REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 05/2014

In the matter between:

NEW ERA INVESTMENT (PTY) LTD	**APPLICANT**
and	
THE ROADS AUTHORITY	**FIRST RESPONDENT**
THE CHAIRPERSON OF THE BOARD OF DIRECTORS – ROADS AUTHORITY	**SECOND RESPONDENT**
CHINA JIANGSU J V OTJOMUISE	**THIRD RESPONDENT**
CHINA JINGXI INTERNATIONAL (PTY) LTD	**FOURTH RESPONDENT**
NAMIBIA CONSTRUCTION (PTY) LTD	**FIFTH RESPONDENT**

Neutral citation: *New Era Investment (Pty) Ltd v The Roads Authority* (A 05/2014) [2014] NAHCMD 56 (20 February 2014)

Coram: PARKER AJ
Heard: **31 January 2014**
Delivered: **20 February 2014**

Flynote: Administrative law – Right to the audi alteram partem rule of natural justice – Court held that natural justice is a flexible doctrine and the rule is not cut and dried for it vary infinitely – Court held that as a general rule fairness dictates that prejudicial information should be disclosed to the subject of the information to enable him or her to contradict or correct it – Nevertheless a careful distinction should be drawn between the information and the evaluation thereof during the process of the

decision itself – And a right to discovery of prejudicial information is not an automatic feature of natural justice – In instant case the information complained of was not one of the two factors that led to the rejection of the applicant's tender – The court found that there has not been a failure of fairness.

Summary: Administrative law – Right to audi alteram partem – Court held that as a general rule fairness dictates that prejudicial information should be disclosed to the subject of the information to enable him or her to contradict or correct it – Nevertheless a careful distinction should be drawn between the information and the evaluation thereof during the process of the decision itself – And a right to discovery of prejudicial information is not an automatic feature of natural justice – In instant case the prejudicial information concerns the applicant's 'very questionable quality of work and ability to carry out tasks to programme deadlines in respect of two previous projects – Court found that the information was evaluated in addition to other information and facts, many of which were supplied by the tenderers – Court concluded that it was not established that but for the information the decision would have gone the other way in the applicant's favour but there is ample evidence that the scores of the applicant in respect of technical evaluation and financial evaluation sealed its fate – These two evaluations led to the rejection of the applicant's tender – Court concluded the non-disclosure of the information does not amount to failure of fairness – Court found that the applicant has not discharged the onus cast on it to satisfy the court that good grounds exist to review the decision of the public authority – Accordingly, application was dismissed with costs.

Flynote: Administrative law – Judicial review – In terms of art 18 of the Namibian Constitution – Tender to do work – Applicant seeking review of decision of first respondent (a public authority) rejecting applicant's tender in favour of another tenderer – Court held that there is no onus on the public authority to justify its conduct – Onus rests on the applicant for review to satisfy the court that good grounds exist to review the conduct complained of – Good grounds are grounds that are cogent and relevant – The grounds must be set out in the founding affidavit not grounds put forth or as sanitized by counsel in submissions from the Bar – Court held that it is up to a decision maker who knows what he or she desires to achieve to

decide what information or facts to collect, what criteria to apply to the information or facts collected and what weight of importance and relevance to put on each piece of information or facts and each individual criterion – In the instant case the criteria or factors applied are contained in the first respondent's procurement policy, rules and regulations the first respondent's controlling line ministry's policy – Court held that the first respondent being a public authority was entitled to apply the Ministry's policy – The test is not what particular factors the public authority could apply and what weight it would put on each factor but whether the factors and weight were applied equally to the entire competition – The same goes for the criteria for factors to apply to the information and facts collected – Having rejected all the grounds of review the court dismissed the application with costs.

