

**REPUBLIC OF NAMIBIA**



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

**JUDGMENT**

Case No: HC-MD-CIV-MOT-REV-2017/00135

In the matter between:

**CONSOLIDATED POWER PROJECTS NAMIBIA (PTY) LTD**                      **APPLICANT**

and

<b>NAMIBIA POWER CORPORATION</b>	<b>FIRST RESPONDENT</b>
<b>CHAIRPERSON OF THE BOARD OF DIRECTORS OF THE NAMIBIA POWER CORPORATION N.O</b>	<b>SECOND RESPONDENT</b>
<b>CHAIRPERSON OF THE TENDER BOARD OF NAMIBIA POWER CORPORATION N.O</b>	<b>THIRD RESPONDENT</b>
<b>CENTRAL PROCUREMENT BOARD OF NAMIBIA</b>	<b>FOURTH RESPONDENT</b>
<b>SIEMENS AKTIENGESELLSCHAFT</b>	<b>FIFTH RESPONDENT</b>
<b>GE GRID SOLUTIONS AND RADIAL TRUSS INDUSTRIES (PTY) LTD CONSORTIUM</b>	<b>SIXTH RESPONDENT</b>

**Neutral citation:** *Consolidated Power Projects Namibia (Pty) Ltd v Namibia Power Corporation* (HC-MD-CIV-MOT-REV-2017/00135)  
[2017] NAHCMD 281 (22 September 2017)

**Coram:**        ANGULA DJP  
**Heard:**        15 August 2017  
**Delivered:**   22 September 2017  
**Reasons given:** 6 October 2017

**Flynote:** Motion Proceedings – Interlocutory application in terms of rule 76(6) and (7) of Court – Applicant seeks disclosure of a number of documents, which the applicant alleges are relevant to the decisions sought to be reviewed and set aside in the main review application – Respondents Opposed interlocutory application – Court Ordered; the first, second and third respondents to disclose to the applicant the documents sought.

**Summary:** This is an interlocutory application in which the applicant the seeks an order in terms of rule 76(6)<sup>1</sup> and (7) of Court, for disclosure of a number of documents, which the applicant alleges are relevant to the decisions sought to be reviewed and set aside in the main review application.

The decisions sought to be set aside, concerned the cancellation by the Board Directors of Nampower of Tender NPWR/2016/16 for the construction of the new Masivi and Shiyambi Substations, as communicated to the applicant on 16 February 2017, as well as the cancellation of Tender NPWR/2015/50 for the construction of the new Kunene Substations and the Omatando Substation Extensions, communicated to the applicant on 16 February 2017.

The application is opposed by the first, second and third respondents who raised two points *in limine*; firstly, that the relationship between the applicant and the respondents was contractual (to which the applicant agreed when it decided to submit the tender) as opposed to administrative in nature; therefore the applicant can protect its rights through private law remedies without resorting to review proceedings; and secondly, that the applicant did not exhausted its internal remedies. Both points *in limine* were dismissed.

**Court held:** In order to inquire into the authority of the Board of Nampower to make the decision sought to be set aside, the procedural fairness of the decision to cancel the tender and the substantive fairness to cancel the tender, it was necessary that ‘every scrap of paper throwing light, however indirectly on what the proceedings were, both procedurally and evidentially...’ must be disclosed.

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<sup>1</sup> Rule 76(6) of the High Court

*Court held further:* The respondent's grounds for refusal to disclose documents based on irrelevance and lack of proper identification. This ground lacked merit; that it was not for the respondents to decide what was and what was not relevant; it is not for the court to determine that the document has been sufficiently identified.

*Court held further:* The applicant's request for disclosure in the present proceedings did not constitute a 'fishing expedition' or pre-litigation disclosure as contended by the respondents: it was permissible and perfectly made under rule 76.

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### **ORDER**

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The first, second and third respondents are ordered, to disclose the applicant the documents listed hereunder on or before 13 October 2017:

1. All Tender Evaluation Reports for Tender NPWR 2015/50 and NPWR 2016/16, which had to have been prepared in terms of the first respondent's Tender and Procurement Policy Clause 29, specifically 29.8 (Page 34 of 60).
2. All Tender Board Recommendation Forms (signed by Head of Tender Evaluation team, Chairperson of Tender Board & MD) for Tender NPWR 2015/50 and NPWR 2016/16.
3. Minutes of each NamPower Tender Board Meeting where Tender NPWR 2015 and NPWR 2016/16 was discussed.
4. Minutes of each NamPower Board Tender Committee Meeting where Tender NPWR 2015/50 and NPWR was discussed.
5. 8 February 2017 NamPower Board of Directors Meeting minutes, referred to in discovered 15 February 2017 Board meeting minutes.

