



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-MOT-GEN-2021/00255

In the matter between:

RADIAL TRUSS INDUSTRIES (PTY) LTD

APPLICANT

and

**CHAIRPERSON OF THE CENTRAL PROCUREMENT
BOARD OF NAMIBIA**

1ST RESPONDENT

**CENTRAL PROCUREMENT BOARD OF NAMIBIA
MINISTER OF FINANCE**

2ND RESPONDENT

3RD RESPONDENT

ONGOMA TRADING ENTERPRISES CC

4TH RESPONDENT

**MINISTER OF EDUCATION, ARTS AND CULTURE
REVIEW PANEL**

5TH RESPONDENT

6TH RESPONDENT

NEXUS BUILDING CONTRACTORS (PTY) LTD

7TH RESPONDENT

OCTAGON CONSTRUCTION (PTY) LTD

8TH RESPONDENT

**KUNENE RIVER CONSTRUCTION AND ELECTRICAL CC
& NCCS INVESTMENT HOLDINGS (PTY) LTD JV**

9TH RESPONDENT

JDN CIVIL ENGINEERING CC

10TH RESPONDENT

BENGUELA TRADING CC & EKODI INVESTMENT CC JV

11TH RESPONDENT

FLD TRADING ENTERPRISES CC

12TH RESPONDENT

**CJB BUILDERS CC & J. GROENWALD PROPERTIES
CC JV**

13TH RESPONDENT

**TATIANA TRADING ENTERPRISES CC & ONGUSHE
INVESTMENTS CC JV**

14TH RESPONDENT

PALLADIUM CIVIL ENGINEERING (PTY) LTD

15TH RESPONDENT

VALOMEK CIVIL CC & AUGUST TWENTY-SIX CONSTRUCTION (PTY) LTD JV	16 TH RESPONDENT
AR GEISEB CIVIL ENGINEERING ENTERPRISES CC	17 TH RESPONDENT
AMUPOLO BUILDING CONTRUCTION CC	18 TH RESPONDENT
PRALO INVESTMENT CC	19 TH RESPONDENT
WT BUSINESS GROUP (PTY) LTD	20 TH RESPONDENT
M. SHIKONGO'S INVESTMENTS GROUP CC	21 ST RESPONDENT
ETN TECHNICAL SERVICES CC	22 ND RESPONDENT
JAMES AND YOUNG TRADING ENTERPRISES CC	23 RD RESPONDENT
NDKALIMWE INVESTMENTS CC	24 TH RESPONDENT
GONGALENI INVESTMENT CC	25 TH RESPONDENT
FA DEVELOPMERS CC	26 TH RESPONDENT
CAPITAL TECHNICAL SERVICES CC & ART CONSTRUCTION CC JV	27 TH RESPONDENT
I.D. BUILDING CONTRACTORS CC	28 TH RESPONDENT
VERI GROUP CC	29 TH RESPONDENT
ADAPTIVE BUILDING CONSTRUCTION CC	30 TH RESPONDENT
FLORIDA TRADING CC & PENATU TRADING CC JV	31 ST RESPONDENT

Neutral citation: *Radial Truss Industries (Pty) Ltd v Chairperson of the Central Procurement Board of Namibia* (HC-MD-CIV-MOT-GEN-2021/00255) [2021] NAHCMD 380 (24 August 2021)

Coram: ANGULA DJP
Heard: 10 August 2021
Delivered: 24 August 2021

Flynote: Applications and motions – Urgent application – Public Procurement Act 15 of 2015 – Section 55 – Regulation 38 – Interpretation of Statutes – Regulation *ultra vires* and null and void to the extent that it is in conflict with the Public Procurement Act, 2015.

Summary: On or about the 8 July 2020 the Central Procurement Board called for submission of bids for the emergency upgrading and renovation and repair of Tubusis Primary School situated in the Erongo Region for an estimated value of just

slightly over N\$75 million – About twenty five bidders submitted their bids. – The applicant's bid was accepted by the board on 16 October 2020 and the applicant was notified when the board issued and sent a formal Notice of Selection of Award to the applicant advising that its bid for the sum of N\$68,969,851.75 had been accepted by the board.

