

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK  
JUDGMENT

In the matter between:

<b>THE CENTRAL PROCUREMENT BOARD</b>	<b>APPLICANT</b>
and	
<b>ONO ROBBY NANGOLO N.O.</b>	<b>1<sup>ST</sup> RESPONDENT</b>
<b>LEX TECHNOLOGIES (PTY) LTD</b>	<b>2<sup>ND</sup> RESPONDENT</b>
<b>BUSINESS CONNECTION PARTNERSHIP</b>	<b>3<sup>RD</sup> RESPONDENT</b>
<b>THE ROADS AUTHORITY</b>	<b>4<sup>TH</sup> RESPONDENT</b>

**Neutral Citation:** *The Central Procurement Board v Nangolo N.O.* (HC-MD-CIV-MOT-REV-2017/00441) [2018] NAHCMD 357 (9 November 2018)

**Coram:** MASUKU J  
**Heard:** 22 March 2018  
**Delivered:** 9 November 2018

**Flynote:** Legislation – Procurement Act No. 15 of 2015 – award of tenders – transitional provisions and whether the award in this case falls to be done in terms of the repealed Act or the new Act – review – whether the applicant is entitled to be served with a copy of the application for review – hearing – the applicant had a right to be afforded a proper opportunity to present its case in relation to the application for review – whether the

applicant is required to consult the Policy Unit in relation to the appointment of members of its evaluation committee – Meaning of ‘consultation’ and ‘after consultation and with’ – Standstill period in respect of applications for review - Constitutional law – meaning of good constitutional citizenship.

**Summary:** The applicant, a body formed in terms of the Procurement Act (the ‘Act’) awarded a tender to the 3<sup>rd</sup> respondent. The tender had been processed in terms of the repealed legislation and the technical and financial processes had been processed by the time the Act came into force. The applicant’s decision to award the tender was taken on review and the Review Panel upheld the review and ordered the applicant to start *de novo*, holding that it was not *functus officio* and to was to among other things, consult with the Policy Unit in the appointment of the evaluation committee. Aggrieved by this decision, the applicant approached this court, seeking an order reviewing and setting aside the decision of the Review Panel.

*Held* – that there was nothing wrong or untoward with the applicant taking legal proceedings against the Review Panel, another functionary established in terms of the Act. In a constitutional State, good constitutional citizenship encourages the resort to the courts for relief and frowns upon self-help.

*Held further* – that the applicant was entitled to have been served with the application for review and that failure to serve the applicant with the application for review rendered the review a nullity.

*Held* – that the applicant was also not granted a proper of fair opportunity to make its representations to the Review Panel, thus causing failure of justice, thus rendering the judgment issued by the Review Panel liable to be set aside as its right to be heard had been violated.

*Held further that* – the Review Panel was not entitled to call Mr. Swartz to attend the review hearing in the absence of a proper invitation to the applicant. As such, the applicant was never invited nor properly represented at the review proceedings.

*Held* – that where tenders had been initiated under the repealed law, they could be dealt with in terms of the repealed law if all that was left was for to announce the successful tenderer. To do otherwise, it was held, would result in the loss of time and money both for the public institutions and the tenderers.

*Held further* – that the ‘standstill period’ ushered in by s. 55 (5) of the Act is illusory in view of the fact that while an application for review is launched within the period legislated, the launch of the review does not serve to suspend the award. In this regard, even if an award is found to have been irregularly awarded, the provisions of s. 60 (c) allows decisions or actions bringing a procurement contract into existence not to be set aside.

*Held* – that the Review Panel had not set aside the tender awarded by the applicant and for that reason, the award stood and for that reason, the applicant had become *functus officio* in the matter.

*Held further* – that in terms of s.60 (c) of the Act, the Review Panel could not set aside a decision or action whose effect is to bring into force a procurement contract or the framework agreement into force.

*Held* – that consultation means that there must be some conference and exchange of opinions between the party required to consult and the party to be consulted. In this regard, where there is consultation after, the party required to consult need to not obtain the concurrence of the party to be consulted.

*Held further that* - the applicant was not required by the law to consult with the Policy Unit before appointing an evaluation committee. That requirement, it was noted, was prescribed by the regulations only in respect of a controlling officer.

The application for review was therefore granted as prayed.

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**ORDER**

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1. The decision by the Review Panel delivered on 8 November 2017 be and is hereby set aside.
2. It is hereby declared that Section 81 (2) of the Public Procurement Act, 15 of 2015 is to be interpreted to mean that the provisions of the Public Procurement Act take effect from the date of commencement of the Act, namely 1 April 2017 and therefore has no retroactive effect.
3. The steps taken by the Roads Authority in the process of the tender “BUREAU SERVICES FOR SUPPLY AND PERSONALISATION OF DRIVING LICENCE CARDS, 60 MONTHS – DRIVING LICENCE CARD PRODUCTION TENDER- AR/SE-2016” as at 1 April 2017 remain valid and enforceable.
4. It is hereby declared that the Public Procurement Act does not require the Applicant to consult with the Policy Unit (established in terms of section 6 of the Public Procurement Act, 15 of 2015) prior to appointing Bid Evaluation Committees in terms of the provisions of section 26 of the Act.
5. There is no order as to costs.
6. The matter is removed from the roll and regarded as finalised.

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**JUDGMENT**

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MASUKU J:

## Introduction

[1] Scripture records that a house divided cannot stand.<sup>1</sup> This application for review is rather unusual for the reason that the party that has initiated it is a creature of statute, namely, the Central Public Procurement Board, duly established in terms of the provisions of s. 8 of the Public Procurement Act,<sup>2</sup> (the 'Act').

[2] The relief sought, it would seem, is primarily against another creature of the same Act, namely Mr. Ono Robby Nangolo *N. O.* He is cited in his official capacity as the chairperson of the Review Panel, constituted in terms of s. 58(1) of the Act, as read with ss. (4) thereof.

[3] The rest of the respondents are cited for the reason that they have an interest in the matter. No relief, is, however, sought from any of them in the present matter.

