REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 330/2014

In the matter between:

FIRE TECH SYSTEMS CC **APPLICANT**

And

NAMIBIA AIRPORTS COMPANY LIMITED & 20 OTHERS **RESPONDENTS**

Neutral citation: *Fire Tech Systems CC v Namibia Airports Company Limited (A 330-2014) [2016] NAHCMD 220 (22 July 2016)*

Coram: **UEITELE, J**

Heard: **19 April 2016**

Delivered: **22 July 2016**

Flynote: ***Practice*** Citation of parties - Review - of a decision of an administrative body - Citation of respondent - Requirements of Rule of Court 76 (1) - Chairman of the administrative body in his or her representative capacity to be cited - Separate citation of the administrative body itself not required.

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: On the 8th January 2014 under Tender No. NAC/OPS/35/2013 the Namibia Airports Company called for tenders for the supply, delivery, installation and commissioning of hold baggage, carry-on baggage scanners, metal detectors and provision of after sales services for a period of two years. A total of nineteen companies (this includes Fire Tech systems CC, the applicant in this matter) responded to the invitation and submitted tenders to provide the goods and services requested by the Namibia Airports Company. On the 24th February 2014 the board of directors of the Namibia Airports Company resolved to award the tender to a close corporation named IBB Military Equipment and Accessories Supplies CC.

Aggrieved by the fact that the tender was awarded to IBB military Equipment and Accessories Supplies CC the applicant, on the 27th November 2014, launched these proceedings for the court to review and set aside the award of the tender to IBB military Equipment and Accessories Supplies CC. The Namibia Airports Company and the fourth respondent opposed the application. In the opposition of the application the respondents raised two points *in limine* namely that the applicant allegedly delayed in instituting the review proceedings and that the applicant unnecessarily cited the Chairperson of the Namibia Airports Company's Tender and Technical Committee and the Namibia Airports Company itself.

Held that in the circumstances of this matter, the applicant did not unreasonably delay in the institution of the review application.

Held further that where the review proceedings relate to the decision or proceeding of an administrative body (whether the administrative body is a juristic person or not) and that body is presided over by a chairperson, Rule 76(1) requires the notice of motion to be directed to the chairman of the administrative body in the sense that he or she must in his or her representative capacity be cited as a party to the proceedings. The application against the Namibia Airports Company's Tender and Technical Committee and the Namibia Airports Company was accordingly dismissed.

Held further that the decision by the Namibia Airports Company to disqualify fourteen tenderers was capricious and irrational and cannot be fair and that the decision to award the tender to the fourth respondent is not fair and it was in contravention of Article 18 of the Namibian Constitution and amounts to an unlawful administrative act.

Held further that administrative officials and bodies have an obligation to justify their decisions and that reasons for those decisions must be recorded and if required be given to those affected by the decision because one can only account for one's decision by giving reasons for the decision.

Held further that the applicant's option to speedily approach this court for relief was greatly hampered by the Namibia Airports Company when it withheld information from the applicant and that the scope of granting an effective relief to vindicate the applicant's infringed rights has drastically been reduced.

Held furthermore that this court has a discretion to decline to set aside an invalid administrative action;

ORDER

1 The application against the first and third respondents is dismissed, but no order as to costs is made.

2 The award of Tender No. NAC/OPS/35/2013 for the supply, delivery, installation and commissioning of hold baggage, carry-on baggage scanners, metal detectors to the fourth respondent is unlawful and irregular, but is not set aside.

3 The applicant is granted leave to, (if so advised) institute an action for damages against the Namibia Airports Company as a result of that Company's infringement of the applicant's right to fair administrative action as envisaged in Article 18 of the Namibian Constitution.

4 That the second respondent and the fourth respondent must pay the applicant's costs of the review application, which costs include the costs of one instructing and two instructed counsel.

JUDGMENT

UEITELE, J

Introduction

[1] On 21 September 1998 the Airports Company Act, 1998[1] (I will, in this judgment, for ease of reference refer to this Act as the Act) was promulgated. In terms of s 3(2) of the Act, the Minister of Works and Transport was designated as the Shareholding

1 Act No. 25 of 1998.

Minister. Section 2 of the Act empowers the Shareholding Minister to incorporate a public company with share capital and to issue a certificate for the company to commence business under the Companies Act, 2004.[2] The Shareholding Minister executed his mandate and during February 1999 the Namibia Airports Company commenced trading as a public company. The Namibia Airports Company is the first respondent in this matter and I will, for ease of reference, continue to refer to it as the Company or where the context so requires as the Namibia Airports Company.

[2] Section 4 of the Act sets out the objects of the Company and it, amongst other things, states that the object of the Company is the acquisition, establishment, development, provision, maintenance, management, control or operation, in accordance with sound and generally accepted business principles, of any aerodrome, any part of any aerodrome or any facility or service, including a relevant activity at any aerodrome normally related to the functioning of an aerodrome. The Namibia Airports Company has set out its mission as *'to develop and manage airports on sound business principles, with due consideration to safety and the environment, in the best interest of all stakeholders.'*

[3] In the execution of its mandate and the pursuit of its mission to manage airports the Company on, 8 January 2014 under Tender No. NAC/OPS/35/2013 called for tenders for the supply, delivery, installation and commissioning of hold baggage, carry-on baggage scanners, metal detectors and provision of after sales service for a period of two years. A total of nineteen companies (this includes Fire Tech Systems CC the applicant in this matter) responded to the invitation and submitted tenders to provide the goods and services requested by the Namibia Airports Company.

[4] On 24 February 2014 the board of directors of the Company resolved to award the tender to a close corporation named IBB Military Equipment and Accessories Supplies CC. The applicant is aggrieved by the fact that the tender was awarded to IBB Military Equipment and Accessories Supplies CC and on 27 November 2014 launched these proceedings for the court to review and set aside the award of the tender to IBB Military

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2 Act, No. 28 of 2004.

Equipment and Accessories Supplies CC (I will, in this judgment, refer to this close corporation as the fourth respondent).

[5] The Company, the Chairperson of the Board and the Chairperson of the tender board of the Namibia Airports Company opposed the application filed by the applicant. The answering affidavit filed in support of the Company's opposition of the application was deposed to by its Chief Executive Officer a certain Mr. Tamar El-Kallawi. In the answering affidavit Mr. El-Kallawi states that he has been advised that the decision to award the tender to the fourth respondent was taken by the Board and is therefore a decision by the Company. He further stated that he was advised that the Rules of Court prescribe that the chairperson of the administrative body which took the decision is the person to be cited in proceedings brought under Rule 76. He contended that in the premises the citation of the first respondent and third respondent amount to a misjoinder.

