

REPUBLIC OF NAMIBIA



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT**

Case no: A 349/2014

In the matter between:

**PAMO TRADING ENTERPRISES CLOSE
CORPORATION
CIRCLE HOSPITALITY SERVICES
(PROPRIETARY) LIMITED**

1st APPLICANT

2nd APPLICANT

and

**CHAIRPERSON OF THE TENDER BOARD
OF NAMIBIA
MINISTER OF EDUCATION
PRIME MINISTER OF THE REPUBLIC OF
NAMIBIA
E NAMIBIA.COM CC
KUNENE CATERING SERVICES (PTY) LTD
OMAUNGU CATERERS CC
ENM OUTSOURCEING SOLUTION CC
JOHN & PENNY GROUP (PTY) LTD
OZONKONO INVESTMENTS CC
QUIVER TREE INVESTMENT TWO SIX CC
SHERVIAN INVESTMENTS CC
KUVARE TRADING ENTERPRISES CC**

1st RESPONDENT

2nd RESPONDENT

3rd RESPONDENT

4th RESPONDENT

5th RESPONDENT

6th RESPONDENT

7th RESPONDENT

8th RESPONDENT

9th RESPONDENT

10th RESPONDENT

11th RESPONDENT

12th RESPONDENT

KARLOS CATERING SERVICES CC	13th RESPONDENT
ALFA INVESTMENT CC	14th RESPONDENT
ANKER BAY INVESTMENTS (PTY) LTD	15th RESPONDENT
PENA MANUFACTURERS CC	16th RESPONDENT
MBEUMUNA TRADING CENTRE CC	17th RESPONDENT
UANOPAUA TRADING CENTRE CC	18th RESPONDENT
LIZE & LOLA'S KITCHEN	19th RESPONDENT
JJF INVESTMENTS	20th RESPONDENT
MAGNETIZE INVESTMENTS CC	21st RESPONDENT
ROCKHARD INVESTMENTS (PTY) LTD	22nd RESPONDENT
EKWAO INVESTMENTS (PTY) LTD & TONA	
TRADE HOLDINGS CC J.V.	23rd RESPONDENT
CLOUDS TRADING ENTERPRISES CC	24th RESPONDENT
NDAFI TRADING & INVESTMENT CC	25th RESPONDENT
TERIMA INVESTMENTS CC	26th RESPONDENT
OKAGUMBO INVESTMENT CC	27th RESPONDENT
HALUTUSANE INVESTMENT CC	28th RESPONDENT
OMAHEKE CATERING SERVICES CC	29th RESPONDENT
DONTRE INVESTMENTS CC	30th RESPONDENT
THE CHEFS PALACE J/V EDHIYA	
INVESTMENTS CC	31st RESPONDENT
SEAL CATERERS (PTY) LTD	32nd RESPONDENT
NEW SUCCESS INVESTMENTS CC	33rd RESPONDENT
SPARROW INVESTMENTS CC	34th RESPONDENT
JORMOS INVESTMENTS CC	35th RESPONDENT
EKWAKUTI TRADING CC	36th RESPONDENT
KOCK'S TRADING ENTERPRISE CC	37th RESPONDENT
JACQUIE'S CLEANING & CATERING CC	38th RESPONDENT
VEETA CATERING & CLEANING SERVICES	39th RESPONDENT
ATLANTIC CATERING SOLUTIONS (PTY) LTD	40th RESPONDENT
ATLANTIC FOOD SERVICES (PTY) LTD	41st RESPONDENT
WETU CATERING	42nd RESPONDENT
INTERNATIONAL FACILITIES SERVICES	
OPERATIONS (PTY) LTD	43rd RESPONDENT
CROWN CATERERS (PTY) LTD	44th RESPONDENT

MD GENERAL DEALER SERVICES	45th RESPONDENT
UNIFOODS CATERING SERVICES	46th RESPONDENT
ONYOFI CATERING SUPPLIES CC	47th RESPONDENT
CELESTIAL INVESTMENT CC	48th RESPONDENT
WINDHOEK FOOD ENTERPRISES	49th RESPONDENT
OSHILONGO INVESTMENTS CC	50th RESPONDENT
NEPTUNE INVESTMENT (PTY) LTD	51st RESPONDENT
PLATINUM INVESTMENT CC	52nd RESPONDENT
TRADING ENTERPRISE CC	53rd RESPONDENT
TULIPAMWE CATERING SERVICES CC	54th RESPONDENT
OMHALANGA MILLS CC	55th RESPONDENT
INDEPENDENCE CATERERS NAMIBIA (PTY) LTD	56th RESPONDENT
GOMA FOODS SERVICES (PTY) LTD	57th RESPONDENT
TULELA ENTERPRISE CC	58th RESPONDENT
VASHITA CATERING SERVICES CC	59th RESPONDENT
M & M INVESTMENT HOLDINGS (PTY) LTD	60th RESPONDENT
OVAKVATJIVI TRADING ENTERPRISES CC	61st RESPONDENT
NUTRIFOODS (PTY) LTD	62nd RESPONDENT
OASES GENERAL DEALERS CC	63rd RESPONDENT
RENDES-VOUS INVESTMENT CC	64th RESPONDENT
TUYENI KUMWE FOOD AND COMMODITY DISTRIBUTORS CC	65th RESPONDENT
ALSIM INVESTMENT CC	66th RESPONDENT
ESSENTIAL GREEN INVESTMENT CC	67th RESPONDENT
PROTRACTOR INVESTMENTS (PTY) LTD	68th RESPONDENT
JOEDILA INVESTMENTS CC	69th RESPONDENT
LIZAPO INVESTMENTS CC	70th RESPONDENT
NOKOKURE INVESTMENT CC	71st RESPONDENT
SOUTHER DEBT COLLECTORS CC	72nd RESPONDENT
JACKY SELFHELP INVESTMENTS CC	73rd RESPONDENT
NAMIBIA CATTLE COUNTRY FOOD SERVICES (PTY) LTD	74th RESPONDENT
KAZA FOOD SERVICES (PTY) LTD	75th RESPONDENT
OMEGA CONSTRUCTION t/a DESTINY HOTELS	76th RESPONDENT