[4] It may appear unusual or strange that the 'procurement house' is divided from what I have said above and cannot stand, but it is for good reason, as I will seek to demonstrate below. It is now a growing phenomenon in this constitutional era in which we live even for Government departments and functionaries to seek relief against each other from the courts in deserving cases.

[5] In this regard, the Constitutional Court of South Africa made the following lapidary remarks in the now celebrated case of *Merofong City v AngloGold Ashanti Limited*,<sup>3</sup> where the court dealt with what is now referred as the concept of 'good constitutional citizenship' as follows:

'First, as a matter of practice, and good constitutional citizenship, it is undoubtedly so that Merafong should have gone to court to set aside the Minister's ruling. As a state organ, Merafong had the resources, and the responsibility, to obtain judicial clarity in

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<sup>1</sup> Matthew 12 v 22-28.

<sup>2</sup> Act No. 15 of 2015.

<sup>3</sup> 2017 (2) SA 211 (CC) at 28.

its dispute with AngloGold about the ruling. Instead of doing so, it threatened to cut off AngloGold's water. That was not nice. Worse, it was not good constitutional citizenship.

[16] As a good constitutional citizen, Merafong should either have accepted the Minister's ruling as valid, or gone to court to challenge it head-on. AngloGold did what Merafong advised it to do – it appealed to the Minister. On legal advice, Merafong later recanted its view that AngloGold was entitled to appeal. But that didn't give it warrant to bully one of its ratepayers. In enforcing its view of the Minister's disputed ruling, Merafong was resorting to a form of self-help.

[61] This was out of kilter with Merafong's duty as an organ of state and a constitutional citizen. This court has affirmed as a fundamental principle that the state "should be exemplary in its compliance with the fundamental constitutional principle that proscribes self help.' What is more, in *Khumalo*, this court held that state functionaries are enjoined to uphold and protect the rule of law by *inter alia* seeking the redress of their departments' unlawful decisions. Generally, it is the duty of a state functionary to rectify unlawfulness. The courts have a duty to insist that the state, in all its dealings, operate within the confines of the law, and in doing so, remain accountable to those on whose behalf it exercises power. Public functionaries must, where faced with an irregularity in the public administration, in the context of employment or otherwise, seek to redress it. Not to do so may spawn confusion and conflict, to the detriment of the administration and the public. A vivid incident is where the President himself has sought judicial correction for a process misstep in promulgating legislation.'

[6] It is an undeniable fact that the Act is relatively new, probably teething. As such, there may be areas where there is a contestation of views and territory among the various functionaries created thereunder. It is in that spirit, viz to delineate the boundaries and the extent of powers given and to be exercised by each functionary under the Act that the applicant has approached this court on review. This is, according to the *Merafong* judgment, the epitome of good constitutional citizenship. In that sense, the applicant does not want strife to fester between or among the relevant functionaries created by the Act.

[7] Rather than keeping the 'procurement house' divided as it were, the applicants' approach to the court was to ask for clarity and direction where there appears to have been an overlap or perceived excesses by one functionary, spilling over into the legislative domain of another functionary under the same roof as it were. It is in that context that the applicant ought to not to be deprecated and maligned for its stance as it has sought to walk in the contours set by the Constitution of this Republic in enacting the rule of law as a foundational principle in Article 1.

[8] The only regrettable drawback in this matter, however, is that the respondents, all of whom I am satisfied, were duly served, did not oppose the application nor did they participate, even if to agree with the applicant in its propositions to the court. Courts always appreciate and encourage the expression of different perspectives and views in cases that come before them because in the multitude of counsel given to the court, there is safety.

[9] Even what may be considered an 'open and shut' case may, with the unleashing of counsel's incisive powers of analysis and persuasion, in certain cases, yield an unexpected result not previously anticipated or even imagined. This is very much so in Namibia, where with the advent of the new procurement law, we are seeking to build a harmonious, ordered and cohesive 'procurement house', where there are no lacunae or contestation for turf, power or authority and where the mission, intent and solitudes of the framers of the law is resoundingly met.

#### Relief sought

[10] In its notice of motion, supported by the affidavits of Mr. Patrick Petrus Swartz and Lena Kangandjela, the applicant seeks the following relief:

'Reviewing and setting aside a decision by the Review Panel on 8 November 2017 as follows:

1. The Applicant's review application is dismissed as the Central Procurement Board has not discharged its duty. In short, the Central Procurement Board is not *functus officio*.
2. The decision to endorse the evaluation committee initially appointed by the Roads Authority as the evaluation committee to evaluate the bid is set aside.
3. The evaluation report by persons not appointed after consultation with the Central Procurement Board is set aside.
4. The Board is directed to submit names of prospective members of the *ad hoc* evaluation committee to the Policy Unit for consultation and appointment, as well as set a date for re-evaluation of the bids in accordance with the specifications in the Bid documents.
5. Declaring that section 81(2) of the Public Procurement Act 15 of 2015 is to be interpreted that the provisions of the Act are of effect from date of commencement of the Act, 1 April 2015, and has no retroactive effect.
6. Declaring that the steps taken by the fourth respondent in the process of the tender "BUREAU SERVICES FOR SUPPLY AND PERSONALIZATION OF DRIVING LICENCE CARD PRODUCTION, 60 MONTHS – DRIVING LICENCE CARD PRODUCTION TENDER – AR/SE-NAT01-2016" as at 1 April 2017 remain valid and enforceable.
7. Declaring that the Public Procurement Act 15 of 2015 does not require the applicant to consult with the Policy Unit (established in terms of section 6 of the Public Procurement Act 15 of 2015) prior to appointing of Bid Evaluation Committees in terms of the provisions of section 26 of the Act.
8. That any respondent opposing this application be ordered to pay the costs, jointly and severally, the one paying and the other being absolved, the costs to include the costs of instructing and instructed counsel.'



## Background

[11] Mr. Swartz deposes in the founding affidavit that there is a tender referred to in para 6 in the immediately preceding paragraph. That tender was for the 4<sup>th</sup> respondent herein, the Roads Authority for the personalisation of driving licenses cards.

[12] In that regard, he contends that the process of the said tender commenced in 2016 and an evaluation of the tender had been completed at both the technical and financial levels. In this regard, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents had qualified through the technical evaluation process. The tender had however, not been awarded when the Act came into force. Indications at that stage, were that the 3<sup>rd</sup> respondent was the preferred bidder. It was later informed that it had indeed been the successful bidder.