[6] The fourth respondent also opposed the application. The answering affidavit filed in support of the fourth respondent's opposition of the application was deposed to by its Managing Director, a certain Mr. Mohamed Ahmed Omar. In the answering affidavit filed on behalf of the fourth respondent Mr. Omar takes the point, *in limine, that* the applicant has unreasonably delayed in launching the review proceedings. I find it appropriate to, before I consider the points raised *in limine* and if necessary the merits or demerits of the application, give a very brief background as to why the applicant is before this court seeking the relief that it is seeking in its notice of motion.

Background.

[7] The events which led to the applicants instituting this action are not in dispute, and I will briefly outline those events as I could gather them from the pleadings filed in this matter. As I have indicated above the Company invited interested parties to submit tenders for the supply, delivery, installation and commissioning of hold baggage, carry-on baggage scanners, and metal detectors. The closing date for the tenders was set for 31 January 2014.

[8] The tender document authored by the Company and which guided the tenderers in the compilation of their offers, amongst other things, provided for a tender evaluation and award process. Section 24 of the tender document provided for eight phases of the evaluation and award process, it inter alia reads as follows:

> 'NAC and its duly appointed representatives shall be the sole adjudicators of this tender and will evaluate each Tenderer's conformance in accordance with the Tender Criteria, Conditions, Administrative Requirements and Specification outlined in this tender document.
>
> 24.1 PHASE ONE: To determine whether the tender complies with the Pre-qualification Criteria. Non-compliant tenders will not be evaluated further.
>
> 24.2 PHASE TWO: To determine whether the tender complies with the Minimum Selection Criteria. Non-compliant tenders will not be evaluated further.
>
> 24.3 PHASE THREE: To determine whether the tender complies with the Administrative Criteria. Non-Compliant tenders will not be evaluated further.
>
> 24.4 PHASE FOUR: To evaluate tenders according to the Tender Specification and Conditions to determine a Shortlist of Tenders.
>
> 24.5 PHASE FIVE: NAC may require Shortlisted Tenderers to make a presentation in person to NAC. The purpose of these presentations will be to explain the Service Supply concept, operations, service maintenance and to respond to requests for further information and/or questions that might arise before and /or during the presentation. NAC reserves the right at Phase Five to:
>
> a) Visit the Tenderer's premises and / or similar environment where the respective services are in operation.
>
> b) Request a "best and final offer" from the Short listed Tenderers.
>
> 24.6 PHASE SIX: A final evaluation of the relevant Tenderers will be completed after the presentation and site visit, if conducted.

24.7 PHASE SEVEN: Submission to the NAC Tender Board for approval of the award of the tender.

24.8 PHASE EIGHT: Notification of the successful and unsuccessful Tenderers will be made.

24.9 TENDER AWARD:

24.9.1 Execution of the Agreement.

NAC will provide a letter of award to the successful Tenderer. The successful Tenderer must execute and deliver to NAC the written Agreement to be prepared by NAC, a copy of which is included together with this request for tender for information purposes, together with the Performance Guarantee and such other documentation that may be necessary to properly record the agreement between the parties. The Tenderer must complete this within seven (7) workdays from receipt of the letter of award.

24.9.2 Notice of Commencement

NAC will, in consultation with the Tenderer, and once the written agreement and other documents have been duly signed and received by both parties, issue a Notice of Commencement to the successful Tenderer.'

[9] On the closing date of the tender (that is on 31 January 2014) the Company, in the presence of the tenderers or the presence of the representatives of certain of the tenderers opened the tenders and read out the prices quoted by the different tenderers. The price quoted by the applicant was the cheapest.

[10] On 07 February 2014 the Company's Tender and Technical Committee (the Technical Committee) held a meeting to evaluate the offers made in respect of Tender

No. NAC/OPS/35/2013. The minutes of the Technical Committee in respect of that evaluation simply read (I quote verbatim from the minutes) that:

> 'After the thorough understanding of the comparison analysis done by the user department, the meeting agreed to endorse the appointment of IBB Military Equipment for the supply of screening equipment based on option 2 N$ 4 397 316 because they proposed value for money. The same be referred to the Board for approval.'

[11] A week later that, is, on 13 February 2014 the Technical Committee prepared and made a submission to the Company's board of directors. Paragraphs 4 and 5 of the submission read as follows (I again quote verbatim from the submission):

> '**4 Evaluation Process.**
>
> A comparison analysis was conducted to all the various brands proposed and five (5) companies were shortlisted for evaluation namely IBB Military Equipment, CSS Security, Commercial Consultant, Camelot Investment Group, and Renaissance Technology Group. IBB Military Equipment, and CSS Security were shortlisted for further evaluation, since the other three companies' prices were way above our budget.
>
> ❖ **Technical evaluation.**
> - IBB Military Equipment = 60 points
> - CSS Security=35 points
>
> ❖ **Financial Proposal.**
> - IBB Military Equipment = Option 1 N$ 34 100 220 , Option 2 N$ 48 370 476
> - CSS Security=N$ 23 008 273-78.
>
> Although option 1 offered by IBB (N$ 34 100 220) is cheaper than option 2, it is a single and thus not recommended. CSS Security offers the cheapest solution, but they do not comply with all tender specifications.
>
> **5 RECOMMENDATION**

- THAT the tender be recommended to NAC board for approval and be awarded to IBB Military Equipment for the supply of screening equipment based on option 2 of US$ 4 397 316-00 (N$ 48 370 476-00) of Astrophysics Technology since they comply with all DCA requirements and offer a dual view system and their prices are reasonable.'

[12] On 21 February 2014 the Company's board of directors (I will in this judgment refer to the board of directors as the 'Board') convened a special board meeting and at that meeting, amongst other matters, considered the recommendations from the Technical Committee with respect to Tender No. NAC/OPS/35/2013 'for the supply, delivery, installation and commissioning of hold baggage, carry-on baggage scanners, metal detectors'. The minutes of that special meeting indicate that the submission informed the Board that nineteen proposals were received of which five companies were shortlisted for evaluation.

[13] The submission listed the companies that were shortlisted for evaluation as IBB Military Equipment, CSS Security, Commercial Consultant, Camelot Investment Group, and Renaissance Technology Group. The submission further informed the Board that IBB Military Equipment and CSS Security were shortlisted for further evaluation and the other three companies were not considered because the prices which they quoted exceeded the Company's budget. To the submission there was attached four annexures namely: Annexure 1 which is a comparison of the points scored by IBB Military Equipment and CSS Security, Annexure 2 which is the financial proposal of IBB Military Equipment and CSS Security, Annexure 3 which is the comparison of the different brands of the equipment quoted, and Annexure 4 which is the attendance register of the parties who attended the opening of the tenders on 31 January 2014.

[14] After considering the submission the Board resolved to award Tender No. NAC/OPS/35/2013 'for the supply, delivery, installation and commissioning of hold baggage, carry-on baggage scanners, metal detectors' to IBB Military Equipment based on option 2 dual view in the amount of US$ 4 397 316-00 (N$ 48 370 476-00).