TOVARISCH INVESTMENTS CC	77 th RESPONDENT
B.P.I. SUPPLIES CC	78 th RESPONDENT
OTUZEMBA CATERING SERVICES (PTY) LTD	79 th RESPONDENT
MAHOMO CATERERS & CLEANING SERVICES CC	80 th RESPONDENT
TYETU TRADING ENTERPRISES CC	81 st RESPONDENT
ROMAN DYNAMIC SERVICES AND SUPPLIES CC	82 nd RESPONDENT
HARITAGE CATERERS (PTY) LTD	83 rd RESPONDENT
OKG FOOD SERVICES (PTY) LTD	84 th RESPONDENT
NAMIBIA WORK CREATION ENTERPRISE CC	85 th RESPONDENT
PATRIOT GENERAL SERVICES (PTY) LTD	86 th RESPONDENT
PISCES INVESTMENT HOLDINGS NUMBER THIRTY TWO CC	87 th RESPONDENT
XANTIUM TRADING SERVICES (PTY) LTD	88 th RESPONDENT
NAMIBIAN FOOD FACILITY SERVICES (PTY) LTD	89 th RESPONDENT
SUPREME CATERING (PTY) LTD	90 th RESPONDENT
TSEPO CATERERS (PTY) LTD	91 st RESPONDENT

Neutral citation: *Pamo Trading Enterprises CC v Chairperson of the Tender Board of Namibia (A 349/2014) [2017] NAHCMD 268 (18 September 2017)*

Coram: UEITELE, J

Heard: 23 November 2015

Delivered: 18 September 2017

Flynote: *Administrative Law* – Procedural fairness-Whether the Tender Board acted fairly when it cancelled the tender – Tender Board entitled to cancel the tender without affording tenderers an opportunity to be heard – Allegations not leveled against tenderers.

Administrative Law – Lawfulness – *Functus Officio*-Whether the Tender Board acted unlawful when it cancelled the tender – Decision of the Board not communicated to tenderers – Tender Board not *functus officio*.

Summary: The Tender Board invited interested parties to submit tenders for the provision of catering services to Government school hostels for 8 regions. 88 interested parties including the two applicants and the fourth to the 91st respondents submitted their tenders.

After the Tender Board accepted recommendations from the Ministry of Education as to which parties were successful, the Permanent Secretary for the Ministry of Education requested the Tender Board to cancel the tender for catering services. The Board acceded to the request and cancelled the tender. The applicants were aggrieved by the decision of the Tender Board to cancel the tender, and consequently approached this Court on the ground that they were not given an opportunity to be heard before the Tender Board decided to cancel the tender and secondly that the Tender Board was *functus officio*.

Held that due to the impropriety and corruption that marred the tender evaluation process, the Tender Board did not act unfairly when it canceled the tender without affording the applicants an opportunity to be heard.

Held further that due to the non-communication of the outcome of the tender award to any of the tenderers, the Tender Board was not *functus officio*. The reasons advanced by the Tender Board for the cancellation of the tender were reasonable.

Held that the applicants' application is dismissed.

ORDER

1. The applicants' application is dismissed.
2. The applicants must pay the respondents' costs. In respect of the 1st to the 3rd respondents the costs include the costs of two legal practitioners.

JUDGMENT

UEITELE, J

Introduction

[1] On 23 November 2015 (that is, approximately 22 months ago) I heard arguments in this matter. At the conclusion of hearing the review application on 23 November 2015 I promised to deliver judgment not later than six months from that date (that would have been around May 2016). I have unfortunately failed to keep to my promise and commitment. I must confess that whatever excuse I have for the failure to keep to the promise I made to the parties, it is unfair to parties who approached court to wait for more than six months for the pronouncement by the court on their dispute. I therefore unreservedly and sincerely apologize to all the parties in this matter for the delay in delivering this judgment.

[2] The first applicant in this matter is Pamo Trading Enterprises CC, a close corporation incorporated in accordance with the Close Corporations Act, 1988.¹ The second applicant is Circle Hospitality Services (Pty) Ltd, a private company incorporated in accordance with the Company Laws of the Republic of Namibia. I will, in this judgment, refer to both first and second applicants collectively as the 'applicants' except where the context requires of me to refer to them separately.

[3] The first respondent is the Chairperson of the Tender Board of Namibia which was established in terms of s 2 of the Tender Board Act, 1996.² (I will, in this judgment refer to the first respondent as 'the Tender Board').The affidavit of the first respondent was deposed to by Ms. Erica Shafudah who is the Chairperson of the Tender Board of Namibia.

¹ (Act No. 26 of 1988).

² (Act No. 16 of 1996).

[4] The second respondent is the Minister of Education and the third respondent is the Prime Minister of the Republic of Namibia. (I will in this judgment refer to the second respondent as 'the Minister and to the third respondent as Prime Minister and where I need to collectively refer to the first three respondents I will refer to them as the 'state parties'). The fourth to the 91st respondents are all participants in the tender relevant to this application. (I will in this judgment refer to these respondents collectively as 'the tenderers' except where the context requires of me to refer to a tenderer separately, in that event I will refer to the tenderer by its name).

The Background to this application

[5] I find it appropriate to, before I deal with the application for review, briefly give a background of the events that led to this application. The background facts are as follows: On 4 March 2014 the Tender Board, in accordance with its mandate³, invited (by an advertisement in the local printed media) interested parties to submit tenders for the provision of catering services to Government school hostels for the period of 1 June 2014 to 31 May 2019 in 8 catering regions. The tender was issued under Tender No. M9-11/2014. The closing date of the tender was 1 April 2014. (I will, in this judgment, except where the context requires me to do otherwise, refer to the tender relating to the provision of catering services to Government school hostels simply as 'the tender').