[13] It is therefore clear that the tender was finalised after 1 April 2017, the date on which the Act came into force. There is accordingly no clarity on the procedure to be adopted in relation to tenders, which commenced in terms of the previous Act, i.e. the Tender Board of Namibia Act,<sup>4</sup> but were not completed by the time the Act came into force. Mr. Swartz states that the applicant was, in respect of the tender in question, of the view that they should proceed to award the tender, having satisfied themselves that there was substantial compliance with the provisions of the Act, in which case the decision would be accepted and ratified accordingly, avoiding the need to commence the process *de novo* under the Act. The question is what the proper approach should be in such cases as there may be a few more matters where this conundrum faces the applicant.

[14] Once the successful and unsuccessful bidders were advised accordingly, continues Mr. Swartz, the unsuccessful bidders noted an appeal in terms of s. 59 of the Act. This included the 2<sup>nd</sup> respondent. The review by the dissatisfied tenderers to the Review Panel was, however, not served on the applicant. As a result, it was unaware of the identity of the applicants for review and the bases on which the review was predicated. It could therefore

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<sup>4</sup> Act No. 16 of 1996.

not properly prepare itself to deal with the issue raised on review and seeks the court's determination on whether the applicant is entitled to notice of an application for review to the Review Panel and whether it is entitled to properly present its case to the Review Panel.

[15] I now intend to interrogate the correctness of the procedure adopted by the Review Panel, which is complained of by the applicant. I will also consider the correctness of the decision reached by the Review Panel. I will, in the process, also deal with the question of the proper approach to tenders initiated in terms of the old legislative regime but which become ripe for award after the date of the coming into effect of the Act. There is a last issue also raised and it relates to the appointment of Bid Evaluation Committees.

[16] What I need to state up-front is the sentiment expressed earlier in the judgment, namely that the respondents did not file any opposing papers in this matter. For that reason, in the absence of their respective versions before court, the court has no other option but to decide the matters on the only version placed before court under oath, which is that of the applicant.

#### Procedure followed by the Review Panel

[17] In this regard, it is well to remember that the applicant complains at two different levels. Firstly, it claims that it was not served with the application for review. As a result, it was unaware of who the applicants for review were and more importantly, it was therefore not privy to the bases advanced for the review. What is worse, the applicant states is that it was not afforded any proper or adequate opportunity to prepare itself to appear before the Review Panel and so that it could make meaningful representations that would hopefully assist the said Panel in reaching a proper decision, armed with the benefit of submissions by all the parties involved – the complainants and the 'accused' as it were.

[18] I must mention that I am concerned by the actions of the Review Panel in not allowing the applicant to be served with the application for review before the review application was heard. Service of relevant documents on a party

that has an interest in a matter, particularly one in a position of the applicant, whose decision is sought to be set aside is fundamental.

[19] This is so because if the other party to the review is not served with the papers, the arbiter, in this case, the Review Panel, is likely to make a decision based on skewed information provided by the complainant and in the process denying the 'accused' body an opportunity to place its own version before the Review Panel, which process should, all things being equal, lead to a proper and full ventilation of all the issues, thus placing the arbiter in a proper position where it will consider all the relevant versions before making its decision.

[20] In *Knouws N.O. v Josea and Another*,<sup>5</sup> Damaseb JP stated the following in relation to service:

'If short service is fatal, a *fortiori*, non-service cannot be otherwise. Where there is complete failure of service it matters not that, regardless, the affected party somehow became aware of the legal process against it, entered appearance and is represented in the proceedings. A proceeding which has taken place without service is a nullity and it is not competent for a court to condone it.'

[21] One cannot find a more emphatic position on the effect non-service has on a party with a direct and substantial interest in the matter, which is the subject of the proceedings. According to the uncontested affidavit evidence of Mr. Swartz, the applicant never received the application for review and only became aware of its existence when he received a letter from the 1<sup>st</sup> respondent dated 30 October 2017, making reference to an application for review. There was no indication or intimation of who the applicants and respondents in that application were. Ultimately, the deponent insisted that the applicant be served with the application for review, which was not done.

[22] Mr. Swartz states that they did not obtain a copy of the application until when they were favoured with a copy of same by the C.E.O. of the 4<sup>th</sup> respondent on or about 2 November 2017. It was in this indirect, if not

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<sup>5</sup> 2007 (2) NR 792 (HC) at [23].

circuitous manner, that the applicant got knowledge of the review application and the grounds upon which it was predicated. Worse was still to happen to the applicant.

[23] On 2 November 2017, the applicant received a 'Request to Attend a Hearing of the Review Panel'. This notice, believe it or not, was sent to Mr. Swartz' mobile telephone on social media, known as 'whatsapp'. The hearing was slated for the very self-same day. The 'notice', he further deposes did not identify who was invited to attend the review hearing. Mr. Swartz states that this was the first time that he got to know that the applicant was one of the respondents in the review application.

[24] It is his evidence that his efforts to excuse himself from this impromptu hearing did not succeed as he received a 'WhatsApp' message that stated in very emphatic terms that the Review Panel had very strict 'deadlines' to adhere to. He decided to drop everything and attend the hearing at the Ministry of Finance where he was informed the meeting was convened. He arrived there at around 16h00 and found the 2<sup>nd</sup> and 4<sup>th</sup> respondent, were duly represented.

[25] Upon his arrival, four or five questions were fired at him by the 1<sup>st</sup> respondent. It is safe to assume that he was taken aback because he says he cannot remember the questions posed to him nor the answers he proffered because he was simply unprepared (if not ill-prepared) to attend a hearing of this nature. It would seem that the die was already cast.

[26] This court is not averse to the harnessing of modern technology but there must be limits. Regardless of how convenient WhatsApp as a means of communication may be, for the proper conduct of formal business such as review hearings in respect of tender queries, WhatsApp cannot be a proper or appropriate mode of notice or even service of relevant process. I say this particularly considering that whatsapp is dependent on one having internet connection and once in a zone where same is not available, one may not get a message, regardless of how urgent it may be. The principle of fairness

should never be sacrificed on the altar of convenience, particularly where it comes to issues of notice and the right to be heard.