Thereafter, on 27 November 2020, the applicant received a notice from the board advising that one of the unsuccessful bidders, the fourth respondent, Ongoma Trading Enterprises CC ('Ongoma') had requested the board to reconsider its decision to award the bid to the applicant. The board acceded to Ongoma's request. Having reconsidered its previous decision, it decided on 19 April 2021, to revoke the award to the applicant and awarded it to Ongoma.

Aggrieved by the board's decision, the applicant filed a review application on 26 April 2021 with the Review Panel, the (sixth respondent) whereby it sought the decision of board to be reviewed and set aside, contending that the board has no power to reconsider its own decision and that only the Review Panel has the power to review the board's decisions. Having considered the application on 20 May 2021, the Review Panel made its ruling and/or decision which reviewed and set aside the board's decision and ordered the board to act in accordance with the provision of the Act by awarding the tender to the successful bidder.

Held; that it is not, however legitimate to treat the Act and the Regulations made thereunder as a single piece of legislation and use the latter as an aid of interpretation of the former. The provisions of the Act must be interpreted before the Regulation is looked at and if the Regulation purports to vary the section as so interpreted, it is *ultra vires* and void. It cannot be used to cut down or enlarge the meaning of the provisions of the Act.

Held; that the meaning to be assigned to the words 'application for review' in s 55(5) is the same 'review application' mentioned in s 59. Section 59 provides in clear language that a bidder or supplier may apply for a review of a decision by the board. Any other interpretation would be incompatible with the clear intention of the Legislature, viewed in the total context and scheme of the Act.

Held; that what Regulation 38(2) (c) then impermissibly does is to create a right for a bidder to request the board or a public entity to ‘reconsider’ its selection for the award within the standstill period. That right is not provided for in s 55(4). This amounts to impermissibly using Regulation 38 to enlarge the meaning of s 55 which was not provided for and not envisaged by the Legislature. If the Legislature intended to create such right for a bidder, it would have done so in s 55(4) and in a clear language.

Held; that any challenge to the board’s notice of selection of an award must be made by way of a review in terms of s 55(5) and that that review is to be determined by the Review Panel established by the minister in terms of s 58.

Held; that to the extent Regulation 38 is in conflict with the provisions of the Act it is to be considered *ultra vires* and null and void.

Held; that the decision by the board to make an award and notify the successful bidder is final in nature and that after such decision the board became *functus officio*.

ORDER

1. The applicant, first respondent and second respondent’s non-compliance with the Rules of this Court, if any, relating to the form and service and time limits as set out in rule 73(3) of the Rules of this Court, are dispensed with and the matter is heard as one of urgency.
2. The first and/or second respondents are directed to comply with paragraph (c) of the sixth respondent’s, the Review Panel, ruling/order of 20 May 2021 to the following effect:

‘That the First Respondent [the second respondent in these proceedings] is hereby ordered to proceed in the manner consistent with Section 55(5) of the Public Procurement Act 2015 (Act No. 15 of 2015), for there has never been an Application

for Review in terms pursuant to the Notice of Selection for Award dated 16 October 2020.'

3. The first and/or second respondents are directed to comply with the order, as set out in paragraph 2 above, within the bid validity period due to expire on Friday, 27 August 2021.
4. The first and second respondents' counter-application is dismissed.
5. The first and second respondents are ordered to pay the applicant's costs of this application and counter-application, to include the costs of one instructing and two instructed legal practitioners, jointly and severally, the one paying the other to be absolved.
6. The matter is removed from the roll and is considered finalized.

JUDGMENT

ANGULA DJP:

Introduction

[1] This urgent application, concerns the Central Procurement Board of Namibia (the 'Board') asserting its perceived power to review or reconsider its decision before it makes a final award of a procurement contract. The applicant was initially a successful bidder and had been so formally notified in the prescribed manner. However, after such notification, the board claiming to have reconsidered the award it had made to the applicant, decided to revoke the award to the applicant and awarded the procurement contract to another bidder, the fourth respondent.