[6] By the closing date (that is, on 1 April 2014) 88 interested parties (this include the two applicants and the fourth to the 91st respondents) submitted their tenders, each of the tenders submitted identified the relevant catering region in respect of which it submitted its tender. The first process of evaluation of the competing tenders was

³ Section 7 of the Tender Board Act, 1996 sets out the functions of the Tender Board; That section amongst others reads as follows:

'7 Powers and Functions of Board

- (1) Unless otherwise provided in this Act or any other law, the Board shall be responsible for the procurement of goods and services for the Government, and, subject to the provisions of any other Act of Parliament, for the arrangement of the letting or hiring of anything or the acquisition or granting of any right for or on behalf of the Government, and for the disposal of Government property, and may for that purpose-
- (a) on behalf of the Government conclude an agreement with any person within or outside Namibia for the furnishing of goods or services to the Government or for the letting or hiring of anything or the acquisition or granting of any right for or on behalf of the Government or for the disposal of Government property;
 - (b) with a view to conclude an agreement contemplated in paragraph (a), invite tenders and determine the manner in which and the conditions subject to which such tenders shall be submitted...;' (My underlining)

undertaken by the Ministerial Tender Evaluation Committee of the Department of Education (I will in this judgment refer to it as the 'Evaluation Committee') which is a committee consisting of officials from the Ministry of Education.

[7] On 15 July 2014 the Evaluation Committee made a written recommendation to the Tender Board for the award of the tender. On 15 August 2014 the Tender Board held a meeting to consider various submissions, including recommendations by the Evaluation Committee in respect of tender number M9-11/2014. At that meeting the Tender Board considered the recommendations of the Evaluation Committee and resolved not to accept those recommendations but to remit the tenders back to the Evaluation Committee for further consideration in the light of concerns that the Board had raised.

[8] The Evaluation Committee in accordance with the directions of the Tender Board reconsidered the competing tenders. After re-consideration the Evaluation Committee, on 29 September 2014, for the second time made recommendations to the Tender Board for the award of the tender. On 2 October 2014 the Tender Board convened to consider various submissions including the second time recommendations from the Evaluation Committee. The outcome of the re - evaluation and the Tender Board's deliberations was that the Tender Board accepted the Evaluation Committee's recommendations, which included that the applicants were the successful tenderers for the Khomas and Otjozondjupa regions.

[9] On 8 October 2014, the Permanent Secretary of the Ministry of Education addressed a letter to the Chairperson of the Tender Board requesting the Tender Board to cancel the entire food tender. The letter by the Permanent Secretary amongst other things reads as follows:

'I am instructed by the Minister of Education, Honorable David Namwandi to request the Tender Board of Namibia to cancel the above Tender and to re-advertise it as soon as possible. The reason for the request is due to endless criticism which has prompted the political leadership of the Ministry to request its cancellation. This will be prudent and in the best interest of the Ministry, the children, and that of the entire Nation to request cancellation and re advertisement.

The support and cooperation of the Tender Board will be highly appreciate in facilitating this request.'

[10] The Chairperson of the Tender Board replied to that letter (i.e. the letter dated 8 October 2014 by the Permanent Secretary) informing the Permanent Secretary to put the request for the cancellation in the standard form for submissions to the Tender Board. The Permanent Secretary of the Ministry of Education as informed by the Chairperson of the Tender Board prepared a submission, requesting the cancellation of tender number M9-11/2014, in the standard form for submissions to the Tender Board and submitted it to the Tender Board.

[11] On 10 October 2014 an article appeared in a weekly newspaper, the *Confidante*, in which it was alleged that the Permanent Secretary of the Ministry of Education was improperly involved in the allocation of a tender to a company in which his wife had an interest without having declared this to the Tender Board. This tender was allegedly for N\$47 million in respect of one of the eight geographical regions for which the tender was submitted, namely the Omaheke Region. On 10 and 13 October 2014 further articles appeared in the '*New Era*' and the '*Die Republikein*' newspapers, in which the essence of the article in the *Confidante* was repeated.

[12] On 13 October 2014, the Tender Board held a meeting at which meeting it amongst other things discussed the request by the Permanent Secretary of the Ministry of Education to cancel tender number M9-11/2014. At that meeting the Tender Board resolved to approve the cancellation of Tender number M9-11/2014. On 15 October 2014 the Secretary to the Tender Board addressed a letter to all the 88 tenderers informing them of the cancellation of tender number M9-11/2014.

[13] On 23 October 2014 the applicants' legal practitioners addressed a letter to the Chairperson of the Tender Board, asserting that the applicants had been prejudiced by the cancellation and had not been consulted on that issue. The letter required the Tender Board to furnish them with the minutes of all meetings where the tender was discussed 'to enable us to responsibly advise our clients with respect to their rights'. The applicants conceded in the letter that neither the Tender Board Act, 1996 nor the regulations promulgated under it made it compulsory for the Tender Board to make available the documents in question but they argued that their right to acquire the documents arose by virtue of Arts 12 and 18 of the Constitution (which respectively entrench their rights to a fair trial and to fair administrative justice).

[14] When the Tender Board declined to provide the requested minutes, the applicants, on 5 November 2014, launched an urgent application and set it down for hearing on 10 November 2014, but I only heard that application on 14 November 2014. In the notice of motion, the respondents not only sought the minutes of meetings where the tender was discussed but also copies of the mechanical recordings of those meetings as well as handwritten notes from which the minutes were compiled, a copy of each document which served before the Tender Board and the attendance list for each meeting.