6. 13 December 2016 NamPower Board of Directors allegedly resolved to block the award of the two tenders NPWR 2015/50 and NPWR 2016/16 to the applicant, notwithstanding the recommendations from the internal Tender Board to award the tenders to the applicant, allegedly due to a conflict of interest.
7. Documents evidencing each objection raised to and by the NamPower Board of Directors against awarding the tenders NPWR 2015/50 and 2016/16 to the applicant, including but not limited to those raised by Siemens and General Electric, directed to the NamPower Managing Director, the NamPower Tender Board and/or the Nampower Board of directors, about conflict of interest, between the period September 2016 to December 2016.
8. Documents evidencing each action taken by NamPower management, the NamPower Tender Board and/or the NamPower Board of Directors following and/or in response to the objections raised against the award of tenders NPWR 2015/50 and 2016/16 to the applicant.
9. The respondents to make copies of the requested documents available to the applicant for inspection and complying within 10 days.
10. In the event of confidentiality being claimed by the respondents in respect of a specific document, such issue is to be referred to the managing judge for directions.
11. The respondents are to supplement the record filed with the Registrar, within 5 days of having given the applicant access to the requested documents.
12. The respondents are to pay the applicant's costs of this application not limited to N\$20,000, as per rule 32(11), such to include the costs of employing one instructing counsel and two instructed counsel.

13. The matter is postponed to **18 October 2017** at **08h30** for case management conference.

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## JUDGMENT

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ANGULA DJP:

### Introduction

[1] This is an interlocutory application wherein the applicant, in terms of rule 76(6)<sup>2</sup> and (7) of Court, seeks disclosure of a number of documents, which the applicant alleges are relevant to the two decisions sought to be reviewed and set aside in the main review application.

[2] The decisions concerned the cancellation by the Board Directors of Nampower of Tender NPWR/2016/16 for the construction of the new Masivi and Shiyambi Substations, as communicated to the applicant on 16 February 2017, as well as the cancellation of Tender NPWR/2015/50 for the construction of the new Kunene Substations and the Omatando Substation Extensions, communicated to the applicant on 16 February 2017.

[3] The applicant further seeks an order directing the Central Procurement Board of Namibia to consider all the tender bids in respect of the aforesaid tenders and further, that if the Central Procurement Board of Namibia contemplates cancelling the aforesaid tenders, that it be directed to communicate the reasons of such intention to the tenderers and afford them an opportunity to make representations thereon.

[4] The applicant contends that the decisions were taken by an unauthorised body (the Board of Directors instead of the Tender Board) without a preceding

<sup>2</sup> Rule 76(6) of the High Court: "If the applicant believes there are other documents in possession of the respondent, which are relevant to the decision or proceedings sought to be reviewed, he or she must, within 14 days from receiving copies of the record, give notice to the respondent that such further reasonably identified documents must be discovered within five days after the date that notice is delivered to the other party."

recommendations made by the Evaluation Committee to the Tender Board as required by clause 32 of NamPower's Tender and the Procurement Policy, without affording the applicant an opportunity to be heard in circumstances where it was imperative to have done so; without any lawful reason for the decisions; and on the basis of false allegations.

[5] The application is opposed by the first, second and third respondents who in this judgment, are collectively referred to as 'the respondents'.

[6] The applicant seeks disclosure of the following document:

1. All Tender Evaluation Reports for Tender NPWR 2015/50 and NPWR 2016/16, which had to have been prepared in terms of the first respondent's Tender and Procurement Policy Clause 29, specifically 29.8 (Page 34 of 60).

2. All Tender Board Recommendation Forms (signed by Head of Tender Evaluation team, Chairperson of Tender Board & MD for NPWR 2015/50 and NPWR 2016/16).

3. Minutes of each NamPower Tender Board Meeting where Tender NPWR 2015/50 and NPWR 2016/16 was discussed.

4. Minutes of each NamPower Board Tender Committee Meeting where Tender NPWR 2015/50 and NPWR 2016/16 was discussed.

5. 8 February 2017 NamPower Board of Directors Meeting minutes, referred to in discovered 15 February 2017 Board meeting minutes.