[27] I am of the firmly considered view that the 1<sup>st</sup> respondent committed two cardinal sins in this matter. First, the applicant was not served with a copy of the review application. This was so notwithstanding that the applicant was cited and listed as a respondent in the matter. This failure to serve the applicant with the application for review, together with the premises on which it was based constituted a treasonous illegality and failure of justice such that the proceedings were, according to *Knouws*, a nullity, which the court, even in its most benevolent mood, cannot properly or at all condone.

[28] The second unforgivable irregularity was that the applicant was denied a proper opportunity to know the case against it but more importantly, an opportunity to present its case to the 1<sup>st</sup> respondent. Mr. Swartz was clearly ambushed when given no choice but to attend the hearing, unprepared as he was and totally ignorant of what the issues at stake were. I will say more about Mr, Swartz's appearance below.

[29] As a result, I have no hesitation in coming to what I consider an ineluctable conclusion that the failure to afford the applicant a fair opportunity to prepare its case and to present it properly to the 1<sup>st</sup> respondent's Panel, was a grave failure of justice, an abortion of fairness and an abject aversion to the hallowed principle of the *audi alteram partem*.

[30] The *audi* principle, as it has come to be known, is an important cornerstone of the fairness of any proceedings, be they judicial, administrative or disciplinary. So embedded is it in the Roman-Dutch common law, which is the law of this country, that Browde JA had occasion to comment as follows on the importance of the observance of this cardinal principle in *Swaziland Federation of Trade Unions v The President of the Industrial Court*<sup>6</sup> where the learned Judge of Appeal reasoned thus:

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<sup>6</sup> (11/97) [1998] SZSZ 8 (01 January 1998).

'The *audi alteram partem* principle i.e. that the other party must be heard before an order can be granted against him, is one of the oldest and most universally applied principles enshrined in our law. That no man was to be judged unheard was a precept known to the Greeks, was inscribed in ancient times upon images in places where justice was administered, is enshrined in the scriptures, was asserted by an 18<sup>th</sup> century English judge to be a principle of divine justice and traced to the events in the Garden of Eden, and has been applied in cases from 1723 to the present time . . . Embraced in the principle is also the rule that an interested party against whom an order may be made must be informed of any possibly prejudicial facts or considerations that may be raised against him in order to afford him the opportunity of responding to them or defending himself against them.'

[31] In this case, the hearing, if it is fit to be called that, was illusory. It amounted to no hearing at all when the applicant was not properly notified of the hearing and furthermore, not properly served with the grounds of review and as a respondent, also not afforded an opportunity to make representations on the case made for review. As it later turned out, the applicant should have been notified of the hearing and granted ample time to prepare to meet the case against it. The ambush laid by the 1<sup>st</sup> respondent on the applicant must be deprecated in the strongest possible terms, as I hereby do.

[32] It therefor follows, as night follows day, that the decision reached by the 1<sup>st</sup> respondent's Panel, following such a fatally flawed process, must be as poisoned as the procedure. One cannot expect, in the ordinary order of things, that a poisoned tree can produce fruits free of poison. In this particular case, the poison that ran in the veins of the process affect the result with the same degree of debilitating effect. The decision reached as a result of the flawed process, cannot, therefor stand and it must perforce be set aside as I hereby do.

[33] As a timely reminder, and in closing on this matter, the Supreme Court stated the following in *Vaatz v Municipal Council of Windhoek*<sup>7</sup> regarding the two issues the 1<sup>st</sup> respondent's Panel dismally failed to observe or better still, observed in breach:

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<sup>7</sup> 2017 (1) NR 21 (SC) at 25.

' . . . two fundamental requirements that need to be satisfied before a hearing can be said to be fair: There must be notice of the contemplated action and a proper opportunity to be heard.'

Evidently, the Panel failed on both counts. The failure to comply with one of the fundamentals is extremely bad. To fail on both accounts is unforgivable and that is the 1<sup>st</sup> respondent's lot in this matter.

[34] I now turn to the invitation of Mr. Swartz to attend the review hearing by the 1<sup>st</sup> respondent on 2 November 2017. It must be appreciated by the Review Panel that the applicant is a Board set up in terms of the Act. For that reason, concepts of corporate governance come into play. Whenever any action or task is required to be done by the applicant, there are procedures and requirements to be followed. Not anyone, even an employee, may just take the bull by the horns, in the absence of proper authorisation by the appropriate structures of the applicant.

[35] I am accordingly not aware of the basis upon which the 1<sup>st</sup> respondent decided to pick on Mr. Swartz to attend the review hearing on behalf of the applicant. I say this because in the absence of proper authorisation by the Board, Mr. Swartz could not have been representing the applicant. If there was any report or action required of the applicant, the 1<sup>st</sup> respondent should have sent official communication to the applicant, which would, following its procedures, attend to same and make a resolution entitling an appropriate officer to attend to same and to present and represent the applicant before the Panel.

[36] The casual approach adopted by the Panel was certainly wrong and not in keeping with the principles of corporate governance. Proper care should be employed by the Review Panel in these matters in the future. They should not treat dealings with statutory and other parties levity when serious legal consequences, as setting aside an award of a tender, may arise therefrom. In this regard, a conclusion that the applicant was not invited in the circumstances and never appeared at the hearing before the Review Panel, is

inescapable. Mr. Swartz did not represent the applicant as he had no authority to do so as stated earlier.

[37] There is a further basis upon which the decision of the 1<sup>st</sup> respondent cannot be allowed to stand. This is steeped in the very provisions of the Act. S. 60 which deals with the decisions of the Review Panel and the various options open to the Panel. The section provides the following:

'Upon receipt of the application for review referred to in section 59, the Review Panel may –

- (a) dismiss the application;
- (b) direct the Board or the public entity that has acted or proceeded in a manner that is not in compliance with this Act or proceed in a manner that is in compliance with this Act;
- (c) set aside in whole or in part the decision or an action of the Board or public entity that is not in compliance with this Act, other than any decision or action bringing the procurement contract or the framework agreement into force, and referring the matter back to the Board or public entity for reconsideration with specific instructions;
- (d) correct a decision or action by the Board or public entity; or
- (e) order the procurement proceedings be terminated and start afresh.'