Summary: Administrative law – Judicial review – In terms of art 18 of the Namibian Constitution – Tender to do work – Applicant seeking review of decision of first respondent (a public authority) rejecting applicant's tender in favour of another tenderer – Court held that there is no onus on the public authority to justify its conduct – Onus rests on the applicant for review to satisfy the court that good grounds exist to review the conduct complained of – Good grounds are grounds that are cogent and relevant – Applicant's main complaint was that certain criteria and weights of importance and relevance put on those criteria that did not favour it were applied by the public authority to its disadvantage – Consequently, for the applicant, there was failure of fairness and reasonableness because the public authority did not apply its mind and it took into account irrelevant and extraneous considerations in rejecting applicant's tender – Court rejected the grounds on the basis that the public authority was entitled to whatever information and facts it desired to collect and apply whatever criteria or factors in its procurement policy, rules and procedures and the policy of its controlling line Ministry and put any weight of relevance and important on any piece of information and fact and any criterion or factor so long as all these were applied equally to all the tenderers.

ORDER

(a) The application is dismissed with costs, including costs of one instructing counsel and one instructed counsel in favour of the fifth respondent; and

(b) One instructing counsel and two instructed counsel in favour of the first and second respondents.

JUDGMENT

PARKER AJ:

[1] Once more, the court is confronted with a matter in which a person who has failed to win a tender to supply goods or do work has dragged the employer to court, and with the employer the person who won the tender, as well as those who did not. In this matter, the employer is the first respondent. The first respondent is a State-Owned Enterprise (SOE). The chairperson of the first respondent's Board is the second respondent. The third and fourth respondents did bid but did not win the tender. The fifth respondent won the tender. According to the applicant, the third, fourth and fifth respondents have been cited for the interest they have in the outcome of the application. The work involved is the construction of the new headquarters buildings of the first respondent ('the project').

[2] The applicant's bid was the lowest in terms of price, at N$197 997 677,25. The fifth respondent's bid was the highest in terms of price, at N$219 758 471,21. After bids had closed the first respondent invited pre-qualification tenders for the project. Six proposals were received from six tenderers. Four out of the six tenderers qualified. Those who qualified were the applicant and the third, fourth and fifth respondents. All the four tenderers are companies registered in Namibia. The fifth respondent has Namibian shareholders. The remaining three have Chinese shareholders.

[3] The first and second respondents, represented by Mr Maleka SC (assisted by Mr Hinda SC) have moved to reject the application; so has the fifth respondent, represented by Mr Tötemeyer SC (assisted by Mr Dicks). The deponent of the answering affidavit of the first and second respondents is Conrad Lutombi. He is the chief executive officer of the first respondent. Lutombi swears that the first respondent 'resolved to oppose the relief sought'. That was not challenged. He goes on to swear that he is authorized to make the founding affidavit. I am satisfied that the first respondent resolved to oppose the application and in order to be heard there should be an affidavit and that affidavit is that which Lutombi has deposed to. There is, accordingly, an opposition to the application by the first respondent, with it the second respondent. For the sake of simplicity, any reference to the first respondent in this judgment includes the second respondent where the context allows.

[4] At the commencement of the hearing Mr Frank SC, assisted by Mr Namandje, counsel for the applicant, informed the court from the Bar that the applicant had abandoned its challenge respecting appointment of architects (of the respondent) and also non-joinder of the architects. In their submissions Mr Maleka and Mr Tötemeyer responded that the abandonment should have adverse consequences for the applicant as to costs. I understood counsel to mean, if the application was successful.

[5] In its answering affidavit the fifth respondent raises two points in limine. The first point relates to the issue of urgency. The fifth respondent's first preliminary point is based on the following. The procedure which the applicant should have adopted, according to the fifth respondent, is that the applicant should have sought interim relief pending a review application (in terms of rule 53 of the rules of court) so as to protect its immediate interests. In that way, the fifth respondent would have received the record of the proceedings about the decision which the applicant seeks to have reviewed and set aside or reviewed and corrected. And since the fifth respondent is denied that 'procedural right', the fifth respondent is prejudiced. Mr Tötemeyer's submission on the point ran along these lines set out in the fifth respondent's answering affidavit.