On 24 February 2014 Mr. T El- Kallawi informed the fourth respondent that it had been awarded Tender No. NAC/OPS/35/2013 ‘for the supply, delivery, installation and commissioning of hold baggage, carry-on baggage scanners, metal detectors’. On 3 March 2014 the fourth respondent accepted the award and indicated that it will start to make arrangements for it to execute the tender. On 29 August 2014 the Company and the fourth respondent signed the agreement as contemplated in the tender documents. In terms of clause 6 of the agreement the company had to pay one third of the contract price not later than five days after the agreement was signed.

[15] On 19 September 2014 an article was published in the Namibian Newspaper. In that article it is alleged that the Company was likely to install scanners, at four airports in Namibia, that do not have a system to detect dangerous metal objects and explosives as per aviation requirements. The article further alleged that the Company’s spokesperson confirmed that the tender ‘for the supply, delivery, installation and commissioning of hold baggage, carry-on baggage scanners, metal detectors’ was awarded to the fourth respondent.

[16] On 13 October 2014 the applicant’s legal practitioners sent a letter to the Company’s chief executive officer and to the Board. In the letter, the legal practitioners stated that the applicant never received any communication from the Company as regards the acceptance or rejection of the tender it submitted. In the letter the legal practitioners *inter alia* requested the following information from the Company:

(a) Confirmation as to whether or not Tender No. NAC/OPS/35/2013 ‘for the supply, delivery, installation and commissioning of hold baggage, carry-on baggage scanners, metal detectors’ was awarded to the fourth respondent.

(b) If the tender was awarded to the fourth respondent when it was awarded; and

(c) If the tender was awarded to the fourth respondent the reasons why the applicant’s tender was rejected.

[17] By the 24th of November 2014 the Company had not yet replied to the letter by the applicant's legal practitioners. The applicant accordingly resolved to launch this review application. I will now proceed to consider the points *in limine* raised by the respondents.

The points *in limine*.

The first point in limine –the alleged unreasonable delay.

[18] Mr. Corbett, counsel for the fourth respondent, argued that the primary object of the Tender (i.e. Tender No. NAC/OPS/35/2013 'for the supply, delivery, installation and commissioning of hold baggage, carry-on baggage scanners, metal detectors) was the security and safety of the traveling public. He argued that these are issues which dictate that a party which intends to challenge the award of the Tender is expected to act without any delay.

[19] He further argued the applicant would have known that the tender was only binding for three months, and would have thus been awarded at the latest in April 2014. Applicant would further have known that in the invitation to tender it was expressly stated that "*only the successful tenderer will be notified*". Thus the applicant would have been aware at the latest in late April 2014 that it had not been awarded the tender. Instead of making enquiries as to the award, the applicant did absolutely nothing for a period of five months. He proceeded to argue that even the newspaper article which appeared on 19 September 2014 which the applicant admits it saw (and which confirms the award of the Tender to IBB and suggests that it's tender was not compliant) did not spur the applicant into action.

[20] Instead, argued Mr. Corbett, the applicant waited almost a further month before engaging in correspondence on 13 October 2014 with the Company. In accepting that in matters such as these it had to act with expedition, applicant requested that the Company not implement the tender. Although it received no response to the letter, no follow-up letters were written or telephonic enquiries made with the Company enquiring about a response to such letter. The applicant contented itself with sitting back for a full further

month before launching this application on 20 November 2014 argued Mr. Corbett. The application was only served on IBB on 26 November 2014 and NAC on 3 December 2014. This constitutes a delay – from the date when applicant should have been aware of the award of the tender of almost 7 months. Applicant must have known that the tender would have been implemented in the interim whilst it sat back doing nothing to effectively assert its purported rights the argument continued.

[21] It is now settled that the question of whether a litigant has delayed unreasonably in instituting review proceedings involves two enquiries: the first is whether the time that it took the litigant to institute proceedings was unreasonable. If the court concludes that the delay was unreasonable, then the question arises whether the court should, in an exercise of its discretion, grant condonation for the unreasonable delay. In considering whether there has been unreasonable delay, each case must be judged on its own facts and circumstances, so what may be reasonable in one case may not be so in another. Moreover, that enquiry as to whether a delay is unreasonable or not does not involve the exercise of the court's discretion, but is a factual enquiry.

[22] I repeat what I said in the unreported matter of *JB Cooling and Refrigeration CC v Dean Jacques Willemse t/a Windhoek Armature Winding and Others*[3], that the length of time that had lapsed between the cause of action arising and the launching of the review is not by itself an indication of unreasonable delay, but the court must consider the facts of each case on its own circumstances because what may be reasonable in one case may not be so in another. The facts of this case are that the tender closed on 31 January 2014, the Company awarded the tender on 24 February 2014 and communicated its award to the fourth respondent. The Company never communicated to any of the unsuccessful tenderers the fact that their offers were not accepted. When it came to the attention of the applicant that the tender was awarded to the fourth respondent, it requested the applicant to confirm or deny that fact. The Company did not bother to answer the applicant.

3(An unreported judgment delivered on 20 January 2016 Case No. A 76/2015 [2016] NAHCMD 8 (20 January 2016).

[23] The tender document provides for an eight phase process of evaluating and awarding the tender. The eight phase entailed the notification of the successful and unsuccessful tenderers. The applicant states that it was never notified that its offer was rejected. The applicant further allege that the first time it got to know that the tender was awarded to the fourth respondent was when the article I referred to above appeared in the Namibian newspaper of 19 September 2014 after which the applicant's managing member addressed a letter to the Company enquiring whether the tender was indeed awarded. When after a month the Company did not respond the applicant launched the application. These facts the applicant does not and cannot deny. I thus find them proven by the applicant. The argument by Mr. Corbett that the applicant ought to have known by April 2014 that its offer was not accepted is unconvincing because the Company had in its tender document undertaken to inform unsuccessful tenderers and it did not keep that commitment. Worst still when it was requested to confirm whether the tender was awarded it opted to remain silent. I am thus satisfied that, in the circumstances of this matter, the applicant did not unreasonably delay in the institution of the review application. The first point *in limine* must, as it does, fail.

The second point in limine –the alleged mis-joinder of the first and third respondents.

[24] Mr. Frank counsel for the first to third respondent argued that Rule 76 of this court's Rules requires that that the chairperson of the body whose decision is sought to be reviewed must be cited as a party to the review proceedings. He proceeded and argued that it is obviously intended that the chairperson acts in a representative capacity for, or in respect of the body involved and is not cited in a personal capacity. To cite both the chairperson and the body or entity concerned is thus not correct because it is in essence the same entity being sued. The citation of the Company separately and distinctly from the Chair thus amounts to a misjoinder, so the argument went. Mr. Frank referred me to the matter of *Safcor Forwarding (Johannesburg) (Pty) Ltd v National Transport Commission*[4] where Corbett JA, at p 671-672, said:

4 1982 (3) SA 654.