[38] I must, before dissecting the impact of this provision, hasten to mention that the above provision must not be misunderstood. The first sentence may be misleading to the unwary. When the legislature proclaimed that 'Upon receipt of the application for review' the Panel may take the decisions or options provided, it must not be understood that the decisions taken exclude a hearing of the parties involved or likely to be affected by whatever decision is made.



[39] It has been authoritatively stated in this jurisdiction that the right to be heard is presumed in every legislation, unless Parliament, in its manifold wisdom, in express and unambiguous terms, decides to exclude it.<sup>8</sup> No reader of the Act must be left with the misleading and pernicious impression or view that the Panel makes any of the listed decisions on its whims and caprices, particularly without having heard all the interested parties who stand to be detrimentally or positively affected by the decision they make.

[40] Having heard the parties in what the court considered to be a flawed hearing, the Panel issued the following order on the review application:

'Having heard the Parties, on the 2<sup>nd</sup> November 2017 at the Ministry of Finance Head Office building, Moltke Street, the Review Panel made the following order –

[1] The applicants review application is dismissed, as the Central Procurement Board has not discharged its duty. In short, the Central Procurement Board is not *functus officio*.

[2] The decision to endorse the evaluation committee initially appointed by the Roads Authority as the evaluation committee to evaluate the bid in this matter is set aside.

[3] The evaluation report by persons not appointed after consultation with the Central Procurement Board is set aside.

[4] The Board is directed to submit names of prospective members of the *ad hoc* committee to the Policy Unit for consultation and appointment, as well as set a date for re-evaluation of the bids in accordance with the specifications in the Bid documents.'

[41] The applicant complains about the order of the 1<sup>st</sup> respondent in so far as the review application was dismissed but has no order setting aside the decision of the applicant was contemporaneously issued. The applicant argued that its decision therefor stands as it was not set aside and for that

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<sup>8</sup> *Westair Aviation (Pty) Ltd and Others v Namibia Airports Company and Others* 2001 NR 256 (HC) at 265D.

reason, it cannot be correct that the applicant is, as stated by the 1<sup>st</sup> respondent, not *functus officio*.

[42] In the instant case, it was incumbent on the 1<sup>st</sup> respondent, if it found that the matter had not been properly handled in any manner, to then set aside the decision made by the applicant. I agree with the applicant that it is not necessary for this court, or for any other person, for that matter, to second-guess the 1<sup>st</sup> respondent.

[43] The fact of the matter is that the applicant's decision to award the tender was never set aside by the 1<sup>st</sup> respondent, meaning that it stands and rights inhere from that decision as soon as it is made and which may only be set aside by an appropriate authority clothed with power to set administrative decisions aside.<sup>9</sup> The concomitant of that finding, is that the applicant was therefor *functus officio* as its decision to award the tender, was not set aside and it had no power, in those circumstances, to re-do the work it had done in the absence of a properly made decision setting aside its decision to award the tender.

[44] The decision of the 1<sup>st</sup> respondent is erroneous for another important reason as well. S. 60 (c), quoted elsewhere above, grants the Panel the power set aside the whole or part of a decision that is not in compliance with the Act, other than any decision or action bringing the procurement contract or the framework of the agreement into force . . .' (Emphasis added).

[45] The question to interrogate, in the circumstances, relates to the nature and effect of the decision made by applicant. If the effect of the decision was to bring a procurement contract into force, then according to my understanding of s. 60(c), such a decision may not be set aside in whole or in part. That, appears to be the effect of the words occurring therein to the following effect "other than . . ." It suggests that decisions which bring a procurement contract into effect, constitute an exception to the general powers that may be exercised by the Review Panel.

<sup>9</sup> *Minister of Finance v Merlus Seafood Processors* 2016 (4) NR 1048 (SC); and *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) [2004] 3 All SA 1; [2004] ZASCA 48.

[46] It must be mentioned in this regard, that the applicant, having evaluated the applications for tender in terms of s. 55(5) of the Act, duly advised the 3<sup>rd</sup> respondent in part that its bid ‘ . . . is hereby accepted by the Central Procurement Board on behalf of the Roads Authority’. I am of the view that there can be no other manner of interpreting the nature and effect of that decision other than to conclude that the decision had the effect of bringing a procurement contract into force.

Conflict between s. 59 and s. 60 of the Act

[47] Section 59 (1) reads as follows:

‘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 contract.

S. 60 (c) as stated earlier in this judgment, proscribes the Review Panel from taking a decision to set aside in whole or in part a decision or action that serves to bring the procurement contract or the framework agreement into force.

[48] It would appear that the two provisions read together, stand in conflict and contradict one another. S. 59 would, on its simple reading, suggest that the Review Panel may entertain an application for review against a decision or action taken by the applicant or a public entity for the award of a procurement contract. S. 60 (c), on the other hand, seems to say whatever review powers the Panel may exercise, same should not extend to setting aside in whole or in part a decision or action bringing the procurement contract or framework of the agreement into force.

[49] One of the main canons of interpretation is that the legislature must be presumed to be consistent with itself and that where two provisions of an Act seem conflict, the court should strive to bring to bear on them an interpretation that gives full effect to both of them. The question is whether this is possible in the instant case.

[50] I am in agreement with the applicant that it is possible in the instant case to interpret both provisions in such a way as to save both of them. In this regard, I am of the considered view that s. 59 entitles an aggrieved party to apply for review of a decision or action taken for the award of a contract. In this regard, this provision creates the jurisdiction in terms of which the Review Panel may be approached, namely, where a decision or action taken either by the applicant or a public entity regarding the award of a procurement tender, aggrieves a tenderer.

[51] S. 60, on the other hand, prescribes the various orders or decisions that the Panel may issue in relation to the review launched. In that regard, whatever decisions it may take, it may not set aside a decision or an action that brings a procurement contract or the framework agreement into force. This means that the Panel may, for instance set aside the processes followed by the applicant or an public entity that are not in compliance with the Act but not a decision or action that results in the bringing of a procurement contract or framework agreement into force. If the processes are such that they have resulted in a contract or a framework agreement into force, then whatever other powers the Panel may exercise, it may not set aside the decision or action that serves to bring a procurement contract or framework agreement into force.