[6] I do not see in what manner the fifth respondent is prejudiced. The fifth respondent was not involved in the making of the decision that the applicant seeks its review. It is not within the province of the fifth respondent to say anything in these proceedings, after it has gone through the record, as to why, for example, in its opinion, the decision of the first respondent is correct. That is the burden of the court. And the applicant has not made any allegations against the fifth respondent tending to show, for instance, that on the record it is found that the fifth respondent won the tender on some illegal or disreputable pursuits of the fifth respondent's, which would call for the fifth respondent's response. In that case it would be prejudicial to the rights of the fifth respondent if the record was not made available to it. I do not think the fifth respondent's point has merit. I accordingly reject it.

[7] Mr Maleka appears to be basically in concert with Mr Tötemeyer on the issue of bringing a review application without a record, but on a different basis. What Mr Maleka appears to say, if I understood counsel, is that it is not permissible for a party to bring such an application in which he or she seeks such drastic relief on urgent basis and to do so without the record of the proceedings leading up to the decision that is challenged. I do not read rule 53 of the rules of court to deny a party his or her desire to approach the seat of judgment for the relief of judicial review just because the record involved was not available to all the parties when the application was launched, unless some demonstrable prejudice to the opposing parties has been established. I find that no such prejudice has been established in this proceeding, as I have said previously. If this finding is taken together with my decision below that the matter should be heard as an urgent application, Mr Maleka's point – I am afraid – cannot be sustained.

[8] Mr Maleka has a second bow to his arrow – it would seem – which relates in a way also to the absence of the record when the applicant lodged its application. The point counsel took which was in a way also taken by Mr Tötemeyer and into which I have enquired above, concerns the applicant bringing an application in which the applicant seeks a final order for review on urgent basis. Like Mr Tötemeyer, Mr Maleka says the applicant ought to have sought an interim order pending the hearing of the review application so as to protect its interests in the interim.

[9] That route does not commend itself to me in the circumstances, and on the facts, of the case. The end result of such procedure would be that the court will hear the interim urgent application and retire to consider its decision, which, in terms of the Judge President's directions on the delivery of judgments, should come within three weeks after conclusion of the hearing. If I granted the interim order I would come to court again on the return date to determine to either confirm or discharge the interim order. If I confirmed the order, I would then appoint a date for the hearing of the review application. In that case the applicant would only have gained a pyrrihic victory. Besides, Mr Maleka appreciates and submits that in a case as the present one the court should be alive to the 'public interest'. I do not think it would be in the public interest to go by the route proposed by Mr Tötemeyer and Mr Maleka, unless, of course, the applicant has not satisfied the requirements of rule 6(12)*(b)* of the rules of court, in which case the applicant would have itself to blame if the application was to be heard in the ordinary course. As Mr Frank submits, we are looking at a delay of some 12 to 18 months and that would not be in interest of any of the parties, considering, as Mr Frank submitted, the scale of the construction project. Indeed, the procedure adopted by the applicant conduces to promotion of what Mr Maleka referred to as 'public interest', subject, of course, to whether the applicant has satisfied the requirements of rule 6(12)*(b)* of the rules of court, as aforesaid.

[10] The question now is, therefore, this: Has the applicant satisfied the requirements prescribed by rule 6(12)*(b)* of the rules? Rule 6(12)*(b)* provides that in every affidavit or petition filed in support of any application under para (a) of subrule 12 the applicant must set forth explicitly the circumstances which he or she avers render the matter urgent and the reasons why he or she claims that he or she could not be afforded substantial redress at a hearing in due course. The rule entails two requirements: first, the circumstances relating to urgency which must be explicitly set out, and second, the reasons why an applicant could not be afforded substantial redress in due course which must also be explicitly set out.

[11] In my opinion, the applicant has explicitly set out the circumstances relating to urgency. The applicant 'got wind of the award', submits Mr Frank, that the tender had

been awarded to the fifth respondent on 4 December 2013. He then, the same day, addressed a letter of enquiry to the first respondent. It was on 19 December 2013 that the first respondent answered the letter that the applicant did not win the tender. As a result of the December-January holidays the applicant could not obtain the services of its legal practitioners. It was on 8 January 2014 that the applicant could get hold of his legal practitioners when their offices opened that day. On 10 January 2014 a letter was sent to the first respondent putting it on notice that the applicant would challenge the decision by way of 'an urgent review application' and that such application would be brought by 22 January 2014. Indeed, the application was launched on 21 January 2014. Thus, within 33 days (including the Christmas festive holidays and days during which the offices of the applicant's legal practitioners were closed) from the date on which applicant received formal correspondence that it did not win the tender, the applicant launched the application. It is undisputed that the construction site was to be handed over on 3 February 2014; and an undertaking by the first respondent not to proceed with execution of the tender was not forthcoming.

