as supported by both internal and external evaluations.
 - ii. In the re-evaluation the offer from KST BV is disqualified due to its draft and beam and not for being a non-harbor tug.
 - iii. Clarity is given on the actual tendered bollard pull on the offer from Damen Shipyard. If the tendered bollard pull is 59/60 T the offer should not be disqualified for this reason. If 54 T the offer should be disqualified without the need to further motivate. The Marine Department further provides a detailed motivation (supported by external information) on the suitable and safe harbor use of an astern ASD tug as offered by Damen Shipyards. Pending this outcome the offer should either be included or disqualified.
 - iv. The Marine Department provides clarity on the recognition of RINA as a classification society.
 - v. Pending above the evaluation is re-submitted to tender board.'

[13] On the same date (i.e. 24 May 2011) that Mr van Rhyn authored his report, Captain Mundia also authored a document titled "*Report on the review of tender 079 evaluations submitted by the manager technical services on 24 May 2011.*" In this report Captain Mundia makes the observation that "some changes were...made to the original scores and which cannot be justified in line with the specification...At this point we have nothing to add but to conclude that we do not concur with the second evaluation as submitted."

[14] On 25 May 2011, Mr van Rhyn suggested in an email that a special meeting be held on the following day to discuss the tender. A "Special Technical Meeting" (whatever that may mean) was held on 26 May 2011. The minutes of that 'special technical meeting' indicate that the following persons attended the meeting Immanuel ! Hanabeb, Raymond Visagie, Anton van Rhyn, Mussa Mundia and Alfeus Kathindi. I

highlight the names of the persons who attended the 'special technical' meeting to contrast them with the names of the persons who attended the tender committee meeting of 27 April 2011 and who are recorded as members of the tender committee. The persons who attended the tender committee meeting of 27 April 2011 and who are recorded as members of that committee are, Immanuel !Hanabeb, Raymond Visagie, Anton van Rhyn, Elzevir Gelderbloem and Mario Polster. It was indicated that another member Mr Elias Mwenyo was absent with an apology. Mussa Mundia and John Guard were indicated as individuals invited for tender adjudication. What is thus clear is that the meeting of 26 May 2011 was not attended by majority of the tender committee members. The 'special technical' meeting allegedly (I say allegedly because the minutes from which this recommended is based are not signed and the first respondent has not explained why it submitted unsigned minutes nor has the chairperson and the secretary of that 'special technical' meeting vouched to the accuracy of the minutes) resolved as follows:

'After deliberation the house agreed and recommended that tender 079/2011 supply and delivery of a second hand or existing new Tug should be awarded to Damen Shipyards subject to a few alterations to be done without fluctuating the quoted amount.'

[15] An unsigned copy of the minutes of the 'special technical' meeting records the following: *'Captain Mundia had admitted making error during the evaluation proceedings and suggested to retender or consider the other option to qualifying the two companies who meets most of the requirements, Centani Investments and Damen Shipyards and reevaluate accordingly.'* I pause here to observe that I have reservations about the accuracy of the minutes of the 'special technical' meeting of 26 May 2011'. My reservation on the accuracy of the purported minutes is based on the following; On 24 May 2011 Captain Mundia authored a report in which he is at pains to demonstrate that Mr van Rhyn's scoring and report is incorrect and on 01 June 2011 he send an email to the Chairperson of the tender committee and copied in the Chief Executive Officer of the first respondent in which he states the following:

'It is with regret and pain that I am writing this e-mail to you on the above captioned subject matter, more so because I have not received any formal correspondence to revoke our submission to the Board on the very subject. I do however feel obliged to respond to the matter in the best interest of Namport in that; it has come to my knowledge that after submitting the Board Paper for the "Approval to Procure an

Existing New Voith Tractor Tug” as directed by ExCo, another evaluation has been initiated to counter our submission. This followed a request by Executive Finance to provide him with the tender documents which were still under my custody.