[2] Aggrieved by the decision of the board, the applicant filed a review application in terms of the Public Procurement Act, No. 15 of 2015 (the 'Act'). Thereafter the Minister of Finance, who is vested with the administration of the Act, appointed a

Review Panel. Having considered the applicant's review application, the Review Panel set aside the board's decision and ordered the board to act in compliance with the provisions of the Act. Thereafter, the board refused and/or neglected to comply with the Review Panel's order. This caused the applicant to bring the present application on urgent basis seeking an order compelling the board to comply with the decision and/or orders of the Review Panel. In turn, the board and its chairperson, launched a counter-application seeking *inter alia* an order that the minister's decision to appoint the Review Panel be declared null and void; and that the Review Panel's decision ordering it to comply with the provisions of the Act be reviewed and set aside.

Factual background

[3] The facts are by and large common cause. It is the interpretation of the relevant provisions of the Act and the Regulations where the parties take opposing views. On or about the 8 July 2020 the board called for the submission of bids for the emergency upgrading, renovation and repair of Tubusis Primary School, situated in the Erongo Region for an estimated value of just slightly over N\$75 million. About twenty five bidders submitted their bids. The applicant's bid was accepted by the board on 16 October 2020 and the applicant was notified when the board issued and sent a formal Notice of Selection of Award to the applicant advising that its bid for the sum of N\$68,969,851.75 had been accepted by the board.

[4] Thereafter, on 27 November 2020, the applicant received a notice from the board advising that one of the unsuccessful bidders, the fourth respondent, Ongoma Trading Enterprises CC ('Ngoma') had requested the board to reconsider its decision to award the bid to the applicant. The board acceded to Ongoma's request. Having reconsidered its previous decision it decided on 19 April 2021 to revoke the award to the applicant and awarded the tender to Ongoma.

[5] Aggrieved by the board's decision, the applicant filed a review application on 26 April 2021 with the Review Panel, the (sixth respondent) whereby it sought the decision of board to be reviewed and set aside contending that the board has no power to reconsider its own decision and that only the Review Panel has the power to review the board's decisions. Having considered the application on 20 May 2021,

the Review Panel made its ruling and/or decision which reviewed and set aside the board's decision and ordered the board to act in accordance with the provisions of the Act by awarding the tender to the successful bidder.

[6] Thereafter the board refused and/or failed to comply with the Review Panel's order/and or ruling. In terms of the Act, a bid validity period is 180 days. However the validity period may be extended only with consent of all the bidders. In the present matter, the bid was due to expire on 28 June 2021. It would appear that as a result of the imminent expiry of the bid validity period, the applicant launched the present application on 23 June 2021 in order for a determination to be made before the expiry date. The court has been informed by the parties that following the filing of this application the validity of the bid had been extended to 27 August 2021.

Relief initially sought by the applicant.

[7] During the hearing, the court expressed its concern with the type of relief sought by the applicant and requested counsel for the applicant to reconsider the matter. At the end of the hearing, the court was provided with an amended notice of motion in the form of a draft order. The draft order was provided to counsel for the respondents who made some comments. The applicant now seeks the following relief in the amended notice of motion:

1. The applicant, first respondent and second respondent's non-compliance with the Rules of this Court, if any, relating to the service and time limits as set out in rule 73(3) of the Rules of this Court are dispensed with and the matter is heard as one of urgency.
2. The first and/or second respondent is (are) directed to comply with paragraph (c) of the sixth respondent's ruling/order dated 20 May 2021, to the following effect:

'That the First Respondent [the second respondent in these proceedings] is hereby ordered to proceed in the manner consistent with Section 55(5) of the Public Procurement Act 2015 (Act No. 15 of 2015), for there has never been an

Application for Review in terms pursuant to the Notice of Selection for Award dated 16 October 2020.’