6. 13 December 2016 NamPower Board of Directors Meeting minutes when the NamPower Board allegedly resolved to block the award of the two tenders NPWR 2015/50 and NPWR 2016/16 to the applicant, notwithstanding the recommendations from the internal Tender Board to award the tenders to the applicant, allegedly due to a conflict of interest.

7. Documents evidencing each objection raised to and by the NamPower Board of Directors against awarding the tenders NPWR 2015/50 and NPWR 2016/16 to the applicant, including but not limited to those raised by Siemens and General Electric,

directed to the NamPower Managing Director, the NamPower Tender Board and/or the NamPower Board of Directors, and which served before the NamPower Tender Board and/or the NamPower Board of directors, about conflict of interest, between the period September 2016 to December 2016.

8. Documents evidencing each action taken by NamPower management, the NamPower Tender Board and/or the NamPower Board of Directors following and/or in response to the objections raised against the award of tenders NPWR 2015/50 and 2016/16 to the applicant.

9. All minutes, recommendation and presentations and similar documents related to tenders NPWR 2015/50 and NPWR 2016/16, which are not specifically identified here, but which served before the NamPower Tender Board and/or the NamPower Board of Directors when it discussed and/or made decisions regarding tenders NPWR 2015/50 and NPWR 2016/16.

Upon disclosure the applicant wishes in terms of rule 76(7) to inspect and make copies of the documents so disclosed.

### Background

[7] It is necessary to briefly set out the background preceding the launching of this application.

[8] On 9 June the applicant delivered to the respondents a notice in terms of rule 76(6) and (7). In response to the notice the respondents first filed edited minutes of the Board Meeting minutes of 8 February 2017.

[9] On 16 June 2016, the respondents legal practitioners addressed a letter to the applicant's legal practitioners in which it refused to discover the documents listed in the notice asserting inter alia that the documents sought for discovery were 'not relevant' to the decision sought to be reviewed; that the document were 'confidential' by virtue of Nampower Procurement Policy; and finally that the documents were not 'reasonably identified'.

[10] Thereafter on 11 July 2017 the applicant's legal practitioners responded to the respondents' legal practitioner letter of 16 June 2017, in which they drew the respondents' attention to the well-established principles of law pertaining to review proceedings and further highlighted the nature and import of proceedings envisaged in rule 76 of Court. The letter further reiterated and stressed that the respondents' needed to comply with the notice to discover in an endeavour curb costly proceedings.

[11] On 14 July 2017, the respondents' legal practitioners reiterated their earlier stance. The letter further advised that they were in the process to determining whether if any other documents exist pertaining to the decision to cancel the tenders.

[12] A status report was subsequently filed stating inter alia that a dispute arose<sup>3</sup> as to whether further documents should be discovered.

[13] Thereafter the parties appeared in chambers and allocated a date for hearing of arguments on the issue of further discovery.

#### Issue for determination

[14] Falling for determination is therefore whether the applicant is entitled to discovery of the documents listed in the notice in terms of rule 76(6).

#### Scope of application

[15] It might be necessary to record that this application is to be adjudicated strictly with reference to the following documents filed of record:

- (a) the applicant's founding papers in the main proceedings;
- (b) the review record disclosed by the respondents (being extracts of the Board Meeting Minutes of 8 and 15 February 2017);

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<sup>3</sup> Rule 76(8) if a dispute arises as to whether any further documents should be discovered the parties may approach the managing judge in chambers who must give directions for the dispute to be resolved.



- (c) the applicant's notice in terms of rule 76; and
- (d) the status report dated 18 July 2017 and the documents attached thereto.

[16] Mr Heathcote SC assisted by Mr Maasdorp, appeared for the applicant and Mr Shikongo assisted by Ms Miller, appeared for the respondents. Counsel filed extensive heads of arguments for which the court expresses its appreciation.

#### Points in limine

[17] The respondents raised two points in law *in limine*.

[18] The first point *in limine* advanced is that the relationship between the applicant and the respondents was contractual (to which the applicant agreed when it decided to submit the tender) as opposed to administrative in nature; therefore the applicant can protect its rights through private law remedies without resorting to review proceedings; and that the review proceedings gives the applicant an unfair advantage while abusing court process.

[19] The second point *in limine* is that the court is not the correct forum for hearing this review application as section 59(4) of the Public Procurement Act 15 of 2015 ('Procurement Act'), provides that, '[A] bidder or supplier who is aggrieved or claims to have suffered or to be likely to suffer, loss under this Act must exhaust all available remedies under this Act before instituting any judicial action in the High Court'. In the light of that provision, it is accordingly the respondents' contention that applicant did not exhausted its internal remedies.