Since I do not know, neither do I have the authority to question the motives behind this move; allow me to bring the following to your attention:

1. It is very difficult to get an existing new tug that will fully comply with ones specifications as it would have been built for another market, as such our submission is based on a tender that is closest to our specifications,
2. We have further taken necessary precautions to ask for an on sight visit to ascertain the provisions of the tender so as to minimize risks against NAMPORT.
3. Our choice was also based on experience of the best performing tug amongst our fleet (the Odnjaba which is also a tractor tug).
4. Above is a list of previous tenders that were received for a “New Tug to be built” with a minimum bollard pull of 50 tons. It will may be recalled that Tender No 3 was the most successful one which apparently was beyond the budget. Hence tapping from this experience we were able to establish that we could get a bigger tug within the allocated capital budget. It was therefore our conviction to optimally use the available budget and get a tug that can be fully utilized for at least 20 years.
5. Considering the above facts we still believe that Voiht Tractor Tug tendered by Centani was the most appropriate in this regard.

In any case it remains the prerogative of the higher Authorities to make the ultimate decision on what to buy. With this e-mail I attach and endorse statements of facts as have been compiled by my team for your perusal, records and necessary action. Here I submit.’

It furthermore appears that Mr Mundia was resolute to prove to the tender committee’s chairperson and the Chief Executive Officer that the recommendation from line management was correct. My view is based on an email dated 3 June 2011, which he send to Mr !Hanabeb

[16] On 26 May 2011 the executive committee met. The minutes of that meeting indicate that “Anton briefly explained his process of evaluation and also listed the items of discrepancies. The final evaluation shows a small difference in favour of Damen

Shipyard.” {My emphasis} The executive committee thereafter approved the award of the tender to the second respondent.

[17] On the same date (that is on 26 May 2011) the chief executive officer of the first respondent prepared a ‘board paper’ and in that board he recommended the award of the tender to the second respondent. In support of his recommendation, the chief executive officer annexed copies of the following:

- (a) The report of Mr. Van Rhyn dated 26 May 2011;
- (b) The report of van Rhyn dated 24 May 2011; and
- (c) The report of Mr. Van der Meer dated 22 May 2011

C The grounds on which the appellant seeks the award Tender 079/2011 reviewed and set aside.

[18] The applicant in its heads of argument identified three grounds on which it is seeking the decision of the first respondent to be reviewed and set aside namely:

- (a) The award followed a flawed and irregular process that was inconsistent with the first respondent’s procedures.
- (b) The second respondent’s tender did not meet the mandatory minimum requirements namely a bollard of 60 tons.
- (c) The second respondent’s should not have been considered since at the time of considering the tender the Tug tendered for by the second respondent was non-existent.

D The law in regard to the review of the first applicant's decision.

[19] Article 18 of the Namibian Constitution provides as follows:

'Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common-law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal.'

[20] Commenting on the content of article 18² Parker, J said:

'As respects art 18 [i.e. of the Namibian Constitution], in order for the second applicant to succeed, the second applicant must show that he has been aggrieved by an act of an administrative body or an administrative official because of non-compliance by the administrative body or administrative official with any of the requirements expressed in art 18, {i.e. (1) to act fairly and (2) reasonably and (3) comply with the requirements imposed upon such bodies and officials by (3a) common-law and (3b) any relevant legislation,...}'

[21] The Supreme Court of Namibia has expressed itself as follows³ as regards the scope of Article 18 of the Namibian Constitution:

'[31] What will constitute reasonable administrative conduct for the purposes of art 18 will always be a contextual enquiry and will depend on the circumstances of each case. A court will need to consider a range of issues including the nature of the administrative conduct, the identity of the decision-maker, the range of factors relevant to the decision and the nature of any competing interests involved, as well as the impact of the relevant conduct on those affected. At the end of the day, the question will be whether, in the light of a careful analysis of the context of the conduct, it is the conduct of a reasonable decision-maker. The concept of reasonableness has at its core, the idea that where many considerations are at play, there will often be more than one course of conduct that is acceptable. It is not for judges to impose the course of conduct they would have chosen. It is for judges to decide whether the course of conduct selected by the decision-maker is one of the courses of conduct within the range of reasonable courses of conduct available.'

[22] In the matter of *Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd and Another*⁴ Corbertt, JA (as he then was) said:

'Broadly, in order to establish review grounds it must be shown that the president failed to apply his mind to the relevant issues in accordance with the 'behests of the statute and the tenets of natural justice' (see *National Transport Commission and Another v*

²In the matter of *Trustco Insurance Ltd t/a Legal Shield Namibia and Another v Deeds Registries Regulation Board and Others* 2010 (2) NR 565 (HC) at p 578H-J.