[12] For these facts, I find that the urgency craved by the applicant is not self-created, and I am satisfied that the applicant has set out explicitly the circumstances relating to urgency. The applicant has, therefore, satisfied the first requirement of urgency in terms of rule 6(12)*(b)* of the rules of court. The other requirement is the requirement that the applicant should set out explicitly the reason or reasons why the applicant in this matter could not be afforded substantial redress at a hearing in due course. I proceed to consider this requirement.

[13] In my opinion, in a tender to carry out construction works, if the tenderer who did not win the tender and who is aggrieved by the decision of the employer, were to wait for the conclusion of a review application brought in the ordinary course, such aggrieved tenderer would be greatly disadvantaged. He or she would be so disadvantaged in the event of the employer entering into an agreement with the successful tenderer and handing over the site to the successful tenderer who may proceed with the construction works. In such an eventuality it may be difficult to set aside the decision of the employer in due course. If the review application succeeded in the end the aggrieved tenderer may be compensated in damages but the

damages of such nature may be difficult to quantify, thereby protracting the suffering of the aggrieved party who may have to incur huge costs involved in employing a financial consultant in his or her attempt to quantify his or her damages. In any case, a claim for damages does not follow as a matter course. In that event, the harm that the aggrieved party would have suffered would be irreparable if the application is heard in the ordinary course. On that score, I conclude that the aggrieved tenderer could not be afforded substantial redress in due course. I, accordingly, find that the applicant has also satisfied the second requirement of rule 6(12)*(b)* of the rules. Consequently, I was persuaded to hear the matter as an urgent application. I now proceed to consider the merits of the case, which is judicial review of the decision of the first respondent to award the tender to the fifth respondent, as I have mentioned previously.

[14] In our law, broadly speaking, there are four distinct categories of judicial review. The first type of review relates to irregularities and illegalities in the proceedings before a lower court ('category 1 review'). Section 20 of the High Court Act 16 of 1990 contemplates precisely this type of review. The second category is meant to control proceedings before tribunals (and inferior courts) ('category 2 review'). The third category is meant to control acts of administrative bodies and administrative officials ('category 3 review'). The fourth (and last) category comprises reviews provided by legislation ('category 4 review'). The present is a category 3 review and so art 18 of the Namibian Constitution applies. The art 18 principles embrace the common law principles. They also broaden its ambit to include, for instance, the concept of reasonableness as a ground for review.

[15] In determining this application I must keep it firmly in my mind's eye the core principle that there is no onus on the first respondent whose conduct is the subject matter of the review to justify its conduct. On the contrary, the onus rests on the applicant for review to satisfy the court that good, that is cogent and relevant, grounds exist to review the conduct complained of. (See eg *Davies v Chairman, Committee of the JSE* 1991 (4) SA 43 (W), approved by the court.)

[16] The burden of this court is, therefore, to determine whether the applicant has established that good grounds exist to review the first respondent's decision to reject the applicant's tender and award the tender to the fifth respondent. In this regard, I should signalize the crucial point that such grounds should have been set out in the founding affidavit because that is the case the applicant has brought to court and which the opposing parties have been called upon to meet, and not grounds put forth or as sanitized by counsel in their submission from the Bar or in their written submission. In addition, there should be grounds of review based on the art 18 principles which have embraced and expanded the common law grounds of review. It is, therefore, to the founding affidavit that I now direct my attention.