[20] I must confess that I have an uneasy feeling in dealing with the points *in limine* in this interlocutory application. I would have expected these point to be raised in the main application because if they are upheld they might have unintended consequences on the main application. The respondents chose to raise them now and I have to consider them. The points *in limine* are briefly dealt with in turn before consideration of the merits.

### Administrative action versus contractual relationship

[21] In support of this point *in limine* the respondents submitted that the applicant is a major commercial undertaking, who contracted freely with the respondents; that the applicant can protect its right through private remedies without resorting to a review process; and finally the applicant failed to set out sufficient facts why a review is justified.

[22] The respondents' submissions are based on what was referred to by Damaseb J (as he then was) in the matter of *Open Learning Group Namibia Finance CC v Permanent Secretary of Ministry of Finance & 3 Others*<sup>4</sup> in the course of the judgment at para 109 the court discussed the judgment in *Cape Metropolitan Council v Metro Inspection Services CC and Others* 2001 (3) 1013 (SCA) where the South African Supreme Court of Appeal said the following:

'It is now accepted that Cape Metropolitan

'... establishes the proposition that a public authority's invocation of a power of cancellation in a contract concluded on equal terms with a major commercial undertaking, without any element of superiority or authority deriving from its public position, does not amount to an exercise of public power'. (Per Cameron JA in *Logbro Properties CC v Bedderson NO and Others* 2003 (2) SA 460 (SCA) in para [10].'

The learned Judge however said the following at par 111:

'The decision of the Supreme Court of Appeal in *Logbro* is significant for the following reasons: first, it overrules the conclusion of the majority of the Court in *Mustapha* and confirms the dissenting judgment of Schreiner JA *supra*. Second, it makes clear that Cape Metropolitan is not authority for the general proposition that a public authority empowered by statute to contract may exercise its contractual rights without regard to public duties of fairness. Third, it confirms that Cape Metropolitan is to be confined to its facts (as to which also see *Bullock* at 269). Fourth, it makes clear that, whether or not a public authority's exercise of powers enjoyed under contract renders it subject to the duty to act fairly, will depend on all the circumstances.'

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<sup>4</sup> 2006 (1) NR 275 para 110-118.

The learned judge the concluded at par 116 as follows:

'The drift of authority from the leading South African cases which I have examined establishes that each case must be approached on its facts in determining whether or not a particular decision of a public authority terminating a contract amounts to administrative action and therefore judicial review should avail. I follow that approach in interpreting art 18 of the Namibian Constitution.'

[23] In countering the respondents' foregoing argument, counsel for the applicant referred the court to the judgment of the SCA in *Logbro Properties v Bedderson NO and Others*<sup>5</sup>. The facts in that matter concerned a tendering process for a sale of a property. The Supreme Court of Appeal held *inter alia* that the tender process constituted 'administrative action'. The court stated at p 466 F – G as follows:

'But the argument is flawed. Even if the conditions constituted a contract (a finding not in issue before us, and on which I express no opinion), its provisions did not exhaust the province's duties toward the tenderers. Principles of administrative justice continued to govern that relationship, and the province in exercising its contractual rights in the tender process was obliged to act lawfully, procedurally and fairly. In consequence, some of its contractual rights – such as the entitlement to give no reasons – would necessarily yield before its public duties under the Constitution and any applicable legislation.

[8] This is not to say that the conditions for which the province stipulated in putting out the tender were irrelevant to its subsequent powers. As will appear, such stipulations might bear on the exact ambit of the ever-flexible duty to act fairly that rested on the province. The principles of administrative justice nevertheless framed the parties' contractual relationship, and continued in particular to govern the province's exercise of the rights it derived from the contract.'

[24] A tender process by a public authority has consistently been held by courts in South Africa and Namibia to constitute administrative action<sup>6</sup>.

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<sup>5</sup> 2003 (2) 2003 SA 460 (SCA) at 466

<sup>6</sup> *Permanent Secretary of Ministry of Finance and Others v Ward* 2009 (1) NR 314 at par 74

[25] It is not disputed by the respondents in their heads of argument that the third respondent cancelled the tender without giving the applicant an opportunity to be heard. The respondents even in the exercise of the contractual rights in the tender process were obliged to act lawfully, procedurally and fairly. The third respondent failed to act in such manner.