'…Prior to the coming into operation of Rule 53 the position was, as I have indicated, that an applicant for review under the common law of the decision or proceedings of a statutory board had merely to cite the board *eo nomine* and, of course, any other interested party. He was not required to cite specifically the chairman of the board. Does this mean that under Rule 53 the applicant in such a case has now to cite both the chairman of the board and the board itself? In *Prospect Investment Co Ltd v Chairman, Community Development Board, and Another* 1981 (3) SA 500 (T) the Court held just that. Relying upon the decision of VERMOOTEN J in the Court a quo, it decided that under Rule 53 (1) an applicant in proceedings to review a decision of the Community Development Board was required to cite the chairman of the Board *qua* chairman and also the Board itself as a separate party, falling under the phrase 'all other parties affected'. In that case the Court held that inasmuch as the applicant had cited only the chairman of the Board there had been a 'material non-joinder'.

I cannot think that this was ever the intention underlying the Rule. Admittedly the Rule does introduce a change as far as statutory boards are concerned. Whereas before it was necessary to cite merely the board *eo nomine*, now the Rule requires the citation of the chairman of the board. But that is a far cry from interpreting the Rule as now requiring the citation of two separate parties in place of one. For I cannot see what purpose could possibly be served by such a proliferation of parties. Taking this case as being illustrative of the general position, the chairman of the Commission has no personal interest in the matter: he is interested merely in his representative capacity. And in that capacity he has no interest separate and distinct from the Commission itself. The Commission consists basically of not more than eleven persons, of whom the chairman, who is the Secretary for Transport, is one (s 3 (2) of Act 44 of 1948). The business of the Commission is conducted at meetings, at which the decision of the majority of the members present is deemed to be the decision of the Commission. The chairman has a casting vote (s 6). The decision which is challenged in this case was, it is to be inferred, taken in accordance with these provisions by the members of the Commission and is thus deemed to be the decision of the Commission, which includes the chairman. According to the opposing affidavit of Mr. Erasmus he was duly authorized to oppose the application on behalf of the Commission. Presumably the basis of his authority was a decision of the Commission, which would be binding on the chairman. Rule 53 (1) (a) requires the notice of motion to call on 'such persons' to show cause why the decision or proceedings should not be reviewed, etc. 'Such persons' refers obviously to the magistrate, presiding officer or chairman, as the

case may be, and 'all other parties affected'. I can conceive of no reason why in this case it would be necessary for both the chairman and the Commission (the latter being introduced as another party affected) to be required separately to show cause.'

[25] Rule 76 (1) of this court's Rules reads as follows:

'**76 Review application**

(1) All proceedings to bring under review the decision or proceedings of an inferior court, a tribunal, an administrative body or administrative official are, unless a law otherwise provides, by way of application directed and delivered by the party seeking to review such decision or proceedings to the magistrate or presiding officer of the court, the chairperson of the tribunal, the chairperson of the administrative body or the administrative official and to all other parties affected.'

[26] In the unreported judgment in the matter of *Premier Construction CC v Chairperson of the Tender Committee of the Namibia Power Corporation Board of Directors*[5] the applicant in that matter failed to win a tender, offered by Namibia Power Corporation (Pty) Ltd, who was cited as the third respondent. The applicant cited the Chairperson of the Tender Committee of the Namibia Power Corporation as the first respondent and the Chairperson of the Namibia Power Corporation board of directors as the Second Respondent. The respondents in that matter took a point *in limine* arguing that the citation of the first respondent (i.e. the Chairperson of the Tender Committee of the Namibia Power Corporation) and the second respondent (i.e. the Chairperson of the Namibia Power Corporation board of directors) was a mis-joinder. The court upheld the point *in limine.* In his judgment Parker AJ said:

'….it is clear that the first respondent is an administrative official, so is the second respondent, and the third respondent is an administrative body within the meaning of art 18 of the Namibian Constitution. But it cannot seriously be argued that the decision sought

5 Case No. (A 200/2014) [2014] NAHCMD 270 (delivered on 17 September 2014).

to be reviewed and set aside is that of the first respondent or second respondent. Doubtless, it is that of the third respondent.

[8] It is inexplicable why the first and second respondents have been joined as parties at all. In this regard, for Mr Hinda there is no good reason why they have been joined and for such misjoinder of parties the notice of motion is doomed to fail unless it is amended. I accept Mr Hinda's submission because it is sound. In all this it is worth noting that it is critical that a party who desires to bring an application to review and set aside a decision of an administrative body or an administrative official must be clear in his or her own mind which administrative body or administrative official he or she is dragging to court. I have said previously that on the facts it can only be the decision of the third respondent that may be reviewed and set aside. The first respondent is the chairperson of a committee of the third respondent; and, in that case, the committee could have played recommendary role only in the award of the tender. And as to the second respondent; she is an administrative official, but she could not have taken the decision as to whom the third respondent should award the tender.

[9] In my opinion, where a party who prays the court to review and set aside the decision of administrative body or an administrative official is not clear in its own mind whose decision it has approached the court to review and set aside, there should be fatal consequences for such party...'

[27] In the matter of *Seagull's Cry CC v Council of the Municipality of Swakopmund and Others*[6] the applicant sought an order reviewing a decision taken by the Municipal Council for the Municipality of Swakopmund. The applicant in that matter cited the Council of the Municipality of Swakopmund as the first respondent, the Mayor for the Municipality of Swakopmund as the second respondent and the Chairperson of the Management Committee of the Municipality of Swakopmund as the third respondent. The second and third respondents raised the point that they were mis joined. The court upheld their objection and dismissed the application against them. Van Niekerk J said the following when she dismissed the application against the second and third respondents:

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6 2009 (2) NR 769 (HC)

'[11] Mr. Tötemeyer for applicant also relied on this case [i.e. the *Safcor Forwarding (Johannesburg) (Pty) Ltd v National Transport Commission*] as authority for the proposition that it is not wrong to cite the second and third respondents and submitted that, as in the Safcor case, there is no prejudice for respondents and no additional costs incurred by citing the second and third respondents. However, in my view, counsel's reliance on the *Safcor* case is misplaced. The issue in *Safcor* was whether there was a fatal non-joinder because of non-compliance with rule 53(1) if a statutory board is cited *eo nomine* instead of the chairperson of the board in a representative capacity. The Appellate Division held (at 673B) that this failure did not merit the dismissal of the application with costs and finally pointed out that 'it was not a case of the wrong person being before the Court, but a case of the right person having been incorrectly cited' (at 673F/G). However, the second respondent in this case was not cited in her representative capacity as chairperson of the municipal council, but as a separate party. In the case of second respondent it is 'a case of the wrong person being before the Court'.