3. The first and/or second respondents are directed to comply with the order, as set out in paragraph 2 above, within the bid validity period due to expire on Friday, 27 August 2021, alternatively should the first and/or second respondents be unable to comply by the aforesaid date, the first and/or second respondents are ordered to extend the bid validity period by a further period of thirty (30) days in order to ensure compliance within such extended bid validity period.
4. The first and second respondents are ordered to pay the applicant’s costs of this application, to include the costs of one instructing and two instructed legal practitioners, jointly and severally, the one paying the other to be absolved.

The respondents’ counter-application

[8] The application is only opposed by the chairperson of the board and the board itself as represented by its chairperson. I will henceforth refer to them as ‘the respondents’. In their counter-application the respondents seek an order declaring the nomination, appointment and constitution of the Review Panel by the minister as null and void and that it be set aside; an order declaring that all processes undertaken and all decisions made by the Review Panel as unlawful and of no force or effect and setting them aside. Finally the respondents seek an order reviewing and setting aside the decision of the Review Panel of 10 May 2021.

[9] In order to appreciate, so to speak, the tug of war between the board and the Review Panel it is necessary to reproduce the terms of the Ruling of the Review Panel of 20 May 2021. It reads:

- ‘(a) The first respondent [the Board] is not clothed with the power enabling it to reconsider and set aside its administrative decisions or actions. Thus, it had not set aside its selection decision for the Applicant continued [contained] in the Notice of Selection for the award dated 16 October 2020;

- (b) That the First Respondent's second selection decision for the Third respondent contained in the second Notice of Selection for an award dated 27 April 2021 is hereby set aside and corrected in terms of section 60(d) of the Public Procurement Act, 2015 (Act No.15 of 2015);
- (c) That the First Respondent is hereby ordered to proceed in the manner consistent with section 55(5) of the Public Procurement Act, 2015 (Act No. 15 of 2015) for there has never been an application for Review in terms of the Notice of Selection for the award dated 16 October 2020; and
- (d) This order is effective for 20 May 2021.'

[10] Mr Corbett, for the applicant, aptly summed up the respondents' opposition to the applicant and I will liberally borrow from his summary. Essentially the respondents main contentions are that: (1) the applicant may not challenge the board's notice of selection issued to Ongoma because that notice does not constitute a decision to award a procurement contract within the meaning of s 59 of the Act; (2) where the board issues a notice of selection. The review of such notice is to be referred to the board for a 'reconsideration' by it in terms of the provisions of Regulation 38 made by the minister in terms of s 79 of the Act; (3) It is thus premature for the applicant in the present matter to have referred its review application to the Review Panel in terms of s 59 of the Act as it should have first referred its application to the board; and (4) accordingly, on this interpretation, the respondents contend that the Review Panel in making its ruling of 20 May 2021 acted *ultra vires* its powers in terms of the Act and the Regulations.

[11] The conflicting interpretations of the relevant provisions of the Act as advanced by the protagonists lie at the heart of the competing relief sought by the parties. This requires a consideration of relevant provisions of the Act in order to determine whose interpretation should be accepted as being aligned with the intention of the Legislature.

Relevant provisions of Act and Regulations

[12] Part 6 of the Act deals with the bidding process and the award of procurement contracts. It is followed by Part 7 of the Act, which deals with the review process in the event any allegation of impropriety is made by an unsuccessful bidder or supplier with regard to the bidding process.

[13] Section 55 is located in Part 6 of the Act. It provides as follows:

- '(1) The Board or a public entity must award a procurement contract to the bidder having submitted the lowest evaluated substantially responsive bid which meets the qualification criteria specified in the pre-qualification or bidding documents, following the steps outlined in subsections (3) and (4).
- (2) There is no negotiation between the Board or a public entity and a selected bidder, except in such special circumstances as the Minister may determine.
- (3) The Board or public entity, whether where special circumstances contemplated in subsection (2) apply, must initiate and oversee the negotiation between the Board or a public entity and a selected bidder.
- (4) An Accounting Officer must, in the prescribed manner and form, notify -
 - (a) the successful bidder of the selection of its bid for award; and
 - (b) the other bidders, specifying the name and address of the of the successful bidder and the price of the contract.
- (5) In the absence of an application 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.'