³Per O Reagan, AJA in the matter of *Trustco Ltd t/a Legal Shield Namibia and Another v Deeds Registries Regulation Board and Others* 2011 (2) NR 726 (SC) where she said at page 736 paragraph 31.

⁴1988 (3) SA 132 (A) at 152.

Chetty's Motor Transport (Pty) Ltd 1972 (3) SA 726 (A) at 735F - G; *Johannesburg Local Road Transportation Board and Others v David Morton Transport (Pty) Ltd* 1976 (1) SA 887 (A) at 895B - C; *Theron en Andere v Ring van Wellington van die NG Sendingkerk in Suid-Afrika en Andere* 1976 (2) SA 1 (A) at 14F - G). Such failure may be shown by proof, *inter alia*, that the decision was arrived at arbitrarily or capriciously or *mala fide* or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose; or that the president misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or that the decision of the president was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter in the manner aforestated.'

[23] In the matter of *Cash Paymaster Services (Pty) Ltd v Eastern Cape Province and Others*⁵ 1999 (1) Pickard, JP said:

- '2. A Court which reviews the exercise of an administrative authority's discretionary power will not substitute its own opinion for that of the administrative authority...
4. The criterion which the Courts will apply in the review of discretionary acts is that, if the administrative authority has duly and honestly applied himself to the question left to his discretion, it will be impossible for a Court of law either to make him change his mind or to substitute its conclusion for his own. An administrative authority will act duly and honestly if, first, he actually exercises his discretion without delegating his discretion to somebody else or subjecting himself to the unauthorised advice of another; secondly, he follows the correct prescribed procedure, which includes the rules of natural justice (if the exercise of his discretion affects the rights and liberties of individuals); and thirdly, he applies his mind to the matter.⁶ {My Emphasis}

[24] It is now well established that the burden of proving that applicant is entitled to relief rests upon the applicant and falls to be discharged upon a balance of probabilities.

E Did the first respondent follow a flawed and irregular process?

⁵1999 (1) SA 324 (CKH) at 331.

⁶Also see *Uffindell t/a Aloe Hunting Safaris v Government of Namibia and Others* 2009 (2) NR 670 (HC) at para 34.

[25] It is well established that a tender process implemented by an organ of State is an 'administrative action' within the meaning of Article 18 of the Namibian Constitution. There is also no doubt or dispute that the first respondent is an organ of the State or an administrative body as envisaged in Article 18 of the Namibian Constitution. At the core of valid administrative action is the principle of legality. Baxter⁷ has argued that:

“...The principle of legality may now be said to imply the following more specific principles:

- the perpetrator of the action in question must be legally empowered to perform the act;
- administrative action may only be taken by the lawfully constituted authority;
- the act must have been performed in accordance with the circumstantial and procedural prerequisites prescribed by the empowering legislation;
- the power to act must not be exercised unreasonably;
- the decision to act must be taken in a action manner;
- action taken without lawful authority generally attracts the same liability as would the acts of private persons.’

[26] The learned author continues⁸ to state that:

“...‘power’ in legal parlance means lawfully authorized power. Public authorities possess only so much power as is *lawfully authorized*, and every administrative act must be justified with reference to some lawful authority for that act. Moreover on account of the institutional nature of the law the public authority itself exist as an office or body created by law. A valid exercise of administrative power requires both a *lawful authorization* for the act concerned and the exercise of that power by the proper or *lawful authority*.”

[27] The principle stated by Baxter in the quotation above (in paragraph 25) is illustrated by the following cases of *Bramdaw v Union Government*⁹ and *State v Koetzie*¹⁰. The facts of the *Bramdaw* case are briefly as follows: The plaintiff was an officer employed in the general division other than in a prescribed post, within the meaning of section 21(2)(b) of the Public Service and Pensions Act, 1923. Certain charges of misconduct of a serious nature were made against him, all of which he denied, whereupon the Secretary of Justice appointed a magistrate to hold an enquiry

⁷Baxter L: Administrative Law : Juta & Co 1984 at 301.

⁸At 384.

⁹1930 NLR 324.