[52] In other words, it would seem to me that the Panel has power to set aside on review, whether in part or as a whole, actions or decisions which have been taken by the applicant or a public entity that are not in compliance with the Act. These may relate to decisions or actions taken in relation to processes leading to an eventual award. Whereas these may be set aside in

whole or partly, a decision or action that brings a procurement contract into force may not be set aside by the Panel.

[53] It accordingly follows that in the instant case, a decision to award the tender to the 3<sup>rd</sup> respondent was taken. Besides the fact that that decision was fraught with serious problems, entitling this court to set it aside, it is my view, expressed earlier in the judgment, that the decision taken by the applicant in this matter resulted in the bringing of a procurement award into effect. For that reason, the Panel did not have the power in terms of s.60, to set aside the decision and it should therefor stand.

#### The 'standstill period'

[54] There is, however, one issue that the court must comment on and this relates to what is in procurement parlance referred to as the 'standstill period'. This is a period provided for in legislation during, including the Act, which in terms of which a tender award has to remain stationary, so to speak for a period in order to allow aggrieved tenderers to launch applications for review.

[55] In the Act, s. 55 (5) provides the following:

'In the absence of an applicant for review by any other bidder within 7 days of the notice referred to in subsection (4), the accounting officer must award the contract to the successful bidder.'

This is the standstill period in our Act. It seems, regrettably, in my view, to be undermined by another provision however, as I shall endeavour to show below.

[56] S. 59 (2), on the other hand provides the following:

'An application for review made in terms of subsection (1) does not suspend the award unless an application has been made and resolved in favour of suspension.'

[57] This effectively means that even though an aggrieved party may properly lodge an application for review of a tender award within the standstill period, there is nothing stopping the award from eventuating and taking full legal effect. The further implication of this provision is that an applicant for review should, besides filing the application of the review, file a further application to stay or suspend the award of the tender pending the review. This then means two applications serve before the review panel, which have to be resolved, the one being the review proper, which is final in nature and the other being interlocutory in nature. Time, which is not on the side of the Panel, is required to deal with each of the applications in turn.

[58] What may effectively happen then is that a party may file an application for review within the period stipulated but the processes to award the contract will remain on course unless a party applies successfully for the suspension of the award pending the outcome of the review. According to s. 60 (c), if a decision or action is taken bringing a procurement contract into force, then it means even if a party becomes successful on review, that success is hollow as the decision may not be set aside, not because it is not wrong but because a decision bringing a procurement contract into force has already been taken. This may be so even if the Panel makes the decision against the propriety of the award within the period set out in s. 59 (3), which is within 7 days of the receipt of the review but not later than 14 days thereafter.

[59] In essence, it would seem that the 'standstill period', is actually one in motion, as it is a standstill in word only. The process of concluding a procurement contract moves on in earnest, although touted to be in standstill mode. As a result the very purpose of the standstill period and the review are rendered nugatory with the result that an award subsequently found to be irregularly awarded may still stand because there was no standstill in fact as the process to take a decision or action bringing a procurement contract into force remained in motion. As the process remains in motion, the ultimate success of the review may be rendered hollow, amounting to a win that is in fact a heavy and irremediable loss.

[60] The concept of a standstill period was adopted from the Austrian case of *Alcatel Austria AG and Others v Bundeministerium fur Wissenschaft and Verkehr*.<sup>10</sup> Its purpose was to set a time limit within which unsuccessful bidders who are aggrieved about the procedures followed may lodge their grievances before a procurement contract is concluded. It would seem that our legislation gives the standstill period with the right hand but simultaneously takes it away with the left. This is a matter that may need to be considered and rectified by the Legislature, in my considered view.

#### Transitional provisions

[61] Section 80 of the Act deals with transitional provisions. In this regard, the court is requested to pronounce on the proper interpretation to be accorded particularly to s. 80 (1) and (2), which reads as follows:

'(1) A tender contract existing at the date of commencement of this Act continues to be administered in terms of and governed by the law repealed by section 80, as if this Act has never been enacted.

(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.'

[62] It would appear to me that the critical stage that determines whether or not the tender will be dealt with in terms of the Act or the repealed one, is the question of bidding. According to s.80 (2), a determination whether the tender will be dealt with in terms of the new Act is whether the tender had been advertised for bidding at the coming into force of the Act, regardless of whether the tender advertisements for the tender were closed or not. If it is at the stage of bidding, whether the advertisement connected with the bidding have been closed or not, the tender has to be dealt with in terms of the Act.

[63] The word 'bid' is defined as ' . . . an offer or proposal submitted in response to a request for the supply goods, works or services, or any combination

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<sup>10</sup> C – 81/98 (A judgment of the Constitutional Court of Austria).

thereof, and, where applicable, includes any pre-qualification process.' I am of the considered view that in light of the definition accorded the word 'bid' by the Legislature, it is clear that bidding is at a relatively infancy stage of the tender process, meaning that the process is very close to the starting blocks so to speak. This, would, in my view, have been so even in terms of the repealed Act I would think.

[64] It is my considered opinion that s.81 (2) applies in circumstances where the tender in question was commenced and subsequently advertised in terms of the repealed law but had not proceeded beyond the bidding stage when the Act came into effect. In that regard, whether the tender advertisements were closed or not, the bidding process is to be carried out in terms of the Act.

[65] I am of the considered view that there is no dispute that this case, on its peculiar facts, had to be dealt with in terms of the repealed law. This is so for the reason that the tender evaluations had been completed at the technical and financial levels on the date of the coming into force of the Act, namely 1 April 2017. It would seem to me that to order processes which had been completed in terms of the repealed Act but for the award, to have to commence *de novo*, would be absurd and would result in a waste of time and of resources, both for the bidders and the various entities formed under the Act. Such an absurdity can hardly be said to have been intended by Parliament in my view.