[15] The Tender Board opposed the application and filed an answering affidavit prior to the hearing. The Board essentially contended that the applicants were not entitled to pre-litigation discovery and that they had an alternative remedy in the form of a review. As I have indicated above I heard the application on Friday, 14 November 2014 and on that day I ordered the Tender Board to provide a copy of the minutes of the meeting of 13 October 2014 to the applicants and I also ordered the Tender Board to pay the applicants' costs.⁴

[16] Despite the court order the respondent refused to produce the minutes. On 27 November 2014 the Chairperson of the Tender Board confirmed that the Board would not comply with the court order of 14 November 2014 pending the outcome of their appeal to the Supreme Court and that it would also not proceed to re-advertise and finalize the Tender afresh by end December 2014, the Chairperson undertook to await the applicants to file the proposed application for review.

[17] On 12 December 2014 the applicants, aggrieved by the cancellation of the tender relating to the provision of catering services to Government school hostels for the period of 1 June 2014 to 31 May 2019, approached this Court amongst other things seeking the following relief:

'1. Reviewing and correcting or setting aside the decision by the Tender Board of Namibia, communicated to the applicants on 15 October 2014, to cancel tender number M9-11/2014 for the provision of catering services to Government school hostels for the period of 1 June 2014 to 31 May 2019 ('the tender').

⁴ The Tender Board appealed against that order and the Supreme Court on 16 November 2016 reversed the order. The case is reported as *Chairperson of the Tender Board of Namibia and Others, United Africa Group (Pty) Ltd v Pamo Trading Enterprises CC*. 2017 (1) NR 1.

2. Directing the first or second respondent to enter into agreements, as contemplated in section 16 (2) of the Tender Board of Namibia Act, with the first and second applicants, in respect of the Khomas and Otjozondjupa catering regions respectively awarded to them on 2 October 2014 by the tender board, within 7 days.

3. Declaring that the agreements entered into by the first and second respondents with service providers, to extend catering contracts originally concluded after the service providers successfully tendered to provide those services as alluded to in paragraphs 25 to 26 of the answering affidavits delivered on behalf of the affidavit delivered on behalf of the first to third respondents on 10 June 2015, are unlawful as they are ultra vires the Tender Board of Namibia Act.

4. Interdicting the first and second respondents from continuing to implement the extended catering contracts referred to in paragraphs 25 to 26 of the answering affidavit delivered on behalf the first to third respondents on 10 June 2015.

5. Cost of suit against those respondents opposing the application, jointly and severally, if more than one opposes.'

[18] The state parties, on 25 January 2015 indicated that they will oppose the application. The 6th, 32nd, 56th, 62nd and 83rd respondents, on 9 February 2015 indicated that they will also oppose the application and they furthermore filed a 'conditional counter application'. The 74th respondent indicated its opposition to the application only on 5 March 2015, whilst the 54th respondent only noted its opposition to the application on 16 April 2015. Having briefly set out the background to the application I will now proceed to set out the basis on which the applicants are impugning the Tender Board's decision to cancel Tender No. M9-11/2014 and the basis on which the Tender Board opposes the application.

The basis on which the applicant seeks to impugn the decision by the tender board and the grounds on which the Tender Board opposes the application

[19] The applicants base their challenge of the decision by the Tender Board to cancel the tender for the provision of catering services to government school hostels principally on two grounds. The first ground is that the Tender Board allegedly did not act fairly, in that it failed to afford them an opportunity to be heard before it decided to cancel Tender No. M9-11/2014. The second ground is that the Tender Board allegedly

did not have the authority, on the basis of the *functus officio* principle, to cancel the entire tender and even if it did, the reasons it advanced did not entitle it to cancel the tender.

[20] The State parties oppose the application on the basis that, in light of the admission by the Permanent Secretary of the Ministry of Education of the conflict of interests on the part of staff members in the Ministry Education who were involved in the evaluation of the tenders, the Tender Board was entitled to cancel the tender without affording the tenderers an opportunity to be heard. These respondents furthermore oppose the application on the ground that the decision of the Tender Board to award the tenders was not communicated to the tenderers and as such no final decision came into being and that the *functus officio* principle was therefore not applicable.

[21] The 54th respondent opposes the application also on the ground that the Tender Board did not communicate to any of the tenderers that its tender had been accepted. The 74th respondent opposes the application on the ground that the Tender Board is empowered by s 15 of the Tender Board Act, 1996 and Regulation 13(1)(c)(i) and (ii) of the regulations promulgated under the Tender Board Act, 1996 to cancel a tender.

[22] The 6th, 32nd, 56th, 62nd and 83rd respondents, withdrew their opposition to the relief sought in paragraph 1 (that is, the review and setting aside of the cancellation of the tender) of the applicants' notice of motion, but persisted with their opposition to the relief sought in paragraphs 2, 3 and 4 of the applicants' notice of motion. At the hearing of the application the applicants indicated that, in view of the fact that the Tender Board undertook not to proceed with the re advertisement of the tender, they will abandon the relief sought in prayer 4 of their notice of motion.

[23] It thus follows that the 6th, 32nd, 56th, 62nd and 83 respondents' opposition is only confined to the relief sought in prayer 2 (that is, the order seeking to compel the Tender Board to conclude agreements with the tenderers that it has approved at its meeting of 2 October 2014) and prayer 3 (that is, the order seeking a declaration that the decision of the Tender Board to extend the contracts of the service providers is unlawful). In respect of prayer 2 these respondents oppose that relief on the ground that if the relief sought in prayer 1 is granted the Court must refer the matter back to the Tender Board

and they oppose the relief sought in prayer 3 on the ground that s 16(2) of the Tender Board Act, 1996 empowers the Tender Board to extend the agreements.

Issues for decision

[24] I am of the view that the following questions arise for decision:

- (a) Was the decision by the Tender Board to cancel the tender taken unlawfully, either because a fair process was not followed, or because the Tender Board was *functus officio*;
- (b) If the answer to the questions posed in paragraph (a) are in the affirmative can the court compel the Tender Board to conclude agreements with the applicants and declare the extension of the contracts of the current service providers invalid.

I will now proceed to consider each of these questions.