[26] In the light of the foregoing, I am of the view that there is no merit in the point *in limine* at this stage of the proceedings and the point stands to be dismissed.

This Court's lack of jurisdiction due to the applicant's non-exhaustion of internal remedies

[27] In motivating this point *in limine*, respondents' counsel drew the Court's attention to the following provisions, placing emphasis on the underlined portions:

Rule 76(1) of the High Court:

'Review application

76(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.'

The Procurement Act

'Transitional provisions

81(2) A tender that has been advertised for bidding before the date of commencement of this Act, whether the tender advert has been closed or not, the bidding is dealt with in terms of this Act.'

and

'Application for review

59(1) A bidder or supplier may, as prescribed, apply to the Review Panel for

review of a decision or an action taken –

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

(4) A bidder or supplier who is aggrieved or claims to have suffered, or to be likely to suffer, loss under this Act must exhaust all available remedies under this Act before instituting any judicial action in the High Court.'

[28] Counsel contended that a careful reading of the above provisions, leads to the conclusion that the applicant, as an aggrieved bidder, ought to have approached the review panel for the relief it seeks in this application instead of approaching this Court. Counsel therefore submitted that the applicant's failure to exhaust the remedies provided in the Procurement Act rendered this application liable for dismissal with costs.

[29] In *Namibia Competition Commission v Wal-Mart Stores*<sup>7</sup>, the Supreme Court set out criteria that should guide a court in determining whether a litigant has exhausted internal remedies. The Court stated that firstly, the court should consider the wording of the relevant statutory provision, and secondly, the court should consider whether the internal remedy affords an aggrieved party sufficient and practical relief in the circumstances.

[30] Section 59(4) of the Procurement Act is explicit in its wording regarding the aggrieved bidder or supplier obligation to first exhaust internal remedies before approaching this court for any relief. Applying the guideline set out by the Supreme Court in *Wal-Mart* to the facts of this matter, I am of the view that the respondents' contention cannot be sustained. Taking into account the following factors:

- (a) the tender was advertised on 21 August 2015, where after evaluation was allegedly conducted;

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<sup>7</sup> 2012 (1) NR 69 (SC), paragraphs 47-49

- (b) the tender decision sought to be reviewed was communicated to the applicants on 16 February 2017;
- (c) the Procurement Act, promulgated on 31 December 2015, came into operation on 01 April 2017 by way of Government Gazette No. 6255/No.46;
- (d) the main application was instituted on 25 April 2017; and
- (e) the individual from which to choose members of the review panel was only published in the Government Gazette on 1 August 2017.

[31] From the above timeline, the following is evident: Firstly, the tender which forms the subject matter of this review proceedings was advertised before the date of the commencement of the Procurement Act. Secondly, the bidding and the alleged evaluation process was conducted long before the coming into operation of the Procurement Act, thus the transitional provision of section 81(2) does not apply. Thirdly, the cancellation of the tender was communicated to the applicant before the coming into operation of the Procurement Act. Fourthly, the list of individual from which members of the review panel can be chosen, was constituted long after the proceedings in the main review application were instituted. In short the internal remedies envisaged by the Procurement Act were not in existence at the time the present proceedings were instituted.

[32] I am therefore of the considered view that there is no merit in the respondents' contention that applicant could or should have approached the review panel for the relief in respect of the main proceedings or this application because the review panel was not constituted. For this reason, this point *in limine* similarly fails.

### The merits

[33] I next turn to consider the grounds upon which the respondents opposed the disclosure of the documents sought namely, that the documents are not relevant to

the decisions sought to be set aside; the documents have not been reasonably identified; and that the documents are confidential.

[34] It is submitted on behalf of the respondents that the disclosure required by the applicant fell within the parameters of pre-litigation disclosure and that the applicant is therefore not entitled to such disclosure.

[35] In support of the above contention counsel referred the court to the Supreme Court judgment in the matter of *Chairperson of the Tender Board of Namibia v Pamo Trading Enterprises CC and Circle Hospitality Services (Pty) Ltd*<sup>8</sup> Case No: SA 87/2014. In that matter the applicant applied for an order to compel the Tender Board to provide minutes of its meetings and documentations as a form of pre-litigation discovery claiming a right of access to such documents grounded on Articles 18 and 12 of the Namibian Constitution. The High Court held that the respondents were requesting reasons which would prove the fairness of the process and thus directed the Tender Board to provide copy of the minutes of the meeting of a specific board meeting. The Supreme Court found that that the respondents did not establish a right to access to the minutes under Article 18 because of the sketchy and unsupported basis raised in the founding papers.