[12] Furthermore, *as the decisions sought to be reviewed are those of the first respondent council, of which the second respondent is the chairperson, there is in my view no need to join second respondent. There is also no need to join the third respondent who merely made recommendations to first respondent.*

[13] In the result the application is dismissed against the second and third respondents.' (Italicized and underlined for emphasis)

[28] I am aware of a recent decision (which was handed down approximately one month before the present matter was argued) of this court in the unreported judgment of *Virtual Technology Services (Pty) Ltd v The Chairperson of the Namibia Student Financial Association Fund Board & Another*[7]*.* The facts of this case are briefly as follows. The applicant was one of the tenderers who submitted tenders for the provision of services for payment of money by the Namibia Students Financial Assistance Fund Board, a Fund duly established in terms of s 3(1) of the Namibia Students Financial Assistance Fund Act, 2000[8], into the bank accounts of the students receiving financial assistance from the Fund.

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7 Case Number (A 56/2016) [2016] NAHCMD 72 delivered on 11 March 2016**.**

8 Act No. 26 of 2000.

[29] The applicant was aggrieved that the contract was not awarded to it and alleged that this was due to a flawed process adopted by the first responded which was contrary to the original tender terms. Applicant launched the application seeking an interim order against the respondents, (it cited the Chairperson of the Namibia Student Financial Association Fund's Board as the first respondent and Namibia Mineworkers Investment Corporation (Pty) Ltd as the Second Respondent) interdicting the respondents from further implementing the contract pending the outcome of the review proceeding simultaneously launched with the application for the interdict.

[30] The application was opposed by the first respondent who raised three points *in limine.* One of the points *in* limine raised was that, the applicant's failure to join the Fund itself was a fatal omission and that the chairperson of the board of the Fund should not have been cited as a party to the proceeding, for the reason that the Fund itself, as a juristic person, should have been sued. The court upheld the point *in limine* raised by the first respondent and dismissed the application. After referring to the *Seagull*[9] and *Premier Construction CC*[10] matters the Deputy Judge President, said:

> '[12] I fully agree with the principles outlined in the two cases cited above and in my view the principles are equally applicable to facts of this application. In the present application the first respondent is cited as: "*The First respondent is the Chairperson of the Namibia Students Financial Assistance Fund Board, a Fund duly established in terms of section 3 (1) of the Namibia Students Financial Assistance Fund Act, 2000".* It is to be noted that the first respondent has not been cited as party to the proceedings "in her representative capacity as chairperson of the board of the Fund". Therefore in my view the decision in *Safcor* is not of assistance to the applicant in this matter. I do not think that even if the chairperson was cited in a representative capacity of the Fund that would have made a difference, because there would not have been any legal justification to cite a representative while the principal legal person (the Fund) of such a 'representative' is

9 *Supra* footnote 5.

10 *Supra* footnote 6.

available and could have been cited and made a party to the proceedings. The Fund is not a mere statutory body; it is a juristic person in terms of section 3 and as such is capable of being sued. As Parker AJ correctly pointed out in *Premier Construction CC*, the decision sought to be reviewed and set aside, is that of the juristic person, the Fund, and not of the chairperson who has no executive power but merely presides over the proceedings of the board of the Fund. It would thus appear to me that where a party or an entity whose decision is sought to be reviewed and set aside is a juristic person then in that event such party or entity must be cited as a party to the proceedings and the provisions of Rule 76 (1) are not applicable. I have therefore come to the conclusion that a wrong person, being the chairperson of the board of the Fund, has been brought before court in this application.

In the result the application is dismissed against both respondents with costs, such cost to include the costs on one instructing counsel and one instructed counsel.'

[31] If my understanding of the Deputy Judge President is that the cases of *Seagull* and *Premier Construction CC* are authority for the proposition that where an administrative body whose decision is sought to be reviewed under Rule 76 is a juristic person, then in that event the administrative body itself must be cited and not the chairperson of the administrative body, then I do not agree with him and his decision is in my view incorrect and I will not follow it. I do not agree with the learned judge for the simple reason that Rule 42 of the rules of this court provides that:

'**42 Proceedings by and against partnerships, firms and associations.**

(1) In this rule-

"association" means any unincorporated body of persons, not being a partnership;

"firm" means a business, including a business carried on by a body corporate or by the sole proprietor thereof under a name other than his or her own;…

"sue" and "sued" and their grammatical derivatives are used in relation to actions and applications.

(2) A partnership, a firm or an association may sue or be sued in its name.'

[32] In my view Rule 42 is of general application and is of application where a party, called a plaintiff or an applicant, institutes any proceedings (either by way of action or application) against another party called the defendant or respondent, then in that event the defendant or respondent may be sued in its own name if it is a juristic person. Rule 76 on the other hand is very specific and applies **only** where a party seeks to review a decision or proceedings of an inferior court, a tribunal, an administrative body or an administrative official. If the decision which is being reviewed is that of an inferior court, a tribunal, an administrative body or administrative official, then and in that event, first the proceedings must be commenced by an application, except where another law provides that the proceedings may be commenced by action. Second the application must be directed and delivered by the party seeking to review such decision or proceedings to the magistrate or presiding officer of the court, the chairperson of the tribunal, the chairperson of the administrative body or the administrative official and to all other parties affected.

[33] In my view the *Safcor Forwarding (Johannesburg) (Pty) Ltd v National Transport Commission*[11] matter concerned exactly the same issues raised in the *Seagull, Premier Construction CC* and *Virtual Technology Services (Pty) Ltd* matters. In the *Safcor* matter the National Transport Commission was a body established by statute, the Transport (Co-ordination) Act, 1944[12] and was thus an administrative body. The decision which the Commission took was sought to be reviewed under Rule 53. In the in the *Seagull, Premier Construction CC* and *Virtual Technology Services (Pty) Ltd* matters the bodies there were established by statute and they also qualify as administrative bodies and their decisions were sought to be reviewed under Rule 53 (in respect of *Seagull*) the forerunner of current rule 76 (in terms of which the decisions in *Premier Construction CC* and *Virtual Technology Services (Pty) Ltd* were sought to be reviewed).

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11 *Supra* footnote 4.