The lawfulness of the Tender Board's decision to cancel Tender No. M9-11/2014

Administrative action

[25] The starting point must be a consideration of whether the tender process and in particular the cancelation of the tender constitute '*administrative action*' under the Constitution, entitling the applicants to a lawful and procedurally fair process and outcome. Despite several decisions of the Supreme Court and this Court⁵ applying the Constitution's administrative justice provisions to governmental tender processes Mr Namandje counsel for the state parties asserted the contrary. In a note that Mr Namandje submitted (with the leave of Court) after oral arguments in this case were heard, in which note he relied on the South African Supreme Court of Appeal case of

⁵ *Petronet International Ltd and Others v Minister of Mines and Energy and Others* 2012 (2) NR 781 (SC) paras [33] and [34]; *Disposable Medical Products (Pty) Ltd v The Tender Board of Namibia and Others* 1997 NR 129 (HC); *Arandis Power (Pty) Ltd v The President of the Republic of Namibia* (A 26-2016) [2016] NAHCMD 194 (7 July 2016); *Fire Tech Systems CC v Namibia Airports Company Limited* (A 330-2014) [2016] NAHCMD 220 (22 July 2016); *Centani Investment CC v Namibian Ports Authority (NAMPORT) & Another* (A 247/2011) [2013] NAHCMD 235 (05 August 2013).

*City of Tshwane v Nambiti Technologies (Pty) Ltd*⁶ and argued that the cancellation of the tender was not an administrative act.

[26] The brief facts of that case (*City of Tshwane*) are as follows. The City of Tshwane in the ordinary course of its business, under Tender CB204/2012, called for tenders for the supply of certain Information Technology services. Nambiti and various other parties submitted tenders. The tenders were opened on 13 November 2012. Prior to the opening of the tenders (i.e. on 5 November 2012) the City had appointed a certain Otumile, as its group chief information officer. Mr Otumile and his department decided to review the terms of the tender in the light of the needs of the City as he had determined. The results of that review were unfavourable. The review exercise concluded that the tender as published was seeking services inconsistent with the City's needs and for a longer period than the policy of the City permitted. Mr Otumile and his Department's conclusion were reported to the City's Bid Adjudication Committee. The Committee on 7 December 2012 took a decision to cancel tender CB204/2012 and to re-advertise, it with a changed specification addressing the current needs of the City.

[27] On 18 December 2012 a letter was addressed to Nambiti informing it formally of the cancellation of the tender. On 27 December 2012 attorneys representing Nambiti wrote to the City requesting written reasons in terms of s 5(1) of PAJA.⁷ The 'decisions' in respect of which reasons were sought included the decision to cancel tender CB204/2012. The City responded to this request on 18 January 2013. It took the attitude that these were contractual matters and that they did not fall within the category of decisions subject to PAJA.

[28] Nambiti did not accept the response from the City and on 1 March 2013 launched review proceedings directed at challenging the cancellation of tender CB204/2012. The review was heard in the High Court of South Africa, Gauteng Division, Pretoria and on 1 November 2013 judgment was handed down whereby the decision of the City to cancel tender CB204/2012 for the provision of on- and off-[site SAP] support services to the City of Tshwane for a three year period with effect from 1st January 2013 was reviewed and set aside. The City was aggrieved and appealed to the Supreme Court of Appeal. On appeal to the Supreme Court upheld the appeal and dismissed the application. The

⁶ [2016] 1 All SA 332 (SCA); 2016 (2) SA 494 (SCA) (26 November 2015) (20580/2014) 2015 ZASCA 167 (delivered on 26 November 2015).

⁷ Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000) (South Africa).

Supreme Court held that the decision by the City to cancel the tender was not administrative action and was not susceptible to review in terms of PAJA. It said:

[22] PAJA gives effect to the right to just administrative action in s 33 of the Constitution. It provides for judicial review of administrative action. What constitutes administrative action is the subject of a lengthy and somewhat convoluted definition, which was consolidated and abbreviated by Nugent JA in *Grey's Marine*, in the following terms:

“Administrative action means any decision of an administrative nature made . . . under an empowering provision [and] taken . . . by an organ of State, when exercising a power in terms of the Constitution or a provincial constitution, or exercising a public power or performing a public function in terms of any legislation, or [taken by] a natural or juristic person, other than an organ of State, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct external legal effect.”

[23] The Constitutional Court, citing *Grey's Marine* with approval, has broken the definition into seven components, namely that —

“there must be (a) a decision of an administrative nature; (b) by an organ of state or a natural or juristic person; (c) exercising a public power or performing a public function; (d) in terms of any legislation or an empowering provision; (e) that adversely affects rights; (f) that has a direct, external legal effect; and (g) that does not fall under any of the listed exclusions”.

[24] Whether the cancellation of a tender before adjudication is administrative action in terms of these requirements depends on whether it involves a decision of an administrative nature and whether it has direct, external legal effect. I do not think that the decision in this case satisfied either of these criteria.

[25] To determine if action by an organ of State is administrative action requires an analysis of the nature of the action in question and a positive decision that it is of an administrative character. Here the decision related to a matter of procurement. The issue of a tender indicated that the City wished to procure certain services. But its desire to procure them was always provisional. That follows from the terms of the advertisement of the tenders, which contained the *caveat* that 'the lowest or any tender will not necessarily be accepted'. In the standard conditions of tender, which counsel agreed applied to both tenders, clause F.1.5.1 provided even more explicitly that the City 'may cancel the tender process and reject all tender

offers at any time before the formation of a contract'. In cancelling tender CB204/2012 the City was doing no more than exercising a right it reserved to itself not to proceed to procure those particular services on the footing set out in that tender.'