[17] On the papers, the applicant says that the purpose of the application is to review and correct or review and set aside a decision by the board of the first respondent that was taken on 3 December 2013 to award tender No RA/CA-04 to the fifth respondent. It is the applicant's contention that the tender should have been awarded to the applicant and so the court should direct the first respondent to award the tender to the applicant. In the alternative, the applicant says, the award of the tender to the fifth respondent should be set aside and the tender be referred back to the first respondent for reconsideration together with such directives as the Court may impose. Furthermore, according to the applicant, the applicant's bid was the lowest in terms of price while the fifth respondent's bid was the highest in terms of price. Indeed, all this represents the applicant's contention and forms the basis of the application.

[18] From the founding affidavit I am able to glean the following as constituting the applicant's grounds of review, that is, the first respondent's – (a) failure to act fairly and reasonably (Ground 1), (b) failure to comply with the common law rule (of natural justice) against bias (Ground 2), (c) failure to comply with the common law rule of audi alteram partem ('audi') (Grounds 3a and 3b), and (d) failure to apply its mind or the first respondent taking into account irrelevant or extraneous facts or considerations (Ground 4).

[19] I now proceed to consider grounds. As to Ground 4; the applicant says that relevant information that is favourable to the applicant was given 'less consideration' (I take it less weight), and that which was not favourable to the applicant was given high and undue weight (I take it great weight). This contention does not add any weight to the applicant's case. In my opinion, it is up to a decision maker who knows what he or she desires to achieve to decide what information or facts to collect and what weight of importance and relevance to put on each information or facts placed before it when deciding. It would be unjustifiably presumptuous for anyone else, including the court, to prescribe to the decision maker what information to collect in the decision making process and what weight of importance and relevance to place on each piece of information collected. If it did that, the court would be overstretching – without justification – the court's power to control administrative decision making.

[20] In the instant case, I find that the pre-qualification selection was carried out by the first respondent after applying certain criteria at the close of which two tenderers were weeded out of the competition, leaving four tenderers, including the applicant, still standing. I did not hear the applicant complain about less weight being put on information that was to his favour and great weight on information that was not to its favour. Neither was it heard to complain about the criteria used. The tenderers did not prescribe to the first respondent what criteria, and the weight of each criterion, that the first respondent should apply in selecting the tenderers that qualified. I fail to see how at the final stage of the tender selection process the applicant or the court can prescribe to the first respondent what criteria to apply and what weight to place on an individual criterion.

[21] In the pre-qualification selection process the first respondent applied certain criteria. At the subsequent stage when the award was to be made the first respondent applied also certain criteria in assessing the information and facts placed before it. It was, thus, entitled to consider all the relevant facts and information placed before it, including information and facts pertaining to skills transfer and programmes that support the socio-economic development of formerly disadvantaged persons. By a parity of reasoning, the first respondent was entitled to put great weight on technical and financial evaluations in comparison with other

factors. The same goes for what information and facts to collect and what weight of importance or relevance it would collect which is discussed in paras 24 – 27 of this judgment.

[22] The test, in my opinion, is not what particular factors the first respondent could apply and what weight it could put on each factor; it is whether the first respondent applied the factors and weights equally to the entire competition. It is as clear as day that the tenderers themselves submitted information in their bids to the first respondent and the first respondent did not give marks for individual factors arbitrarily. It considered the information before it against those factors in equal measures. It could be said that the first respondent did not suck the marks scored by the tenderers from its thumb.

[23] The basis of the scores gained by individual tenderers is clear for all to see; and what is more, I find that the first respondent's rejection of the applicant's tender in terms of technical and financial evaluation is based on sound and rational considerations. For instance, I accept that a tender price below a certain benchmark, in the present case 15 percent, may result in serious prejudice to the first respondent. For instance, it may result in financial strain or insolvency in respect of the particular tenderer. That may in turn result in that tenderer defaulting to carry out the works and the first respondent resorting to the appointment of third parties to complete the works. Additionally, such low tender price may lead to the tenderer cutting corners during the carrying out of the works, resulting in poor workmanship or non-compliance with specifications. As respects this aspect, I accept the first respondent's evidence and Mr Maleka's submission thereanent. Besides, the first respondent contends that it is a well-established practice in the construction industry to use a benchmark of 15 percent; which means that if a tenderer submits a nett tender price which is more than 15 percent below the first respondent's cost estimate for the project, this should count against the particular tender. In the case of the applicant's tender the variance is 17.76 percent. That this policy is only in the Ministry of Works and Transport (MW&T) policy is of no moment, as I demonstrate.