[14] Other relevant provisions are contained in s 59 of the Act which deals with the applications for review by the Review Panel. It reads:

- '(1) A bidder or a supplier may, as prescribed, apply to the Review Panel for the 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.'

[15] Regulation 38 is a further relevant provision for the reason that the respondents contend that there is an interplay between that Regulation and s 55 of the Act. In fact, they contend that it is the source for the board's power to review its own decision. That Regulation provides as follows:

- '(1) A notice for the selection of an award of a procurement contract to the successful bidder and other bidders as contemplated in section 55 of the Act, is made in the form set out in Annexure 5.
- (2) In addition to other details referred to in sub section (4) of section 55 of the Act, the notice referred to in subsection (1) must inform the bidders-
 - (a) of the amount offered by the successful bidder and accepted by the public entity;
 - (b) of the date and time when the standstill period commences and ends;
 - (c) that a bidder who intends to request a public entity to reconsider its selection for the award to apply for the review of the selection for the award within a standstill period; and (underlining added for emphasis)
 - (d) that failure to request a public entity to reconsider its selection for the award under paragraph (c) will result in the awarding of the contract to the successful bidder as contemplated in subsection (5) of that section within seven days from the standstill period.
- (3) The Board or a procurement committee must assess the review made by the bidder under sub-regulation (2) and the Board or procurement committee may-
 - (a) refer the matter to the bid evaluation committee, if the Board or procurement committee is of the view that the outcome of the review warrants re-evaluation of the bids;

- (b) make other orders as the Board or procurement committee may consider necessary; or
- (c) recommend to the accounting officer that the award of the procurement contract to be made to the successful bidder selected under section 55 of the Act.’

[16] That concludes the identification of the relevant statutory provisions in the Act. I will later in this judgment revert to those statutory provisions to consider them in detail.

Issues for determination

[17] Initially, the applicant raised two preliminary points against the respondents’ case. Those are that respondents have failed to comply with the requirements of rule 76 of the rules of this court. In response to this point Ms Shifotoka correctly pointed out that there is no merit in this point, relying on the holding by the Supreme Court in *Namibia Financial Exchange (Pty) Ltd*¹ where the court held that it is not a requirement that in every review application the applicant is compelled to proceed under rule 76 and that failure to do so does not amount to the proceedings being a nullity.

[18] The second point raised related to the fact that the respondents did not make out a case for urgency. As regards to urgency, it suffices to say that the court is satisfied that both the main application and the counter-application are urgent given the fact that the tender in question was for the emergency renovation of a school. Thus commercial urgency attended upon the matter. In my view and in the exercise of my discretion, I hold that urgency attaches to both the main application and the counter application.

[19] The main issue for determination is the proper interpretation to be placed on the relevant provisions of the Act and the Regulations made under the Act. Counsel’s submissions were diametrically opposed to each other as to the proper

¹ *Namibia Financial Exchange (Pty) Ltd v Chief Executive Officer of the Namibia Financial Institutions Supervisory Authority & Others* 2019 NR 859 (SC) at para 40.

interpretation to be accorded to the relevant statutory provisions. It would be useful to briefly summarise counsel's respective arguments with respect to the relevant statutory provisions referred to in detail earlier in paras [13], [14] and [15] of this judgment.

Submissions on behalf of the applicant

[20] Mr Corbett, for the applicant submits in his heads of argument that the respondents have misconstrued the procedure to be adopted in reviewing the decisions or actions of the board. Counsel points out, firstly that central to the respondents' argument is that the Act and the Regulations should be treated as a single piece of legislation providing for the process to challenge a decision of the board. Counsel points out, relying on the approach set out in *Hamilton-Brown v Chief Registrar of Deeds*², where it was held that to treat the Act and the Regulation as a single piece of legislation is entirely wrong approach to the interpretation a statutes. Secondly, it would be absurd to interpret the statutory provisions in such a way that the board is allowed to review its own decisions. Thirdly, the coming into operation of s 59(1) (application for review by a bidder or supplier) is triggered by either a decision or an action taken by the board to award a procurement contract. I should interpose here to point out that in terms of s 58(3)(a) it can also be triggered 'on the grounds of the allegations made in the application' for review submitted to the Review Panel'.