[66] It would have the pernicious effect, in my view, of rendering tenderers who had spent considerable amounts of money and time in these processes under the repealed Act to count their losses as dung, which might have the concomitant effect of rendering them unable to effectively compete in the new tenders called in terms of the Act. It is often stated that Parliament is presumed not to procure absurd results in the legislation it passes.

[67] It is also important to mention that at the bidding stage, very little of any rights can be said to have accrued to the bidders. This accordingly makes sense to then invoke the provisions of the Act, notwithstanding the bidding



process having been commenced in terms of the repealed Act. The further the process goes beyond bidding, it would seem to me, the repealed Act would have to apply.

[68] The court was referred by the applicant to the judgment in *Minister of Public Works v Haffejee*.<sup>11</sup> The court, in the context of considering the issue of retrospectivity, came to the view that the distinction between whether a piece of legislation is prospective or retrospective in effect should not be based on whether the new provisions are procedural in nature or not. The court stated that the distinction between whether the amendments are procedural or substantive, is not always decisive.

[69] The learned Judge of Appeal reasoned that the issue to be considered is determined by whether the interpretation accorded will result in impacting upon existing rights and obligations. The learned Judge said, 'If those substantive rights and obligations remain unimpaired and capable of enforcement by the invocation of the newly prescribed procedure, there is no reason to conclude that the new procedure was not intended to apply.'

[70] The court then stated the following at p. 753 E:

'Furthermore, should the amendments be given retrospective effect it will entail nothing more than the application of a new procedure to the respondent's pre-existing right to compensation; the only difference being that, as from 1 May 1992, the respondent had to enforce that right to compensation in the Natal Provincial Division instead of a compensation court. There would be no adverse impairment of any pre-existing right to compensation.'

[71] Although the case dealt with a different question altogether, I am of the considered view that the reasoning employed commends itself for application in the instant case. In this regard, it will be seen that if all the stages that were followed in this case in terms of the repealed Act were to be jettisoned and the process commenced afresh, there would be a deleterious effect on the bidders and the 4<sup>th</sup> respondent, as I have endeavoured to show in paras [54] and [55] above.

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<sup>11</sup> 1996 (3) SA 745 (AD) at 753.

[72] In coming to the conclusion that I have reached on this issue, I decline the invitation and bait extended by the applicant for the court to make a general decision regarding the application of the s.81 on tenders commenced under the repealed Act but completed after the coming into force of the Act. It must be mentioned that each case must be decided on its own merits. It would be dangerous for this court, in the absence of relevant facts, to make a general statement regarding the application of the provision in question.

#### Appointment of Bid Evaluation Committees

[73] Part of the orders issued by the Review Panel in para 4 was for the applicant to submit names of prospective members of the *ad hoc* committee to the Policy Unit for consultation and appointment, as well as to set a date for the re-evaluation of bids. The applicant takes issue with that order and claims that the position that the Panel, in making the order it did, is, in footballing terms, 'off-side'. The applicant contends that it is not bound in terms of the law to consult the Policy Unit with regards to the appointment of an evaluation committee.

[74] In order to decide on this issue, it may well be necessary to have regard to the relevant statutory regime. The starting point, in my view is to have regard to the responsibility of the Unit. According to s. 6, the Policy Unit is set up generally to advise the Minister of Finance on any procurement related matters, including monitoring of compliance with the Act, codes and guidelines under the Act; review of the impact of the procurement system on the socio-economic policy of the Government, to mention but a few.

[75] Its functions are set out in s.7. They are multifarious but include advising the public procurement; conducting training programmes and compiling a curriculum for training institutions; setting training standards for, capacity building and competence levels and certification requirements; prepare guidelines, manuals directives, instruction for mandatory use by public entities; provide guidance on operational matters in procurement activities, to mention only but a few.

[76] In relation to the appointment of the Bid Evaluation Committee, s.26 provides that the applicant or the accounting officers are to establish an *ad hoc* evaluation committee for the evaluation of bids and must appoint persons as members of bid evaluation committee.<sup>12</sup> Interestingly, Regulation 13 of the Public Procurement Regulations provides the following:

‘Subject to section 26 of the Act, the accounting officer, when establishing an *ad hoc* bid evaluation committee under that section, must appoint not less than three and not more than seven members as members of the bid evaluation committee, after consultation with the Policy Unit.’

[77] Before I deal with the question for determination, it is necessary that I deal, for the benefit of the applicant and particularly the 1<sup>st</sup> respondent, the import of the words ‘after consultation’ employed in the above provision. I start with consultation. In *Maqoma v Sebe N.O. and Another*.<sup>13</sup> At p.490, the learned Judges stated the following about the concept of consultation at C-D:

‘For the aforementioned reasons, it seems to me that “consultation” in its normal sense, without reference to the context in which it is used, denotes a deliberate getting together of more than one person or a party (also indicative of the prefix ‘con’) in a situation of conferring with each other where minds are applied to weigh and consider together the pros and cons of a matter or debate.

The word ‘consultation’ in itself does not pre-suppose or suggest a particular *forum*, procedure or duration for such discussion or debate. Nor does it imply that any particular formalities should be complied with. Nor does it draw any distinction between communications conveyed orally or in writing. What it does suggest is a communication of ideas on a reciprocal basis.’

[78] Having dealt with the meaning of consultation above, which I endorse as applicable in this matter, It is important that guidance is offered as to the meaning of the words ‘after consultation’, which occur in the section quoted above, mean.

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<sup>12</sup> S. 26 (1) (a) and (b) of the Act.

<sup>13</sup> 1987 (1) SA 483 (Ck GD).

[79] In *Minister of Health and Social Services and Three Others v Medical Association of Namibia Limited*<sup>14</sup> the Supreme Court, quoting with approval the sentiments stated in *Van Rooyen and Others v The State and Others*<sup>15</sup> stated:

'The meaning of the phrase "in consultation with" and "after consultation with" are now well established. "In consultation with" requires the concurrence of the other functionary (or person) and if a body of persons, that concurrence must be expressed in accordance with its own decision-making procedures. "After consultation with" requires that the decision be taken in good faith after consulting and giving serious consideration to the views of the other functionary (or person). In the former case the person making the decision cannot do so without the concurrence of the other functionary or person. In the latter case he or she can.'