[24] The issue of the first respondent applying policy considerations or factors in the selection process that are not found in the first respondent's Procurement Policy, Procurement Regulations and Procurement and Tender Procedures Manual ('the RA policy, regulations and procedures') but in the Ministry of Works and Transport policy ('the MW&T policy') appears to straddle all the grounds, that is, Grounds 1, 2, 3 and 4.

[25] It is worth noting at the outset that the first respondent is a State-Owned enterprise (SOE), as I have mentioned previously, and in terms of the system of Namibia's public administration at the Central Government level, the Ministry that, on behalf of the Central Government, controls the first respondent is the MW&T. I, therefore see no good reason why the policy of MW &T cannot be applied by an SOE that it controls on behalf the Central Government. Not one iota of evidence was placed before the court tending to show that in the administration of the tender the first respondent was restricted – without any allowance – to the application of the RA policy, regulations and procedure only.

[26] As I have noted previously, the first respondent is an SOE, a public authority; and I see no good reason why a public authority cannot, in the carrying out of its duties, apply policy considerations that, in its opinion, conduce to the proper administration of tender that is under its charge. A different consideration would arise if the MW&T policy is against public policy or morality or it is offensive of the Namibian Constitution or, indeed, is expressly prohibited by legislation. The applicant does not say it is. Besides, the applicant might have a point if the MW&T policy was applied to the applicant only, while the RA policy, regulations and procedures were applied to the rest of the tenderers. The applicant does not say that the MW&T policy and the RA policy, regulations and procedures were so applied.

[27] In sum, I find that the MW&T policy on the benchmark is a well-established practice; and it is sound and is based on rational considerations. Accordingly, I conclude that the first respondent's decision rejecting the applicant's bid in terms of the MW&T policy and on such factors as the 15 percent benchmark is based on rational principles and standards. (See Lawrence Baxter, *Administrative Law* (1984):

p 522, and the cases there cited.) Accordingly, I conclude that the first respondent's decision to reject the applicant's tender (and the tenders of the rest of the tenders that were unsuccessful) was based on the factors that the first respondent took into account, including policy considerations in the MW&T policy, and that does not amount to a 'purposeless irrationality of capricious or arbitrary action'. (Baxter ibid., p 521, and the cases there cited) These conclusions, in turn, impel me to the inescapable conclusion that the applicant has failed to establish that the first respondent acted unfairly and unreasonably (Ground 1), or that the first respondent did not apply its mind; and, furthermore, I do not find that it took into account irrelevant and extraneous considerations when it rejected the applicant's tender (Ground 4). Based on these reasons I also find that the applicant has not established bias or likelihood of bias on the part of the first respondent in rejecting the applicant's tender (Ground 2). Accordingly, Grounds 1, 2 and 4 are rejected.

[28] The matter does not rest there. The applicant contended that '[t]he process was flawed in that the applicant was not given audi in respect of (a) the adverse comments relating to the quality of its (ie the applicant's) work (Ground 3a), or (b) any of the adverse consequences apparently flowing from the policy' (I take the 'policy' to be the MW&T policy) (Ground 3b). Thus, I see two elements in this contention about audi, that is, Ground 3a and Ground 3b.

[29] I did in a way consider aspects of Ground 3b when I considered Grounds 1, 2 and 4. It serves no good purpose to rehearse here all the reasoning and conclusions respecting Grounds 1, 2 and 4. It is enough to note the following additional reasoning and conclusions. In my view, the applicant's contention (Ground 3b) boils down really in the end to this, that is, according to the applicant, the first respondent pored over the MW&T policy, selected those factors contained therein which the first respondent knew will wreak adverse consequences for the applicant, and applied those factors against the applicant only, and, therefore, the applicant should have been given audi before applying the factors. I fail to see in what manner the first respondent's application of the MW&T policy violates the applicant's right to the audi alteram partem rule.