¹⁰1979 (2) SA 972.

and transmit his finding. The magistrate found the plaintiff guilty of misconduct as defined in section 20(1)(d) of the Act and transmitted his finding to the Secretary of Justice, who in turn reported to the Minister of Justice that he agreed with the finding of the magistrate and that he himself found the plaintiff guilty and recommended his dismissal from the service. The Minister approved the plaintiff's dismissal and the Secretary for Justice advised the plaintiff accordingly. The plaintiff brought a declaratory application claiming damages for wrongful dismissal, defendant pleaded the facts summarized above as justifying plaintiff's dismissal. Plaintiff excepted to the plea as disclosing no defence. The court allowed the exceptions, that the departmental head (Secretary for Justice) had no authority to confer upon the magistrate the duty of investigating or considering or finding upon the charges, because the departmental head was not the 'competent authority' referred to in section 21(2)(b) of the Act. The court further held that even if the enquiry had been properly delegated to the magistrate, he, and not the Secretary for Justice, was the person to make the recommendation to the Minister under sub-section (4) of section 21.'

[28] The facts in the second case that is the matter of *State v Koetzie* are that the Bantu (Urban Areas) Consolidation, 1945 (Act 25 of 1945) prohibited certain person from entering a blacks only residential area, a 'coloured' taxi driver was convicted of contravening that Act when he entered such a residential area. At the trial it transpired that the taxi driver was given a permit to enter the residential area by the superintendent of the area but a week later the permit was withdrawn by the manager of the residential area.- It was held that permission under section 9(9) (b) of the Bantu (Urban Areas) Consolidation, 1945 to enter Black residential area can only be granted by location superintendent and "Superintendent" defined in chap 1 of regulations published in terms of the Act in Government Gazette R2096 of 14 June 1968 only he can withdraw such permission. The court further held that the purported withdrawal was therefore invalid and the conviction was set aside.

[29] In the present matter the there is no major dispute on the facts. The first respondent does not dispute that the recommendations that were forwarded by the executive committee to the board are the recommendations by an outside consultant (retired captain van der Meer and the technical manager Mr Anton Van Rhyn). Mr Frank who appeared on behalf of the first respondent argued that what cannot be disputed is the fact that the first respondent's board has the final say as to who will be awarded the tender and that line management, the tender committee and the executive

committee can only make recommendations to the board and until the board decides to who to award the tender these recommendations do not create any rights for any tenderer. I have no difficulty in accepting Mr Frank's argument as a general argument but what that argument overlooks is the fact that the recommendation to the executive committee and to the board is not the recommendation of the tender committee but the recommendation of two individuals (retired captain van der Meer and Mr van Rhyn) who are not provided for in the procurement policy of the first respondent. It should not be forgotten that the power and authority to source goods and service are vested in the board. Section 10 of the Act empowers the board to establish committees and to assign the performance of identified functions to those committees. The board accepted a procurement policy and in terms of that policy established a tender committee to advise it as regards the acquisition of goods and services. So the board can **only** act on the recommendations of the tender committee and the executive committee. Retired captain van der Meer and Mr Van Rhyn have no power to make any recommendation to the executive committee, that committee could therefore not lawfully accept any recommendation other than the recommendation of the tender committee.

[30] Mr Frank on behalf of the first respondent further argued that the executive committee sanctioned, ratified or endorsed the appointment of retired captain van der Meer and Mr Van Rhyn. What this argument overlooks is the principle of '*delegatus non potest delegare*'. Baxter¹¹ argues that:

'In modern democracies original power derives from the political authority of elected legislatures. Because of the practical requirements of government it is recognized that such bodies may delegate their powers. In South Africa, [I added that the same is applicable in Namibia] Parliament is recognized to have unlimited powers of delegation. Considerable latitude is also given to such 'original' authorities as provincial councils. But all other administrative authorities are treated as *delegees*, power having been delegated to them by the original authority. Not being the direct repositories of public trust they are not permitted the same freedom to choose who shall exercise their powers. There is a presumption that they may not further delegate (i.e. sub-delegate) their powers: *delegates non potest delegare*'.¹²

¹¹*Supra* footnote 7 at 434.

¹²See the case of *Shidiack v Union Government*, 1912 AD 642 at p. 648.