[36] It would become apparent shortly, that the *Pamo* matter is not of assistance to the respondents. In the first place it is distinguishable from the facts in the present matter in that in this matter, the applicant has instituted review proceedings. In the *Pamo* matter the application was brought before any review or any other proceedings had been instituted. Secondly in *Pamo* matter the applicants asserted their rights to access to documentations of an administrative body at pre-litigation stage based on Articles 12 and 18 of the Constitution. In the present matter the applicant's demand to access to documentation is purely based on rule 76 of the rules of this court. This is in line with the Supreme Court's view expressed at par 66 of *Pamo* judgment that under judicial case management a party can demand discovery after the institution of proceedings under rule 76 in order to ensure that the case is dealt with expeditiously and fairly. The court further pointed out that this is because rule 76 expressly requires a decision maker to serve the complete record of the decision making within 15 days after receipt of the review application; and

<sup>8</sup> Case No 87/2014 judgment delivered on 17 November 2016

furthermore that the court have interpreted the record to include 'every scrap of paper throwing light, however indirectly on that proceedings were, both procedurally and evidentially'.

[37] Counsel for the applicant referred the Court to the import of the procedure afforded to an applicant in terms of rule 76 of Court (the old rule 53 of the Uniform Rules of Court) articulated in *Jockey Club of South Africa v Forbes*<sup>9</sup>, where the court stated the following:

'Not infrequently the private citizen is faced with an administrative or quasi-judicial decision adversely affecting his rights, but has no access to the record of the relevant proceedings nor any knowledge of the reasons founding such decision. Were it not for rule 53 he would be obliged to launch review proceedings in the dark and, depending on the answering affidavit(s) of the respondent(s), he could then apply to amend his notice of motion and to supplement his founding affidavit. Manifestly the procedure created by the rule is to his advantage in that it obviates the delay and expense of an application to amend and provides him with access to the record...

The purpose of rule 53 is not to protect the 'decision- maker' but to facilitate applications for review and to ensure their speedy and orderly presentation. Such benefits as it may confer on a respondent, in contradistinction to those ordinarily enjoyed by a respondent under rule 6, are incidental and minor. It confers real benefits on the applicant, benefits which he may employ if and to the extent needed in his particular circumstances.'

[38] Counsel for the applicant raised a question as to what is the import and meaning of the wording a 'complete record of the proceedings sought to be corrected or set aside' in rule 76. The answer was provided in the classic judgment of *Johannesburg City Council v The Administrator of Transvaal and Another*<sup>10</sup> followed by our court in the matter of *Aoinin Fishing v Minister of Fisheries and Marine Resources*<sup>11</sup>.

'The words 'record of proceedings' cannot be otherwise construed, in my view, than as a loose description of the documents, evidence, arguments and other information before the tribunal relating to the matter under review, at the time of the making of the decision in

<sup>9</sup> 1993 (1) SA 649 (AD) at 660 and 662.

<sup>10</sup> 1970 (2) SA 89 (T) 91

<sup>11</sup> 1998 NR 147 at 150 B-F



question. It may be a formal record and dossier of what has happened before the tribunal, but it may also be a disjointed indication of the material that was at the tribunal's disposal. In the latter case it would, I venture to think, include every scrap of paper throwing light, however indirectly, on what the proceedings were, both procedurally and evidentially. A record of proceedings is analagous to the record of proceedings in a court of law which quite clearly does not include a record of the deliberations subsequent to the receiving of the evidence and preceding the announcement of the court's decision. Thus the deliberations of the Executive Committee are as little part of the record of proceedings as the private deliberations of the jury or of the Court in a case before it. It does, however, include all the documents before the Executive Committee as well as all documents which are by reference incorporated in the file before it. Thus the previous decision of the Administrator, and the documents pertaining to the merits of that decision, could not have been otherwise than present to the mind of the Administrator-in-Executive-Committee at the time he made the second decision. If they were not, he could not have brought his mind to bear properly on this issue before him, which is of course denied by the respondents.'