12 Act, 48 of 1944.

[34] In the *Safcor* matter Corbett JA traced the history of how, Rule 53 (1) (which was in material terms worded in similar terms as Rule 76(1)) came on to the statute books. After that survey of the history he said:

> '…Rule 53 speaks of the notice of motion having to be 'delivered' to, *inter alios,* the magistrate, it means service upon him of a copy of the notice of motion. And when the Rule speaks of the notice of motion having to be 'directed' to the magistrate it must mean that the magistrate must be cited as a party to the review proceedings. The word 'directed' is not defined in the Rules, but it seems to me to be an appropriate word to describe the process whereby a respondent is cited in motion proceedings. Notice of motion is, after all, a procedure whereby an applicant institutes proceedings by giving notice thereof to any person against whom he claims relief, and to the Registrar of the Court…. Finally, there seems no doubt that, where the review proceedings seek to challenge the decision of an 'officer' performing quasi- judicial or administrative functions and the Rule requires the notice of motion to be 'directed' to him, it means that he must be cited as a party to the proceedings. Obviously 'directed' bears the same meaning, whether the proceedings be a review of the decision or proceedings of an inferior court, or a review of the decision of an officer or a review of the decision or proceedings of a statutory board. *All this leads inevitably to the conclusion that, where the review proceedings relate to the decision or proceedings of a statutory board presided over by a chairman, Rule 53 requires the notice of motion to be 'directed' to the chairman of the board in the sense that he must be cited as a party to the proceedings. And the notice of motion must also be 'delivered' to him*.'
> (Italicized and underlined for emphasis)

[35] I am thus of the view that the conclusion reached by Corbett JA in the *Safcor* matter is applicable to this matter and that the inevitable conclusion is that, where the review proceedings relate to the decision or proceedings of an administrative body (whether the administrative body is a juristic person or not) and that body is presided over by a chairperson, Rule 76(1) requires the notice of motion to be 'directed' to the chairperson of the body in the sense that he or she must be cited as a party to the proceedings. There is also no reason why it would be necessary for both the chairperson of the body and the body itself (the latter being introduced as another party affected) to be required separately to show cause why the decision of the body must not be set aside.

[36] In my view the citation of the Company and the Chairperson of the Tender Board of the Namibia Airports Company was unnecessary, I therefore agree with Mr. Frank that the application against the first respondent (i.e. the Namibia Airports Company) and the third respondent (i.e. the Chairperson of the Tender Board of the Namibia Airports Company) is an unnecessary proliferation of parties and must, as it is, dismissed. Having dealt with the points *in limine* I now proceed to deal with the merits of the application.

The grounds of review relied upon by the applicant,

[37] The applicant in both, its founding affidavit and heads of argument, identified seven grounds on which it is seeking the decision of the second respondent to be reviewed and set aside namely:

(a) That the Company did not properly apply its mind in awarding tender number NAC/OPS/35/2013 to the fourth respondent.

(b) That the Company failed to take into account relevant considerations, including the applicant's tender.

(c) That the Company took into account irrelevant considerations and failed to appreciate that the fourth respondent's tender was non-compliant with the peremptory specifications set in the tender documents.

(d) That the Company acted unfairly and unreasonably, including *inter alia* by assessing, awarding and ratifying the fourth respondent's tender and any agreement between the first respondent and the fourth respondent as a result of its tender.

(e) That the Company did not afford the applicant an opportunity to make representations regarding any adverse considerations which the Company may have entertained regarding the applicant's tender.

(f) That the Company applied (improperly) different evaluation criteria when assessing the applicant's tender and when assessing the fourth respondent's tender. No valid and basis existed for the Company to differentiate between the tenderers by applying different criteria. The same uniform criteria should have been applied objectively.

(g) That the Company violated the applicant's rights in terms of the common law (pertaining to administrative law) and Article 18 of the Namibian Constitution.

The legal principles relating to the review of administrative action or decisions.

[38] Article 18 of the Namibian Constitution has been quoted in all the cases where decisions or actions of administrative bodies were impugned, I nonetheless quote it here, it 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.'

[39] Commenting on the content of article 18 the Supreme Court in the matter of *Mostert v Minister of Justice*[13], said:

> 'Article 18 of our Constitution requires fair and reasonable acts by administrative bodies and officials and further requires them to comply with the common law and any relevant legislation.
>
> Whether the Constitution intended to create a new ground for review, not as stringent as that of the common law, has also not yet been argued before this Court and in this case

13 2003 NR 11 SC, at p. 28 E-H

the parties accepted that that was so. For purposes of this case I shall also accept that it was enough for the appellant to prove that the Permanent Secretary acted unreasonably.

The word reasonable according to the concise Oxford English Dictionary 9th Ed means:

> 'Having sound judgment; moderate; ready to listen to reasons; not absurd; in accordance with reasons.'

Collectively one could say, in my opinion, that the decision of the person or body vested with the power, must be rationally justified.'

[40] The Supreme Court of Namibia has expressed itself as follows[14] 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.'

[41] In the matter of *Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd and Another*[15] Corbett, JA (as he then was) said:

14Per 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.

151988 (3) SA 132 (A) at 152.

‘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 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.’

[42] In the matter of *Cash Paymaster Services (Pty) Ltd v Eastern Cape Province and Others*[16] 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.’[17] {My Emphasis}

161999 (1) SA 324 (CkH) at 331.

17Also see Uffindell t/a Aloe Hunting Safaris v Government of Namibia and Others 2009 (2) NR 670 (HC) at para 34.

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

Did the Company act fairly when it awarded Tender NAC/OPS/35/2013 to the fourth respondent?

[44] It is well established that a tender process implemented by an organ of State is an 'administrative act' within the meaning of Article 18 of the Namibian Constitution. There is also no doubt or dispute that the Company is an organ of the State or an administrative body as envisaged in Article 18 of the Namibian Constitution and that its decision can therefore be reviewed by this court.

[45] At the core of valid administrative action is the principle of legality. Baxter[18] has argued that the principle of legality implies some specific principles. One or two of the specific principles are that administrative action must be taken in a fair manner and the power to act must not be exercised in an unreasonable manner. These principles of fairness and reasonableness are the central themes in Article 18 of the Namibian Constitution. Fairness is thus one of the core values upon which our Constitution is founded.

[46] I accept and acknowledge that fairness is an open ended norm and that it may be vague or lead to inconsistencies. But as Cameron J recognized[19] the norm becomes certain overtime as it is applied by the courts. In the English case of *Doody v Secretary of State for the Home Department and other Appeals*[20] which was quoted with approval by this court in the matter of *Onesmus v Permanent Secretary: Finance and Others*[21] Lord Mustill is reported to have said:

18Baxter L: *Administrative Law*: Juta & Co 1984 at 301.

19In the matter of *South African Police Service v Solidarity obo Barnard* 2014 (6) SA 123 (CC) at para [100].

20 [1993] 3 All ER 92 (HL).

21 2010 (2) NR 460 (HC).

> 'What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which intuitive judgment. They are far too well known. From them, I derive the following. (1) Where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspect. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the representations on his own behalf either before the decision is taken with a view to producing a favourable result, or after it is taken, with a view to procuring its modification, or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interest fairness will very often require that he is informed of the gist of the case which he has to answer.'

[47] What I gather from what Lord Mustill is reported to have said is that, I must, on the objective facts and for the reasons advanced by the Company for its decision to award the tender to the fourth respondent, determine whether the Company's decision to do so (i.e. award Tender No. NAC/OPS/35/2013 for the supply, delivery, installation and commissioning of hold baggage, carry-on baggage scanners, metal detectors to the fourth respondent) was fair.