[31] In the matter of *Attorney-General, OFS v Cyril Anderson Investments (Pty) Ltd*¹³ Botha, JA explains the basis of the principle as follows:

‘The maxim *delegatus delegare non potest* is based upon the assumption that, where the legislature has delegated powers and functions to a subordinate authority, it intended that authority itself to exercise those powers and to perform those functions, and not to delegate them to someone else, and that the power delegated does not therefore include the power to delegate.’

[32] In the present matter section 10 of the Act simply authorizes the board to delegate its powers to a committee and to appoint any person as a member of the committee. The section does not empower the committee to further delegate the power conferred on it nor does the section empower the Chief Executive Officer or the executive committee to delegate the powers to other persons. In addition the procedure as outlined by Mr Visagie himself is that line management will evaluate the tenders make submissions and recommendations to the tender committee and the tender committee will in turn recommend to the board. This is not what happened in the present matter. I accordingly find that the Chief Executive Officer and the Executive: Finance exceeded their powers when they appointed Mr van der Meer to assess and evaluate the tender. The board accordingly took a decision based on an irregular procedure and invalid recommendation and the decision to award the tender to second respondent is accordingly unlawful and invalid at the outset. Having found that the procedures followed in the award of the tender were irregular I find it unnecessary to consider the other grounds of review, but that does not necessarily mean that they are without merits.

F The appropriate remedy.

[33] But that is unfortunately not the end of the matter. Mr Frank who appeared for the first respondent urged me to fully consider the consequences of setting aside the award of the tender. He argued that ‘Factors such as the impact on the innocent winning tenderer and the degree of irregularity have to be taken into account’ he further submitted that the South African Supreme Court of Appeal has refused to set aside a tender despite an imperfect administrative process because the implementation had

¹³1965 (4) SA 628 (A) at 639.

already commenced. Not every slip in the administration of tenders is necessarily to be visited by judicial sanction'. The submission by Mr Frank appears attractive, but I find it necessary to trace briefly the events between the award of the tender and the hearing of the application before I decide as to what the appropriate remedy for the applicant is.

[34] It is now common cause that the tender was awarded on 24 August 2011. On 16 September 2011 the applicant through its legal practitioners wrote to the first respondent expressing its concern about the adjudication of tenders and seeking an undertaking from the first respondent that it will not issue a supply order to the second respondent. The first respondent responded on 23 September 2011 through its legal practitioners it did not give any undertaking but simply stated that it is taking instructions and will revert to the applicant shortly. The first respondent never reverted to the applicant as promised but continued to make arrangements for the signing of contracts for the implementation of the tender. When the applicant realized that the first respondent is proceeding with the arrangements to implement the tender it (i.e. the applicant) on 29 September 2011 launched an application for an interim relief in terms of which it sought to interdict the first respondent from continuing to negotiate with the second respondent for the conclusion of a contract to implement the tender. The application was brought as a matter of urgency and was set down for hearing on 07 October 2011. As the matter was opposed, it could not be heard on that day. The review application was however only heard on 13 November 2012. The applicant had in the meantime (I was informed in oral argument that the Tug was acquired during November 2011) implemented the tender and acquired the Tug from the second respondent. I presume the second respondent was also paid for the delivery of the Tug.

[35] In view of the brief history outlined above I am satisfied that the applicant did not culpably delay in launching the review application. However, Mr Frank's submission regarding the impracticability of setting aside the tender strikes me as correct. If I were to set aside the tender this will in my view not only to be disruptive but it will also be totally impracticable and will give rise to a host of problems not only in relation to a new tender process but also in relation to the work already performed (i.e. the Tug delivered and price paid). Mr Frank referred me to the South African Supreme Court of Appeal case of *Chairperson, Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others*¹⁴ where Scott, JA said:

¹⁴2008 (2) SA 638 (SCA) at 650.

'In appropriate circumstances a court will decline, in the exercise of its discretion, to set aside an invalid administrative act...It is that discretion that accords to judicial review its essential and pivotal role in administrative law, for it constitutes the indispensable moderating tool for avoiding or minimising injustice when legality and certainty collide.'