[39] As mentioned earlier, the 'record of the proceedings' filed by the respondents constitutes only of extracts of the Board Meeting Minutes of 8 and 15 February 2017. Counsel for the applicant, correctly in my view, argued that the extracts discovered would not assist neither the applicant nor the court to interrogate the decision or to perform an objective assessment of the lawfulness of the decision. In my view, in order to inquire into the authority of the Board of Nampower to make the decision sought to be set aside, the procedural fairness of the decision to cancel the tender and the substantive fairness to cancel the tender, it is necessary that 'every scrap of paper throwing light, however indirectly on what the proceedings were, both procedurally and evidentially...' must be disclosed.

[40] I next move to consider the respondents' refusal to disclose the documents requested on the basis that they are confidential based clause 6.2 of Nampower's Tender Procurement. The clause stipulates as follows: "*Information relating to the examination, clarification, and evaluation of tenders and recommendations concerning wards shall not be communicated to the public and shall remain confidential at all times.*"

[41] In *South African Poultry Association and Others v The Ministry of Trade and Industry*<sup>12</sup>, this Court, held that a party seeking to prevent its opponent from accessing information on the basis that they were competitors must make out a clear case for such an order. In addition the court held that a blanket claim for confidentiality, without specifying the documents in respect of which confidentiality was claimed, undermined a claim for confidentiality. Finally that the party who claims confidentiality in respect of documents bears the onus of demonstrating that exceptional circumstances exist precluding the disclosure of such documents. In this context counsel for the applicant, correctly in my view, submitted that the degree of substantiation required to justify a claim to confidentiality would be at the very least be equal to that of a private body. I am prepared to venture to say that it should be higher for a public body given the public ownership thereby, of such body which requiring the observance of transparency and accountability.

[42] Counsel for the applicant further submitted that the respondents' reliance on clause 6.2 of Nampower's Tender Conditions to justify confidentiality is misplaced. In my view the submission is correct, if the respondents sought to interpret the said clause to oust the power of this court to compel a public body such as Nampower to disclose documents relevant to the court to adjudicate whether a decision is reviewable or not, the interpretation would be wrong and the clause itself would be *contra bonos mores* as it would facilitate arbitrariness in decision making by public bodies.

[43] In *Democratic Alliance v Acting National Director of Public Prosecutions*<sup>13</sup> the court had the following to say with regard to an attempt by a party to limit the court's power order discovery:

'In my view it is not appropriate for a court exercising its power of scrutiny and legality to have its power limited by the *ipse dixit* of one party. A substantial prejudice will occur if

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<sup>12</sup> 2015 (1) NR 260 at pars 42, 43 and 46.

<sup>13</sup> [2013] 4 All SA 610 (GNP) (16 August 2013) at par 29

reliance is placed on the value judgment of the first respondent. To permit the first respondent to be the final arbiter and determine which documents must be produced is illogical... [T]he first respondent has no right to independently edit the record. It must produce everything.'

[44] Similarly in *Democratic Alliance* case<sup>14</sup> the South African Supreme Court of Appeal said the following:

'It can hardly be argued that, in an era of greater transparency, accountability and access to information, a record of decision related to the exercise of public power that can be reviewed should not be made available, whether in terms of rule 53 or by courts exercising their inherent power to regulate their own process.'

[45] The respondents did not list specific documents in their possession which they claim are confidential. They simply referred to clause 6.2 of the Tender Conditions. The wording of the clause is so wide to the extent that it covers every document relating to the tender. For my part, I cannot understand for instance why information relating the 'examination' of the tender would be confidential as clause 6.2 stipulates. In any event I am of the view that within the framework of judicial case management the issue of confidentiality can be managed by the managing judge. I propose to make an order to that effect.

[46] The respondent's refusal to disclose documents based on the grounds of irrelevance and lack of proper identification do not require much attention. The ground lacks merit. It suffices to say that it is not for the respondents to decide what is and what is not relevant; it is for the court to determine. Significantly the respondent did not make any effort to seek clarity as to the identity of the documents requested for disclosure. In my view the basis demonstrate lack of commitment to transparency. It is advanced as a smokescreen to avoid disclosure. It has been held that rule 76 must be generously interpreted so as to include 'every scrap of paper throwing light, however indirectly, on the decision in question, both procedurally and evidentially<sup>15</sup>'.

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<sup>14</sup> *Democratic Alliance and Others v Acting National Director of Public Prosecution and Others* 2012 (3) SA 486 (SCA) at 501 at par 37

<sup>15</sup> *Aonin Fishing* case ( supra)

[47] Finally I am of the view that the request for disclosure in point nine of the notice in terms of rule 76(6) is too wide and the documents requested therein are already covered in the preceding points.