Submissions on behalf of the respondents

[21] Ms Shifotoka, for the respondents, in countering the applicant's contention that the board became *functus officio* after it had issued a Notice of Selection, contends in her written submissions, relying on cases such as *Hitchcock v Steytler, Roux v Civil Commissioners of Briststown*³ and *Union of Teachers' Association of South Africa v Minister of Education & Culture, House of Representatives*⁴, that the board did not become *functus officio* because the Notice of Selection was conditional and not final. She argues that the Notice was conditional because it could only

² *Hamilton-Brown v Chief Registrar of Deeds* 1968 (4) SA 735 (T).

³ *Hitchcock v Steytler, Roux v Civil Commissioners of Briststown* (1893) 10 SC 24.

⁴ *Union of Teachers' Association of South Africa v Minister of Education & Culture, House of Representatives* 1993 (2) SA 828 (C).

become final if within standstill period of 7 days, no unsuccessful bidder challenged the award.

[22] Counsel further argues that the Notice of Selection did not signify the end of the bidding process; that the process is concluded by the awarding of the procurement contract. Counsel thus submits that the board's decision to select a bidder for an award and the subsequent issuance of the Selection Notice was not final and did thus not render the board *functus officio*. In support of this submission, counsel relies on the judgment in *Pamo Trading Enterprises CC*⁵. I will later in this judgment, consider the import of the *Pamo* judgment.

[23] As regards the question which body or entity should consider the review application brought by an unsuccessful bidder, counsel submits that it is the board that must consider such application. This is because – so the argument goes – s 55 falls under Part 6 of the Act which deals with the bidding process. Furthermore, s 55 does not specify the body which should deal with a review application lodged in terms of s 55(5). Therefore, counsel submits, it 'can only be interpreted to the effect that the review application brought in terms of s 55(5) should be adjudicated upon by the Board'.

[24] In respect of the provisions of Regulation 38(2) and (3), counsel accepts the principle laid down in *Hamilton-Brown (supra)* that the Regulation cannot be used to interpret an Act. Counsel however submits in this respect that in the present matter, Regulation 38 does not vary s 55, instead it 'gives flesh' to s 55 in the sense that it provides for the procedure to be followed by the board in assessing the review application. For those reasons, counsel argues Regulation 38 is not *ultra vires* the Act.

Analysis

[25] I will first consider the question relating interpretation of the powers of the board in terms of the Act to review its own decisions or actions. I will thereafter consider the interpretation relating to the powers of the Review Panel.

⁵ *Pamo Trading Enterprises CC v Chairperson of the Tender Board of Namibia* (A 349/2014) [2017] NAHCMD 268 (18 September 2017).

Powers and functions of the Board

[26] Section 8 of the Act establishes the board as a juristic person: thus a creature of statute. It is trite law that a creature of the statute only has powers and can only exercise such powers vested upon it by the statutes establishing it. Section 9 of the Act sets out the powers and functions of the board. I have perused and considered the provisions of s 9 and can state without fear of contradiction that there is no portion or part in that section which vests the board with power to review or reconsider its own decisions.

[27] The closest it comes with regards to review power by the board, is subsection 9(1)(l) which vests the board with the power to review the recommendations of a Bid Evaluation Committee. It needs pointing out in this regard that a Bid Evaluation Committee is an *ad hoc* committee established by the board. The persons who act as members of a Bid Evaluation Committee are appointed by the board. The board may approve or reject the recommendations of a Bid Evaluation Committee and can require a Bid Evaluation Committee to make new or further evaluations on specific grounds. It is thus understandable that under those circumstances the board can review the works or recommendations of a Bid Evaluation Committee. I turn to consider counsels' respective submissions in relation to the proper interpretation of the relevant statutory provisions. But before I do so, I first set out the relevant principles applicable to the interpretation of statutory instruments.