[48] I find it appropriate to, before I make my determination, digress and address an issue that has bothered me with the process followed by the Company in the award of the tender. It appears that the initial responsibility for assessing the tenders rested on the user department. The user department then made its recommendations to the Company's Tender and Technical Committee (the Technical Committee). From the minutes of the Technical Committee it appears that the user department simply made a comparative analysis of the tenders submitted by two tenderers and thereafter recommended that the tender submitted by the fourth respondent based on option 2

be accepted. The Technical Committee accepted this recommendation allegedly because ‘they [i.e. the fourth respondent] proposed value for money’ and that recommendation is the one on which the Board relied upon to accept the recommendation from the Technical Committee and to award the tender to the fourth respondent.

[49] I need to emphasis that our Constitution is founded also on the principles of accountability, transparency and openness. Administrative officials and administrative bodies, therefore, have an obligation to live these values in their day to day dealings with the public and in their decision making processes. I totally fail to understand how the Board could on the recommendations of the Technical Committee make an informed decision. We know for a fact that 19 entities submitted offers to the Company, the recommendation of the Technical Committee does not tell Board or us what it is that the user department ‘comparatively analyzed’ and which companies’ offers it analyzed, the recommendation further does not tell what criteria was used to allocate marks to a given company. The paucity of information makes the decision of the Board to allocate the tender to the fourth respondent, at best, opaque.

[50] Administrative officials and bodies must know that the values I have stated above (i.e. accountability, transparency and openness) places on them an obligation to justify their decisions and that the reasons for those decisions must be recorded and if required, be given to those affected by their decisions because one can only account for one’s decision be giving reasons for the decision. The purposes for giving reasons for one’s decision were articulated by Lawrence Baxter[22] as follows:

> 'In the first place, a duty to give reasons entails a duty to *rationalize* the decision. Reasons therefore help to structure the exercise of discretion, and the necessity of explaining why a decision is reached requires one to address one's mind to the decisional referents which ought to be taken into account. Secondly, furnishing reasons satisfies an important desire on the part of the affected individual to know why a decision was reached. This is not only fair: it is also conducive to public confidence in the administrative decision-making process. Thirdly — and probably a major reason for the reluctance to give reasons —

22 *Administrative Law* (1984) at 228.

> rational criticism of a decision may only be made when the reasons for it are known. This subjects the administration to public scrutiny and it also provides an important basis for appeal or review. Finally, reasons may serve a genuine educative purpose, for example where an applicant has been refused on grounds which he is able to correct for the purpose of future applications.

[51] I now return to determine whether the decision to award Tender No. NAC/OPS/35/2013 for the supply, delivery, installation and commissioning of hold baggage, carry-on baggage scanners, metal detectors to the fourth respondent was fair. The objective facts are that nineteen entities (I will refer to these entities as the tenderers) submitted offers to supply the goods sought by the Company. Of the nineteen tenderers that offered to deliver the goods sought by the Company only five were shortlisted for evaluation. From the five that were evaluated three tenderers' offers were rejected and from the two remaining the fourth respondent's offer was accepted. Other objective facts are that:

(a) The Company informed the fourth respondent on 3 March 2014 that its offer was accepted.

(b) The Company did not communicate its decision to accept the fourth respondent's offer to any of the other tenderers.

(d) During September 2014 the applicant requested the Company to provide it with reasons why its offer/tender was not accepted.

(e) The Company did not give the applicant any reasons for rejecting its offer.

[52] The reasons advanced by the Company for its decision to shortlist only five out of nineteen tenderers are not so clear but they become apparent from the following statement of its chief executive officer Mr El- Kallawi who said:

> 'The applicant was not shortlisted as the user department found that the Astrophysics equipment offered by the fourth respondent was much better than the Rapiscan equipment

which the applicant offered which equipment would also only be available in the course 2014 and hence could not be tested for the purposes of evaluating it. All tenders based on Rapiscan equipment were excluded from further consideration'.

[53] Mr Courage Silombela the Company's Strategic Executive: Projects, IT and Engineering Projects (which department is identified as the user department) deposed to an affidavit confirming, what Mr El-Kallawi said. He said.

'3 …I confirm that my department advised that the Astrophysics Technology was best suited for the operations of Namibia Airports Company…

5 The advice that the Astrophysics Technology was best suited for the company was based on research conducted and the information obtained within the user department…

6 I further accessed the official website of Rapiscan which indicated that whereas a prototype of the scanner offered had been manufactured, production of the scanner had not yet commenced and that the equipment would only become available to the market during the course of 2014.

7 I conveyed the above observations to the tender board committee as reflected on annexure "C" to annexure "FS19".'

[54] The reasons advanced by the Company obfuscate rather than clarify the rationale behind the decision to award the tender to the fourth respondent. I say so for the following reasons firstly, Mr. El- Kallawi's statement that the equipment offered by the fourth respondent was much better than the Rapiscan equipment is misleading. Mr. Silombela never said that the equipment offered by the fourth respondent is much better than the Rapiscan equipment. Mr. Silombela stated that the equipment offered by the fourth respondent is best suited for the Namibia Airports Company's operations. Secondly Mr. Silombela tells us that his advice was based 'on research conducted and the information obtained within the user department', but he does not tell the court who conducted the *'research'* and what it is that was '*researched*', and when the '*research'* was conducted.

[55] Thirdly Annexure ‘C’ to annexure “FS19” to which Mr. Silombela refer does not exist. Annexure ‘FS19’ constitutes the submission to the Namibia Airports Company with respect to the award of Tender No. NAC/OPS/35/2013 for the supply, delivery, installation and commissioning of hold baggage, carry-on baggage scanners, metal detectors. As I have indicated above to that submission were attached four annexures marked as Annexures 1 to 4. In so far as Mr. Silombela equates or refers to annexure 3 as “C” that annexure does also not bear out that he advised the Tender Committee or the Board to disqualify all the tenderers who offered Rapiscan equipment. In Annexure 3 to the submission to the Board Mr. Silombela states the following:

> ‘I have managed to carry out a mini research about:
> - The scanners;
> - What are DCA minimum requirements;
> - What our shortlisted tenderers have offered;
> - The comparison of the two shortlisted companies, Namely IBB and CSS Security.
>
> Findings (scanners)
>
> According to my research there are no scanners [Types] that have been discontinued, but rather they have been revamped and upgraded to meet the minimum international standards thus the European Union (EU) or Transport Safety Administration (TSA) specification.
>
> The following brands are still in the market and meet DCA, EU and TSA requirements:
>
> [The submission then mention the following scanner brands]
>
> Rapiscan systems, Smith Heimann, Astrophysics, L3 and Nuctech.’