[29] I have difficulties in accepting and applying the reasoning of the Supreme Court of Appeal in the *City of Tshwane* matter to the facts of this case. First the Supreme Court of Appeal's determination of whether the cancellation of the tender is 'administrative act' is based on the definition contained in PAJA which is not applicable in our jurisdiction. Secondly as I have indicated above the Supreme Court of Namibia and this Court have held in a number of cases that the process of governmental tendering is administrative action because the steps that precede the conclusion of contracts by the Tender Board is based on decisions by public officials and is accordingly purely administrative action, and additionally the execution of the contracts involve the spending of public money by a public body in the public interest. Naturally, in such a case subjects are entitled to a just and reasonable procedure.⁸

[30] Third and most importantly, the Supreme Court of Appeal in the *City of Tshwane* matter did not purport to provide a general answer to the question whether a public authority when exercising its power to cancel a tender is in all circumstances not performing an administrative action. Instead, the Court's judgment makes it plain that the answer depends on all the circumstances. The critical passage in the reasoning of Wallis JA is contained in para [25] of that judgment which I have quoted above. In my view the calling of tender under statutory powers cannot be broken into events classifying certain events as exercise of public power and others as exercising purely contractual powers. Tendering is a process that commences with the calling of tenders and concludes with the award and signing of contracts.

[31] Unlike in the *City of Tshwane* matter where the power to cancel a tender was not contained in any statutory provision. In the present case, it is evident that the Tender Board itself dictated the tender conditions. The Tender Board was thus undoubtedly, to borrow from the words of Streicher JA in the case *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others*⁹, 'acting from a position of superiority or authority by virtue of it being a public authority' when it cancelled the

⁸ See the case of *Umfolozzi Transport (Edms) Bpk v Minister van Vervoer en Andere* [1997] 2 B All SA 548 (SCA at 552 - 3).

⁹ 2001 (3) SA 1013 (SCA) at para [18].

tender. I therefore do not agree with Mr Namandje that the cancellation of the tender did not constitute an '*administrative act*'.

The audi claim

[32] Having found that the Tender Board when it cancelled the tender was performing an administrative act, it follows that the Tender Board was burdened with the duty to act fairly. The question that must therefore be answered is whether the Tender Board, when it cancelled the tender, acted fairly. It is now trite that the duty to act fairly is contained in the rules of natural justice which is best described by the two Latin maxims of *audi alteram partem* and *nemo iudex in sua causa*. We are here concerned with the first maxim. The *audi* principle was described in the *South African Roads Board v Johannesburg City Council*¹⁰ as being:

'... a rule of natural justice which comes into play whenever a statute empowers a public official or body to do an act or give a decision prejudicially affecting an individual in his liberty or property or existing rights, or whenever such an individual has a legitimate expectation entitling him to a hearing, unless the statute expressly or by implication indicates the contrary;....'

[33] What does the duty to act fairly demand of the public official or body concerned? O'Regan AJA said that the duty to act fairly is not a rigid principle imposing specific obligations upon administrative bodies and officials in an inflexible, invariable way. It is better understood, as an 'ever-flexible' concept.¹¹ What the duty to act fairly demands of public official was best described by Lord Mustill in the English case of *Doody v Secretary of State for the Home Department and Other Appeals*¹² as follows:

'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 the Courts have explained what is essentially an 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) 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

¹⁰ 1991 (4) SA 1 (A) at 10J-11B .

¹¹ In the case of *Minister of Mines and Energy and Others v Petronet International Ltd and Others* 2012 (2) NR 781 (SC) at para [38].

¹² [1993] 3 All ER 92 (HL) at 106d-h.

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 aspects...'

[34] What is the context in which the decision to cancel the tender was taken? The parties agreed that after the Tender Board had met and resolved on how to award the tender, allegations of corruption and irregularities in the award of the tender surfaced. Because of these allegations of corruption and irregularities the Minister of Education through his Permanent Secretary requested the Tender Board to cancel the tender. The minutes of the Tender Board where the cancellation of the tender was discussed¹³ reveal the following deliberations:

'The Ministry of Education recommended that approval be granted for the tender to be cancelled due to the following reasons:

- Observed lapse of integrity in the way this tender was planned and executed within the Ministry...

The Board raised the following questions with regard to the request for cancellation.

- At what stage during the tender process were the lapses of integrity discovered or observed?
- Whether no schools other than Rukonga Vision School was affected due to the omission of price schedule?
- How many regions or companies were affected by the lapses of integrity? If not all regions or companies affected, can the cancellation be made partially?
- Did the line Ministry conduct an investigation to establish whether the reasons or basis for cancellation are valid or appropriate?
- Why the line Ministry recommended companies that are not 100% percentage Namibian owned companies while it is a disqualifying factor.

The Board opined that there should be other information that were not disclosed to the Board and requested for the Technical person from the line Ministry to clarify reasons for cancellation.

¹³

The Tender Board meeting of 13 October 2014 pp 829-833 of the Review Record.

The technical person clarified the following: the lapses of integrity observed at the Ministry of Education were based on the request by the Honourable Minister of Education and are as follows:

- ❖ The Honourable Minister requested that for the interest of the Nation, the tender must be cancelled.
- ❖ The question of integrity arose because of names of persons linked to companies, and those persons were part of the Evaluation Committee.
- ❖ Officials having interest were requested not to participate in the evaluation, but they participated and did not declare interest.
- ❖ Despite the Honourable Minister's request, the evaluation continued with those officials being part of the Evaluation Committee.

The Board sought clarity of the following:

- ❖ Who is the Chairperson of the Ministerial Tender Committee?
- ❖ Whether the Permanent Secretary chaired any meeting relating to this tender.

The Technical Person informed the Board that he is the Chairperson of the Ministerial Tender Committee and the Permanent Secretary did not chair any meeting with regards to this tender.

With regard to shortcomings in the specifications, he indicated as follows:

- ❖ The Vison Schools have a different menu from other Schools.
- ❖ During the evaluation, the Ministry realized that none of the companies quoted for Vision Schools and this omission applied to all the Visions Schools within the catering regions.

With regard to clause 2.1.5 and 2.1.27 he indicated as follows:

- ❖ The official also indicated that Clause 2.1.5 and 2.1.27 in the specimen Catering Supply Agreement contradicts each other.
- ❖ He further indicated that the Ministry understood that all special schools with a catering region should form part of that catering region but tenderers understood it differently.
- ❖ He also indicated that it was a condition that a tenderer who did not tender for the whole region will be disqualified and none of the tenderers quoted for Vision schools.