[30] The applicant has not placed any evidence – not even a phantom of it – before the court tending to show that the first respondent took the time to deliberately select those factors in the MW&T policy that the first respondent knew will occasion adverse consequences to the applicant and then applied just those factors. Such contention is, with respect not only preposterous, it is also absurd. I have said previously that the first respondent was entitled to apply any policy consideration for reasons I gave then. If such policy considerations or factors that were applied to all the tenders alike did not work in the applicant's favour, the applicant cannot seriously argue that it alone was entitled to be told that such and such factor, carrying such and such weight, would be applied in the tender selection process. The applicant does not contend that the other tenderers were told which policy considerations or factors, carrying what weight, would be applied in the tender selection process. Accordingly, I find that the applicant's contention in Ground 3b that the first respondent should have given audi to the applicant before applying those factors does not even begin to get off the starting blocks. Based on these reasons, I feel confident in rejecting the applicant's Ground 3b. These reasons also support my rejection of applicant's Ground 2 based on bias on the part of the first respondent when it rejected the applicant's tender. (See para 25 of this judgment on bias.)

[31] I now proceed to consider Ground 3a, also based on audi alteram partem. The applicant contends that it 'was not given audi in respect of the adverse comments relating to the quality of its work'. It must be remembered that natural justice (of which audi alteram partem is one of the rules) is a flexible doctrine whose content may vary according to the nature of the power exercised and the circumstances of the case. (*Re Pergamon Press Ltd* 1971 Ch 388 at 399) In the words of Lord Denning MR, 'the rules of natural justice – or of fairness – are not cut and dried. They vary infinitely'. (*R v Home Secretary ex parte Santillo* [1981] QB 778) Baxter throws in his authoritative statement thus: 'The principles of natural justice are flexible. The range and variety of situations to which they apply is extensive. If the principles are to serve efficiently the purposes for which they exist, it would be counterproductive to attempt to prescribe rigidly the form the principles should take in all cases'. Baxter refers to the dictum of Tucker LJ in *Russel v Duke of Norfolk* [1949] 1 All ER 109 at 118 for support where the Lord Justice stated:

‘The requirement of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with, so forth.’

Baxter concludes that these words have frequently been approved by South African courts. (Lawrence Baxter, ibid. p 541)

[32] Generally, it conduces to fairness for the administrative body or administrative official to give a person affected by information it has at its or his or her disposal a fair opportunity to correct or contradict any relevant statement or information prejudicial to the case he is seeking to establish by bringing such information to that person. But a careful distinction should be drawn between the information and evaluation thereof during the process of the decision itself. (Baxter, ibid., p 548) The present is not a case where in evaluating the information received the decision maker relies solely on the prejudicial information received in order to take a decision that is not in favour of the subject of the information. To illustrate the point; X (an alien) applies for permanent residence status. Y, a neighbour who know X, writes to the Ministry of Home Affairs and Immigration that X is not a fit and proper person and mentions that in X’s own country, X had been convicted of crimes of sexual nature against child girls. It is clear that the Ministry rejected X’s application solely on the basis of the information received from Y. The Ministry did not consider any other attributes of X. Such a decision would be unfair. In the instant case, it seems to me clear that the prejudicial information about the applicant’s previous ‘unsatisfactory’ work respecting a Ministry of Finance project and UNAM project was evaluated but that was not the factor that led to the rejection of the applicant’s tender in favour of the fifth respondent’s.

[33] The following scores and legends thereto appear against the category ‘Technical Submission’ and ‘Financial Submission’ in respect of the applicant:

‘<u>Technical Submission:</u>
10.5 out of 20 = 52.5%

> Not recommended on account of very thin resource and resource planning. (see attached performance evaluations from other Architects)
> In addition very questionable quality of work (underlining in the original statement) and ability to carry out tasks to program deadlines
> Financial Submission:
> 17,76% below QS tender priced on nett builders work
> This contractor's low price is Not Recommended. The low pricing exposes the RA to possible risks associated with poor workmanship, and ill-conceived programming.
> By DOW tender board standards, this tenderer would be disqualified.'