[56] The tender document which outlined the process to be followed when evaluating the offers received (I have quoted section 24 of that document above) states that the Company is the sole adjudicator of the offers received and that it will evaluate each tenderer’s conformance in accordance with the Tender Criteria, Conditions, Administrative Requirements and Specifications outlined in the tender document. The company does not

tell us that it followed what it said is the process of evaluating the offers received. It is clear from what I have stated in the foregoing paragraphs that, it is Mr. Silombela who without reason disqualified fourteen tenderers. I say without reason because in his own words the Rapiscan scanners were still in the market and met the minimum international standards and specifications set by the Department of Civil Aviation, the European Union (EU) or Transport Safety Administration (TSA). There is no logical and rational reason advanced by the Company why it did not considered the offers by the other fourteen tenderers. The inevitable conclusion is that the Company acted capriciously and irrationally when it failed to consider or disqualified the offers of the fourteen tenderers this include the applicant's tender.

[57] I accordingly find that the decision by the Company which is capricious and irrational cannot be fair. The Company's decision to award the tender to the fourth respondent was thus not fair and it was in contravention of Article 18 of the Namibian Constitution and amounts to an unlawful administrative act. The Board accordingly took a decision based on an irregular procedure and invalid recommendation and the decision to award the tender to fourth respondent is accordingly unlawful and invalid at the outset. Having found that the procedures followed in the award of the tender were unlawful and irregular I find it unnecessary to consider the other grounds of review, but that does not necessarily mean that they are without merits.

The appropriate remedy.

[58] My finding that the board acted unlawfully and irregularly is unfortunately not the end of the matter. Mr. Frank who appeared for the second respondent urged me to fully consider the consequences of setting aside the award of the tender. Mr. El- Kallawi in his answering affidavit contended that on 29 August 2014 the agreement between the Company and fourth respondent was signed. He further stated that at the time when this application was launched 50% of the purchase price was already paid and the balance which became due in the meantime has also since been paid. The contract has thus been fully performed.

[59] Mr. El- Kallawi further stated that the equipment was loaded on a vessel in the United States of America on 15 January 2015 and arrived in Namibia towards the end of that month. The equipment was installed and commissioned at all airports for which it was procured except at Walvis Bay where a new terminal was still being constructed. Once the construction was completed the equipment for Walvis Bay would be installed and commissioned. He therefore implored the court not to set aside the award of the tender at the stage when it had been fully performed for it will be prejudicial to the Company and a setting aside of the tender will simply be to 'assuage the hurt feelings of applicant'.

[60] I must at the outset send out a word of caution to Mr. El-Kallawi and any other administrative officer who labours under the impression that those who approach courts to protect their fundamental rights do so to 'assuage their hurt feelings'. What administrative officers must always keep in mind is that the democratic order which we accepted in 1990 came at enormous cost both in terms of human and material resources. The values of accountability, integrity, transparency and openness expounded in the Constitution must be guarded and protected at all cost less we again slip back to the era of authoritarianism. The collapse of the rule of law in any country is the birth to anarchy. The Rule of law is a cornerstone of the existence of any democratic government and should be proudly guarded and protected and this court will just do that. It is in that spirit of a commitment to democracy, that the late Mahomed AJA (as he then was) in *Ex parte Attorney General: in re Corporal Punishment*[23] he said:

> 'The Namibian Constitution seeks to articulate the aspirations and values of the new Namibian nation following upon independence. It expresses the commitment of the Namibian people to the creation of a democratic society based on respect for human dignity, protection of liberty and *the rule of law. Practices and values which are inconsistent with or which might subvert this commitment are vigorously rejected*.' (Italicized and underlined for Emphasis)

[61] The argument 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 be disruptive but it will also be totally impracticable and will give rise to a host of problems not only in relation

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23 1991 NR 178 (SC) at 179.

to a new tender process but also in relation to the work already performed (i.e. the equipment delivered and installed at the three different airports and the price paid). In the unreported matter of *Centani Investment CC v Namibian Ports Authority (NAMPORT) & Another.*[24] I quoted with approval from the case of *Chairperson, Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others*[25] the statement of Scott, JA where he said:

> '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 minimizing injustice when legality and certainty collide.'

[62] 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 Namibian 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

24 A 247/2011) [2013] NAHCMD 235 (05 August 2013).

252008 (2) SA 638 (SCA) at 650.

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}

[63] 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*[26] the Supreme Court of Appeal in South Africa pointed out that the difficulty that is presented by invalid

262004 (6) SA 222 (SCA).

administrative acts, is that they often have been acted upon by the time they are brought under review. Jafta, JA articulated the difficulty as follows[27]:

> '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.'

[64] Those are exactly the same difficulties that are confronting me in this matter. In this case the scanning equipment has already been delivered, installed and paid for and has been used by the Company for approximately six months now. If I were to set aside the tender at this juncture thus rendering the contract between the Company and the fourth respondent void that will surely spell catastrophy not only for the Company but also for fourth respondent. I can do no better than to echo the words of Scott. J A in the *Sapela* matter[28] 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."

[65] In the *Millenium Waste* case[29] 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*.'

27In 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].

28*Supra* footnote 14 at para 29.

29*Supra* footnote 16 at para 22.

[66] I have considered the interests of the second and fourth respondents, 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 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 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.

[67] In this matter the applicant's option to speedily approach this court for relief was greatly hampered by the Company when it withheld information from the applicant. Consequently the scope of granting an effective relief to vindicate the infringed rights has drastically been reduced. In order not to render the finding of this Court academic I take guidance from the words of Theron, AJA[30] 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.'

[68] 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 Company I will grant leave to applicant (if it is so advise) to approach the court and claim from the Company 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.

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

[69] Finally regarding the question of costs. The applicant has substantially succeeded in its application. The normal rule is that the granting of costs is in the discretion of the court and that the costs must follow the course. No reasons have been advanced to me why I must not follow the general a rule. I am further more satisfied that the complexity of this matter justifies the employment of two instructed counsel.

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

1 The application against the first and third respondents is dismissed, but no order as to costs is made.

2 The award of Tender No. NAC/OPS/35/2013 for the supply, delivery, installation and commissioning of hold baggage, carry-on baggage scanners, metal detectors to the fourth respondent is unlawful and irregular, but is not set aside.

3 The applicant is granted leave to, (if so advised) institute an action for damages against the Namibia Airports Company as a result of that Company's infringement of the applicant's right to fair administrative action as envisaged in Article 18 of the Namibian Constitution.

4 That the second respondent and the fourth respondent must pay the applicant's costs of the review application, which costs include the costs of one instructing and two instructed counsel.

SFI Ueitele
Judge

APPEARANCES

APPLICANT:	Mr. Tötemeyer R, SC assisted by Mr. Obbes D. Instructed by ENSafrica, Windhoek
FIRST TO THIRD RESPONDENT:	Frank, T, SC assisted by Phatella T Instructed by Ellis Shilengudwa Inc, Windhoek
FOURTH RESPONDENT	Mr. Corbett A, SC assisted by Akwenda S Instructed by Dr Weder, Kauta & Hoveka Inc, Windhoek