With regard to 100% Namibian Owned companies:

- The officials indicated that this tender was restricted to 100% Namibian Registered SME and Namibian Nationals only, but the magnitude of this tender exceeds the threshold of SME and as a result, SMEs could not be recommended although the condition indicated that the tender is restricted to SMEs...'

[35] The applicants have not contradicted these allegations, despite their denial and labelling the allegations by the state parties, as rumours or conjured reasons, no proper dispute of fact is created. Therefore, for purposes of this matter, Ms Shafuda's version must be accepted.¹⁴

[36] What happened in this case is unacceptable and disgraceful. Some officers in the Ministry of Education and who were members of the Evaluation Committee were linked to or associated with some of the tenderers. Despite the request by the then Minister of Education that those officials and members of the Evaluation Committee who are linked to or associated with tenderers must not participate in the evaluation of the tenders, the officials disregarded the request by the Minister and participated in the evaluation of the tenders.

[37] The Ministry's officials' conduct illustrates a complete disregard for the relevant legal prescripts, and an abuse of public authority, to facilitate a desired outcome. The conduct is incompatible with the principles and values enshrined in the Constitution. Furthermore, the Constitution, in Article 18, imposes an obligation on officials to act, fairly, reasonably and lawfully when exercising public power. From the deliberations quoted above, it is clear that the initial evaluation of the tender was not based on a lawful and fair process as enjoined by the Constitution, but certain recommendations were influenced by the corrupt interference and incompetence by officers of the Ministry of Education. There is no doubt in my mind that this is corruption.

[38] In the case of *South African Association of Personal Injury Lawyers v Heath and Others*¹⁵ the South African Supreme Court of appeal said:

¹⁴ See *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E – 635C; *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para 26.

¹⁵ 2001 (1) SA 883 (CC) at para [4].

'Corruption and maladministration are inconsistent with the rule of law and the fundamental values of our Constitution. They undermine the constitutional commitment to human dignity, the achievement of equality and the advancement of human rights and freedoms. They are the antithesis of the open, accountable, democratic government required by the Constitution. If allowed to go unchecked and unpunished they will pose a serious threat to our democratic State.'

[39] I fully agree with the sentiments echoed by the South African Supreme Court of Appeal. In those circumstance I am of the view that the Tender Board was duty bound to cancel the Tender and when it did so without affording the tenderers (this include the first and second applicants) an opportunity to be heard it did not in my view act unfairly, this was so because the allegations of impropriety, corruption and irregularity were not levelled against any of the tenderers but against the officials of the Ministry.

[40] The final argument made by appellants' counsel was that the cancellation of the tender was unreasonable and irrational. I have, in detail, quoted above the deliberations which led to the cancellation of the tender by the Tender Board. A staff member of the Ministry of Education 'confesses' that 'Officials having interest were requested not to participate in the evaluation, but they participated and did not declare their interest' this was not only improper but sheer corruption. I fail to understand how counsel for the applicants could, without putting up facts contradicting the statement by the 'technical person' representing the Ministry at the Tender Board argue that these allegations by the technical person are simply 'rumours' and conjured reasons.

[41] I repeat, the minutes of the meeting of 13 October 2014 of the Tender Board disclose corruption and incompetence on the part of officers in the Ministry of Education. The basis upon which the decision to cancel the tender was made was the corrupt and irregular process followed by the Evaluation Committee and the question this court must answer is whether it was irrational or unreasonable for the Tender Board to have sought to address the situation in the manner it did. On the evidence before me the cancellation of the tender cannot be said to be unreasonable or irrational.

The functus officio claim

[42] Counsel for the applicants argued that by virtue of the *functus officio* principle, a decision to cancel the entire 'food tender' could only be made by the person who is

functus, in circumstances where the Act or regulations authorise such a cancellation. Even in circumstances where the Act or the regulations may permit the same body to set aside its own decision, the act of setting aside may only be performed in the particular circumstances envisaged by the Act or regulations and after compliance with the *audi alteram partem* principle, argued Mr Heathcote.

[43] The Tender Board's decisions of 2 October 2014 to accept the recommendations of the Evaluation Committee and award the tender in respect of the Khomas Region to the first applicant and in respect of the Otjozondjupa region to the second applicant were never communicated to the applicants and neither were they made public in any way. The evidence is clear. Before any letter that would have informed Pamo Trading Enterprises CC, and Circle Hospitality Services (Pty) Ltd of the award of the tenders to them was sent to them allegations of corruption emerged and the Ministry requested the Tender Board to cancel the entire tender.

[44] The significance of the fact that the decisions were not communicated or otherwise made known lies in the fact that the decisions of 2 October 2014 were thus not final. In the matter of *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*¹⁶ the Constitutional Court, in dealing with the President's power to appoint a commission of enquiry, held that the appointment 'only takes place when the President's decision is translated into an overt act, through public notification' and that, prior to this overt act, he was 'entitled to change his mind at any time'. Relying on this judgment Hoexter¹⁷ argues that:

'In general, the *functus officio* doctrine applies only to final decisions, so that a decision is revocable before it becomes final. Finality is a point arrived at when the decision is published, announced or otherwise conveyed to those affected by it.'

[45] Mr Heathcote who appeared for the applicants argued that it is common cause between all the parties that the decision to invite the tenders was made known to all the parties concerned. *Pamo* and *Circle* (the applicants) acted on the invitation and in that sense the decision to invite tenders became final and the Tender Board *functus officio*. I do not agree with Mr. Heathcote, as I have said above in this judgment tendering is not a single event, but it is a process that commences with the invitation by the Tender

¹⁶ 2000 (1) SA 1 (CC) at para 44.

¹⁷ Hoexter, C.2012. *Administrative Law in South Africa* (2nd Ed) at 278.