[80] In the premises, it is clear what the responsibilities of the party called upon to consult are. In the instant case, and from the definitions given, it would appear that the party to make the appointment is required confer with and engage and put their minds together to weigh the pros and cons of the various appointment possibilities as to the choice of the evaluation committee.

[81] Thereafter, the appointing party is to then to make the decision of appointment in good faith taking into account the views expressed by the Policy Unit. In that regard, the consulting party has to give serious consideration to the views expressed by the said Unit. According to the authorities, the appointing party does not have to obtain the concurrence of the Policy Unit in making the appointment.

[82] I now turn to the law applicable to the question at hand. It is the applicant's contention that because there is no express provision calling upon it to consult with the Policy Unit in the appointment of members, the Panel was wrong to have ordered it to consult. It is a matter of comment that the Legislature knows that it has granted powers both to the applicant and to accounting officers, to appoint members of the evaluation committee. It, however, chose in the subsidiary legislation, to subject the appointment

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<sup>14</sup> Case No. SA 13/2010 and SA 21/2010.

<sup>15</sup> 2001 (4) SA 396 (T) at 453.

process by the latter to consultation with the Policy Unit in terms of the Regulation in question.

[83] On the interpretational principle *expression unius est exclusio alterius*, i.e. the express mention of one thing, excludes the other, I am of the considered view that the Legislature was aware of the powers it gave to both the accounting officers, on the one hand, and the applicant, on the other, to appoint members of the evaluation committee.

[84] With that knowledge intact, the Lawgiver decided, in the Regulations, to direct only that the accounting officers should make appointments after consultation with the Policy Unit, and in the process, did not include that consultation with respect to the applicant. Parliament had every opportunity to make a similar requirement regarding the applicant but did not do so. We cannot therefore rewrite the Legislation or try and circumvent the clear intention of parliament when it is expressed as clearly as in this case. I accordingly agree that the Panel was not correct in making the order in para 4 that it did.

[85] I must also mention in this regard that having regard to the powers and functions of the Policy Unit, it does not ordinarily appear that they have any power, even of a residual nature, to give advice on the appointment of members of the evaluation committee. It accordingly does not lie with the Review Panel to imbue the Unit with that power, especially in so far as it relates to the applicant.

[86] Without necessarily purporting to get into the mind of the legislature, there does appear to me to have been a sensible rationale for requiring consultation from the one but not from the other. From a reading of the Act, it appears to me that the applicant is composed of a number of individuals, nine to be exact. The accounting officer, on the other hand, who has similar powers to appoint an evaluation committee, on the other hand, is a single individual.

[87] It would appear to me therefor that considering the enormous power that is required in the appointment of such a critical body, it was considered fit in the Regulation in question, to subject the appointment by an individual to consultation so that he or she may derive useful assistance and guidance, where necessary in the choices available. With the applicant, however, composed of nine different individuals of different genders, competencies and skills, there is less need for consultation in appointments for it is often said that in a multitude of counsellors, there is safety.

[88] Parliament, it would seem to me, considered that the accounting officer, an individual, was the one in need of counsel and therefor needed to consult on the appointments but not the applicant, considering the number of its members and the various skills and talents at its disposal at every sitting. This further reinforces the view I expressed earlier that the Panel acted in error when it ordered the applicant to appoint an evaluation committee in consultation with the Unit, when there is no legislative or other basis for doing so. I accordingly find for the applicant in this regard.

### Conclusion

[89] It would appear to me, in view of the foregoing that the applicant has made a compelling case in the circumstances. It appears firstly, that the applicant, whose decision was sought to be set aside by the 1<sup>st</sup> respondent, was entitled to service of the application for review. Furthermore, the applicant was entitled to file its responses in writing to the case made against it, culminating in it being given reasonable notice of the hearing and being afforded an opportunity to make representations before the 1<sup>st</sup> respondent.

[90] I am also of the view that the applicant, as it had awarded the tender, became *functus officio* and could no longer exercise its jurisdiction any further, considering also that the 1<sup>st</sup> respondent did not set aside the applicant's decision, which I am of the view it could not in any event, having regard to s.60 (c). It is also my finding that the applicant was entitled to deal with the tender in terms of the repealed law having regard to the circumstances of this case. Finally, it is also clear that the applicant has no

statutory obligation to consult the Policy Unit in the appointment of members of an evaluation committee.

### Costs

[91] The applicant has understandably not prayed for an order for costs. This may primarily be for the reason that the respondents, the 1<sup>st</sup> respondent in particular, did not oppose the relief sought. But more fundamentally, it may seem a bit odious for entities created by the State in terms of the same Act, to obtain an order for costs against each other for it may amount to taking money from your left pocket and putting it into your right pocket. As mentioned earlier, the main reason for the application was to delineate the lines between these bodies and to extent of the power of each vis-à-vis the other, in the exercise of their statutory duties and functions.

### Order

[92] For the reasons advanced above, I accordingly issue the following order:

1. The decision by the Review Panel delivered on 8 November 2017 be and is hereby set aside.
2. It is hereby declared that Section 81 (2) of the Public Procurement Act, 15 of 2015 is to be interpreted to mean that the provisions of the Public Procurement Act take effect from the date of commencement of the Act, namely 1 April 2017 and therefore have no retroactive effect.
3. The steps taken by the Roads Authority in the process of the tender “BUREAU SERVICES FOR SUPPLY AND PERSONALISATION OF DRIVING LICENCE CARDS, 60 MONTHS – DRIVING LICENCE CARD PRODUCTION TENDER- AR/SE-2016” as at 1 April 2017 remain valid and enforceable.

4. It is hereby declared that the Public Procurement Act, 15 of 2015, does not require the Applicant to consult with the Policy Unit (established in terms of section 6 of the Public Procurement Act, 15 of 2015) prior to appointing Bid Evaluation Committees in terms of the provisions of section 26 of the Act.
5. There is no order as to costs.
6. The matter is removed from the roll and regarded as finalised.

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T S Masuku  
Judge



## APPEARANCES

APPLICANT:

P Barnard  
instructed by Government Attorney,  
Windhoek