[36] The reasoning of Scott, JA quoted above is persuasive, and accords with our Constitutional framework. Since the applicant's complaint is that his constitutional right to fair administrative action has been infringed it is to the Namibian Constitution that I turn to see what remedies the Constitution avails to an aggrieved person. Article 25 of the Namibia Constitution provides as follows;

'Article 25 Enforcement of Fundamental Rights and Freedoms

(1) Save in so far as it may be authorised to do so by this Constitution, Parliament or any subordinate legislative authority shall not make any law, and the Executive and the agencies of Government shall not take any action which abolishes or abridges the fundamental rights and freedoms conferred by this Chapter, and any law or action in contravention thereof shall to the extent of the contravention be invalid: provided that:

- (a) a competent Court, instead of declaring such law or action to be invalid, shall have the power and the discretion in an appropriate case to allow Parliament, any subordinate legislative authority, or the Executive and the agencies of Government, as the case may be, to correct any defect in the impugned law or action within a specified period, subject to such conditions as may be specified by it. In such event and until such correction, or until the expiry of the time limit set by the Court, whichever be the shorter, such impugned law or action shall be deemed to be valid;
- (b) any law which was in force immediately before the date of Independence shall remain in force until amended, repealed or declared unconstitutional. If a competent Court is of the opinion that such law is unconstitutional, it may either set aside the law, or allow Parliament to correct any defect in such law, in which event the provisions of Sub-Article (a) hereof shall apply.

(2) Aggrieved persons who claim that a fundamental right or freedom guaranteed by this Constitution has been infringed or threatened shall be entitled to approach a competent Court to enforce or protect such a right or freedom, and may

approach the Ombudsman to provide them with such legal assistance or advice as they require, and the Ombudsman shall have the discretion in response thereto to provide such legal or other assistance as he or she may consider expedient.

(3) Subject to the provisions of this Constitution, the Court referred to in Sub Article (2) hereof shall have the power to make all such orders as shall be necessary and appropriate to secure such applicants the enjoyment of the rights and freedoms conferred on them under the provisions of this Constitution, should the Court come to the conclusion that such rights or freedoms have been unlawfully denied or violated, or that grounds exist for the protection of such rights or freedoms by interdict.

(4) The power of the Court shall include the power to award monetary compensation in respect of any damage suffered by the aggrieved persons in consequence of such unlawful denial or violation of their fundamental rights and freedoms, where it considers such an award to be appropriate in the circumstances of particular cases. {My emphasis}

[37] From the provisions of Article 25 of the Namibian Constitution it is clear that this court has discretion to decline to set aside an invalid administrative action. In the case of *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*¹⁵ the Supreme Court of Appeal in South Africa pointed out that the difficulty that is presented by invalid administrative acts, is that they often have been acted upon by the time they are brought under review. Jafta, JA articulated the difficulty as follows¹⁶:

‘That difficulty is particularly acute when a decision is taken to accept a tender. A decision to accept a tender is almost always acted upon immediately by the conclusion of a contract with the tenderer, and that is often immediately followed by further contracts concluded by the tenderer in executing the contract. To set aside the decision to accept the tender, with the effect that the contract is rendered void from the outset, can have catastrophic consequences for an innocent tenderer, and adverse consequences for the public at large in whose interests the administrative body or official purported to act.’

[38] Those are exactly the same difficulties that are confronting me in this matter. In this case the Tug has already been delivered and paid for and has been used by the first respondent for more than eighteen months now. If I were to set aside the tender at

¹⁵2004 (6) SA 222 (SCA).

¹⁶In the case of *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province and Others* 2008 (2) SA 481 (SCA) at 490 para [23].

this juncture thus rendering the contract between the first respondent and the second respondent void that will surely spell catastrophe not only for the first respondent but also for second respondent. I can do no better than to echo the words of Scott. J A in the *Sapela* matter¹⁷ when he said, "In my view the circumstances of the present case as outlined above, are such that it falls within the category of those cases where by reason of the effluxion of time (and intervening events) an invalid administrative act must be permitted to stand."

[39] In the *Millenium Waste* case¹⁸ the court said:

'This guideline involves a process of striking a balance between the applicant's interests, on the one hand, and the interests of the respondents, on the other. It is impermissible for the court to confine itself, as the court below did, to the interests of the one side only.