### Conclusion

[48] I am of the considered view that the applicant's request for disclosure in the present proceedings does not constitute a 'fishing expedition' or pre-litigation disclosure as contended by the respondents: it is permissible and perfectly made under rule 76. I am of the further view that the documents sought by the applicant must be disclosed. The disclosure of the documents sought by the applicant potentially allow a proper and fair adjudication of the issues in the main review proceedings. I am of the further view that the respondents' concern with regard to confidentiality of some of the documents can be adequately addressed by the managing judge through the judicial case management process.

### Costs

[49] The application has been decided in favour of the applicant. Counsel for the applicant moved for a costs order that the respondents' pay the costs of this application, such costs to include the costs one instructing counsel and two instructed counsel, not limited to the provisions of rule 32(11)<sup>16</sup>. In support of such order counsel submitted that the respondents not only unreasonably refused to disclose the documents sought in in terms of rule 76(6) of Court but further unreasonably opposed this application. I am inclined to agree. From the correspondent exchanged before the launching of this application it is clear that the respondent did not have intention to co-operate and find an amicable solution. The respondents raised points *in limine* in this interlocutory application which were aimed at dismissing the main application. The respondents further argued the merits of the main application during this interlocutory application in an attempt to, so to speak, to nip the main application in the bud.

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<sup>16</sup> Rule 32(11) of the High Court: 'Despite anything to the contrary in these rules, whether or not instructing and instructed legal practitioners are engaged in a cause or matter, the costs that may be awarded to a successful party in any interlocutory proceeding may not exceed N\$20 000'.

[50] This court feels duty bound to demonstrate its disapproval of the respondents' obstructive and uncooperative conduct by making an order of costs in the terms suggested by applicant's counsel<sup>17</sup>.

[51] In the result, I make the following order:

The first, second and third respondents are ordered, to disclose the applicant the documents listed hereunder on or before 13 October 2017:

1. All Tender Evaluation Reports for Tender NPWR 2015/50 and NPWR 2016/16, which had to have been prepared in terms of the first respondent's Tender and Procurement Policy Clause 29, specifically 29.8 (Page 34 of 60).
2. All Tender Board Recommendation Forms (signed by Head of Tender Evaluation team, Chairperson of Tender Board & MD) for Tender NPWR 2015/50 and NPWR 2016/16.
3. Minutes of each NamPower Tender Board Meeting where Tender NPWR 2015 and NPWR 2016/16 was discussed.
4. Minutes of each NamPower Board Tender Committee Meeting where Tender NPWR 2015/50 and NPWR was discussed.
5. 8 February 2017 NamPower Board of Directors Meeting minutes, referred to in discovered 15 February 2017 Board meeting minutes.
6. 13 December 2016 NamPower Board of Directors allegedly resolved to block the award of the two tenders NPWR 2015/50 and NPWR 2016/16 to the applicant, notwithstanding the recommendations from the internal Tender Board to award the tenders to the applicant, allegedly due to a conflict of interest.

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<sup>17</sup> *South African Poultry Association v The Ministry of Trade and Industry* (A 94/2014) [2014] NAHCMD 331 (7 November 2014)

7. Documents evidencing each objection raised to and by the NamPower Board of Directors against awarding the tenders NPWR 2015/50 and 2016/16 to the applicant, including but not limited to those raised by Siemens and General Electric, directed to the NamPower Managing Director, the NamPower Tender Board and/or the NamPower Board of directors, about conflict of interest, between the period September 2016 to December 2016.
  8. Documents evidencing each action taken by NamPower management, the NamPower Tender Board and/or the NamPower Board of Directors following and/or in response to the objections raised against the award of tenders NPWR 2015/50 and 2016/16 to the applicant.
  9. The respondents to make copies of the requested documents available to the applicant for inspection and complying within 10 days.
  10. In the event of confidentiality being claimed by the respondents in respect of a specific document, such issue is to be referred to the managing judge for directions.
  11. The respondents are to supplement the record filed with the Registrar, within 5 days of having given the applicant access to the requested documents.
  12. The respondents are to pay the applicant's costs of this application not limited to N\$20,000, as per rule 32(11), such to include the costs of employing one instructing counsel and two instructed counsel.
  13. The matter is postponed to **18 October 2017** at **08h30** for case management conference.
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H Angula  
Deputy-Judge President

APPEARANCES:

APPLICANT:

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Instructed by Engling Stritter & Partners, Windhoek

RESPONDENTS:

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