Board for interested parties to submit tenders and ends with the Tender Board entering into agreements with the parties whose tenders were accepted by the Tender Board.

[46] There is no dispute that the power to accept or refuse to accept a tender vests in Tender Board. In law, the award of a tender only takes place when the Tender Board's decision is translated into an overt act, through written notification to the successful or unsuccessful tenderer.¹⁸ It follows that the Tender Board would have been entitled to change its mind at any time prior to the written notification of the tenderers. I am thus of the view that the Tender Board was not *functus officio* when it cancelled Tender No. M9-11/2014.

[47] In view of the conclusions that I have arrived at, namely that the Tender Board could at any time before it notified the successful tenderers cancel the tender without offending the *functus officio* principle, I find it unnecessary to consider the question of whether or not the Tender Board was, in terms of the Tender Board Act, 1996, empowered to cancel the tender.

Is the extension of the agreements of the service providers' *ultra vires* the powers of the Tender Board?

[48] In prayer 3 of their notice of motion the applicants seek an order declaring the agreements entered into by the Tender Board and the Ministry of Education with service providers (who at the time the tender was cancelled were providing services to Government hostel schools in all 14 regions) to extend the catering contracts as unlawful on the basis that the extensions are *ultra vires* the Tender Board of Namibia Act, 1996.

[49] In her answering affidavit Ms. Shafudah stated that:

'...When the decision was made to cancel the whole tender process following serious allegations of impropriety the first and second respondents extended the catering contracts of

¹⁸ See s16 (1) of the Tender Act, 1996 which provides as follows:

'16 Acceptance of tenders, and entry into force of agreements

(1) The Board shall in every particular case-

- (a) notify the tenderers concerned in writing of the acceptance or rejection of their tenders, as the case may be, and the name of the tenderer whose tender has been accepted by the Board shall be made known to all the other tenderers;
- (b) on the written request of a tenderer, give reasons for the acceptance or rejection of his or her tender.'

the various companies that are currently providing catering services to public schools in all fourteen (14) Regions until a new and fresh tender process is finalized and awards are made. The concerned catering contracts therefore had vested rights until a new tender process is finalized.'

[50] That submission by Ms. Shafudah prompted Mr Heathcote to argue that extension of the catering agreements was unlawful and unconstitutional because the catering contracts that were extended by the Tender Board, lapsed and are legally dead catering contracts. Mr Heathcote, relying on the South African Supreme Court of Appeal case of *Eastern Cape Provincial Government and Others v Contractprops 25 (Pty) Ltd*¹⁹ argued that the Tender Board is transgressing the rule of law on a continuous basis.

[51] He argued that it is common cause that these extensions are done by the Ministry or the Tender Board or both the Ministry and the Tender Board without following the compulsory procedures set out in the Tender Board Act, 1996. There can be no doubt that that Tender Board Act is emphatic in its endeavours to give effect to Article 18 of the Constitution, argued Mr Heathcote. He continued and said:

'In *Eastern Cape* the S.C.A confirmed that any procurement decision by the State is null and void if the provisions of the applicable tender board legislation are not invoked to procure the services. This is contrary to transparency and accountability, which are fundamental principles of the public procurement system created by the Tender Board Act and the broader administrative law system created by the Constitution.'

[52] In my view Mr Heathcote's reliance on the *Eastern Cape* matter is misplaced. I say so for the following reason. The brief facts in the *Eastern Cape* matter were as follows: The Department of Education, Culture and Sport of the Eastern Cape Province as lessee purported to conclude lease agreements for two buildings with Contractprops 25 (Pty) Ltd, as lessor, without the tender board established by the Provincial Tender Board Act (Eastern Cape) 2 of 1994 having arranged the hiring of the premises in terms of s 4(1) of that Act. In June 1996 and without any reference to the Tender Board, the Department of Education, Culture and Sport of the Eastern Cape Province took occupation of the buildings and remained in such occupation for a period of three years and has been paying the rent for those three years.

¹⁹ 2001(4) SA 142 (SCA).

[53] After occupying the buildings for three years the Department of Education, Culture and Sport of the Eastern Cape Province indicated that it no longer needed to occupy the buildings. To that end it gave three months' notice of its intention to terminate the leases. When its right to do so was contested by Contractprops 25 (Pty) Ltd, The Department fell back upon the contention that the lease agreements were void for the reason that the department had no authority to conclude the agreements. The Court held that a lease agreement entered into by the department of the provincial government without the tender board having arranged the hiring of the premises in terms of s 4(1) of the Provincial Tender Board Act (Eastern Cape) 2 of 1994 are invalid.

[54] In this matter, the extended contracts were initially concluded with the approval of the Tender Board and the extensions of the contracts with the existing service providers, were done by the Tender Board. Lack of authority therefore does not arise. The argument that the catering contracts were extended in contravention of the Tender Act is in my view fallacious. The non-extension of the contracts would have disastrous consequences for the learners. I am of the view that in circumstances like the present, The Tender Board was authorised by the Tender Act²⁰ to extend the existing contracts until the earliest practical time that new contracts could be concluded in a fair and reasonable manner.

[55] As to the question of costs no reasons have been advanced as to why the general rule, that costs follow the event must not apply. For the reasons set out in this judgment I make the following orders.

1. The applicants' application is dismissed.
2. The applicants must pay the respondents costs. In respect of the 1st to the 3rd respondents the costs include the costs of two legal practitioners.

²⁰ Section 17 of the Tender Board Act, 1996:

"Exemption from tender procedures

17. (l) If, in respect of the procurement of goods and services for, or the letting or hiring of anything or the acquisition or granting of any right for or on behalf of, or the disposal of property of, the Government - (c) the Board in any particular case for good cause deems it impracticable or inappropriate to invite tenders, the Board need not comply with the provisions of section]]]; and

(2) In the application of subsection (1)(c), the reasons for not inviting tenders shall be kept on record by the Board."

SFI Ueitele
Judge

APPEARANCES

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