[40] I have considered the interests of the first and second appellant, which led me to exercise my discretion against setting aside the tender. I am duty bound to also consider the interest of the applicant. In doing so it must be borne in mind that the unfairness in the award of the tender lies in the process of evaluating the tenders. The unfairness is exacerbated by the conduct of Mr van Rhyn and Mr van der Meer. I pause to observe that I find the actions of Mr van Rhyn quite striking. First he purportedly declined to participate in the assessment of the tender because of a 'departmental interest' yet he proceeded on two occasions to evaluate, assess and make recommendations to the tender committee and the executive committee, and worst still he agrees to review the assessment of Mr van der Meer. When I read his review, he gave me the distinct impression that he was not quite sure what he was confirming and recommending (see his comments quoted above in paragraph 13). On what basis did the Board then accept his recommendations, particularly in the light of the fact that, his conclusions (as regards the capacity of the bullard pull) were drawn from information downloaded from the internet and not from documents submitted by a tenderer (in this case the second respondent). The actions of Mr van der Meer smack of ulterior motives. I say so for the following reasons, Mr van der Meer is part and parcel of the executive committee, he did not at those meetings (of 10 & 19 May 2011) of the executive committee raise his concern about the recommendation of the line management, but goes (after the meetings had resolved) to a staff member (to captain

¹⁷*Supra* footnote 14 at para 29.

¹⁸*Supra* footnote 16 at para 22.

Mundia) to obtain the tender documents and instruct a re- assessment of the tender by a person who was initially identified to source the Tug (if the sourcing of the Tug would be exempted from the tender procedures). I am thus of the view that the irregularities are not just “mere slips” in the administrative process.

[41] It was accepted in argument before me that even if the applicant’s tender ought to have been accepted at the outset its loss relates mainly to the profit it would have realized on the contract. I am of the further view that the constitutional dictates should not be ignored at all. The applicant has a constitutional right to participate in a procurement process that is fair, equitable, transparent, competitive and cost-effective. Article 25(2) confers on persons who alleges that their rights have been infringed the right to approach a competent court to enforce the their rights, and Article 25 (3) confers on the court the power to make orders as shall be necessary and appropriate to secure such applicants the enjoyment of the rights and freedoms conferred on them by the Namibian Constitution.

[42] The present case is one of those cases where an applicant for review approached the High Court promptly for relief but it’s cases was not expeditiously heard and as a result by the time the matter is finally determined, practical problems militating against the setting-aside of the challenged decision have arisen. Consequently the scope of granting an effective relief to vindicate the infringed rights becomes drastically reduced. In order not to render the finding of this Court academic I take guidance from the words of Theron, AJA¹⁹ when he said:

‘In appropriate circumstances, a court should be innovative and use its discretion as a tool ‘for avoiding or minimising injustice’. Courts should not shy away from carefully fashioning orders which meet the demands of justice and equity.’

[43] This is such a case requiring the court to be innovative to minimize an injustice. In terms of Article 25(2) this court, in proceedings for judicial review, is empowered to allow an invalid administrative act to stand despite the fact that it is unlawful, and in terms of Article 25 (4) that power include the power to award monetary compensation in respect of any damage suffered by the aggrieved persons. Since the applicant did not lead evidence on the damages that it suffered as result of the irregular procedures followed by the first respondent I will grant leave to applicant to approach the court and

¹⁹Moseme Road Construction CC and Others v King Civil Engineering Contractors (Pty) Ltd and Another 2010 (4) SA 359 (SCA) at page 368.

claim from the first respondent the damages that it suffered as result of the infringement of its right to fair and reasonable administrative procedure as envisaged by Article 18 of the Namibian Constitution.

[44] In the result I make the following order:

- 1 That the applicants' application to file additional affidavits is dismissed with costs;
- 2 That the award of the tender to the second respondent is unlawful and irregular, but is not set aside;
- 3 That the applicant is granted leave to institute an action for damages against the first respondent as a result of the first respondent's infringement of the applicant's right to fair administrative action as envisaged in Article 18 of the Namibian Constitution;
- 4 That the first respondent must pay the applicant's costs (save the cost referred to in paragraph 1 of this order) of the review application, which costs include the costs of one instructing and one instructed counsel.

SFI Ueitele
Judge

APPEARANCES

APPLICANT: Mr Soni, V SC

Instructed by Murorua & Associates, Windhoek

FIRST RESPONDENT:

Frank, T, SC assisted by Ms Schimming-Chase

Instructed by Kirsten& Co Inc, Windhoek