The following must be emphasized: The issue on prejudicial information is couched in the following sentence: 'In addition very questionable quality of work and ability to carry out tasks to (programme) program deadlines'. This apparently concerns Ministry of Finance and University of Namibia (UNAM) projects. It is clear that this item was merely an adjunct to the applicant scoring 10.5 marks out of 20 on Technical Score, as against the fifth respondent's score of 19. And the legend to the 'Technical Score' reads:

> 'Not recommended *on account of very thin resource and resource planning*.' [Italicized for emphasis]

As respects 'Financial Submission' the legend reads:

> '17,76% below QS tender priced on nett builders work
> This contractor's low price is Not Recommended. The low pricing exposes the RA to possible risks associated with poor workmanship, and ill-conceived programming.
> By DOW tender board standards, this tenderer would be disqualified.' (Underlining in the original statement)

[34] These two sets of scores and legends do not relate to the prejudicial statement which I find not to be the main reason why the applicant was not recommended. It must be remembered that a right to discovery of prejudicial information is not an automatic feature of natural justice (Baxter, ibid.: pp 550 – 551, and the case there cited). That being the case, when the right to prejudicial information is raised by an applicant, the applicant should establish that but for the

prejudicial information which was not disclosed to the applicant and which the applicant was not given the opportunity to contradict or correct, the decision the applicant is aggrieved would have gone the other way, that is, in favour of the applicant. The applicant has not established any such thing.

[35] In the instant case, it seems to me clear, as I have shown previously, that it was the applicant's standing on the scores relating to 'Technical' and 'Financial' evaluations that sealed the fate of the applicant. In this regard a careful distinction should be drawn between the prejudicial information and the evaluation thereof. In this case, the evaluation of the prejudicial information did not play any demonstrably significant role in the rejection of the applicant's bid in favour of the fifth respondent's. The legends referred to above support this view. In any case, after examining the information complained of and the entire basis upon which the applicant's tender was rejected, I determine that the first respondent did not act unlawfully by not disclosing the information to the applicant. (See Baxter, ibid: pp 550 – 551.) For instance, different consideration would arise if in this case, the marks scored by the applicant and those scored by the fifth respondent on the 'Technical Submissions' and 'Financial Submission' tied, or were very close, and the first respondent needed a tie-breaker or something else to decide a winner and it relied on the 'very questionable quality of work and ability to carry out tasks to programme (programme) deadlines' as the tie breaker. That was the situation in the instant case.

[36] I have observed previously that fairness in the shape of the audi principle (or the bias principle) is a variable concept. It would, therefore, not be in the interest of justice to prescribe a one-size-fit-all formula for it. (See Cora Hoexter, *Administrative Law in South Africa* (2007): p 328, and the cases there cited.) In the circumstances, and on the facts, of the case, coupled with aforegoing reasoning and conclusions, I decline to hold that there has been a failure of fairness in the shape of audi just because the first respondent failed to disclose the information to the applicant and give the applicant an opportunity of dealing with it. It follows that Ground 3a also fails, and it is rejected.

[37] Having rejected all the applicant's grounds of review, I make the following order:

(a) the application is dismissed with costs, including costs of one instructing counsel and one instructed counsel in favour of the fifth respondent; and

(b) one instructing counsel and two instructed counsel in favour of the first and second respondents.

C Parker

Acting Judge

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APPEARANCES

APPLICANT :	T J Frank SC (assisted by S Namandje) Instructed by Sisa Namandje & Co. Inc., Windhoek
FIRST AND SECOND RESPONDENTS:	I V Maleka SC (assisted by G S Hinda SC) Instructed by Dr Weder, Kauta & Hoveka Inc., Windhoek
THIRD AND FOURTH RESPONDENTS:	No appearance
FIFTH RESPONDENT:	R Tötemeyer SC (assisted by G Dicks) Instructed by Koep & Partners, Windhoek