Applicable principles governing interpretation of statutory instruments

[28] It is argued on behalf of the applicant that the interpretation the respondents seek to advance namely that an application for review referred to in s 55(5) of the Act should be understood to be a reference to the 'reconsideration' of a selection award mentioned in Regulation 38(2), is wrong. It is then submitted that such interpretation would lead to absurdity whereby the board is allowed to review its own decisions. In support of this argument, counsel cited *Byat v Commissioner for Immigration*⁶ where the court had the following to say with regard to the interpretation of a statutory instrument leading to absurdity:

⁶ *Byat v Commissioner for Immigration* 1932 AD 125 at 129.

'The cardinal rule of construction of a statute is to endeavour to arrive at the intention of the lawgiver from the language employed in the enactment ... in construing a provision of an Act of Parliament the plain meaning of its language must be adopted unless it leads to some absurdity, inconsistency, hardship or anomaly which from a consideration of the enactment as a whole a court of law is satisfied that the legislature could not have intended.'

[29] Furthermore, the Supreme Court in *Total Namibia*⁷ has laid down the approach to be followed in construction of statutory instruments or contracts. The court said the following:

'[18] South African courts too have recently reformulated their approach to the construction of text, including contracts. In the recent decision of *Natal Joint Municipal Pension Fund v Endumeni Municipality* Wallis JA usefully summarised the approach to interpretation as follows -

"Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed; and the material known to those responsible for its production. Where more than one meaning is possible, each possibility must be weighted in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or business-like for the words actually used."'

Which body must consider the review application filed by unsuccessful bidder(s)?

⁷ *Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors CC* (SA 9/2013) (30 April 2015).

[30] The applicant contends that on a proper interpretation of s 55 it is the Review Panel which must conduct such review application. The respondents contend contra-wise namely that: 'According to regulation 38(3) the board, and only the board, must assess the review application of the unsuccessful bidder during the standstill period⁸.

[31] The approach to be adopted to the interpretation when there is an apparent conflict between the provisions of the Act and the regulation was laid down by the South African Appellate Division in *Moodley v Minister of Education and Culture, House of Delegates and Another*⁹ where the court said the following:

'In terms of s1 thereof "this Act" includes any regulation. But although regulations have the force of law, they are not drafted by Parliament. It follows that s 15(1) must be interpreted before reg 3(1) is scrutinized and a meaning is assigned to it. It is not permissible to treat the Act and the regulations made thereunder as single piece of legislation; and to use the latter as an aid to interpret the former. Regulation 3(1) cannot be used to enlarge the meaning of s 15(1).'

[32] Both counsel referred the court to *Hamilton-Brown (supra)* which says the same thing as the *Moodley* matter. It says:

'It is not , however legitimate to treat the Act and the Regulations made thereunder as a single piece of legislation and use the latter as an aid of interpretation of the former. The section in the Act must be interpreted before the Regulation is looked at and, if the Regulation purports to vary the section as so interpreted, it is ultra vires and void. It cannot be used to cut down or enlarge the meaning of the section.' (My underlining)

[33] I proceed to apply the principle outlined above to interpret the words 'application for review' in s 55(5). I do not agree with the interpretation proffered on behalf of the respondents that just because s 55 is located in Part 6, which deals with the bidding process it signifies the Legislature's intention that such application must be considered by the board. In my view, the meaning to be assigned to the words 'application for review' in s 55(5) is that 'review application' is the same review application mentioned in s 59. Section 59 provides in clear language that a bidder or

⁸ Para. 47 of the respondents answering affidavit.

⁹ *Moodley v Minister of Education and Culture, House of Delegates and Another* 1989 (3) SA 221 (AD).

supplier may apply for review of a decision by the board. Any other interpretation would be incompatible with the clear intention of the Legislature viewed in the total context and scheme of the Act.

[34] My view, in the immediate preceding paragraph, is fortified by Mr Corbett's analysis of the interplay between s 55 and regulations 38. Counsel correctly points out that in compliance with s 55 the notice for selection of award which is sent to the successful bidder is made by means of Annexure 5 to the Regulations. The notice informs the successful bidder that:

- '(a) Kindly take notice that in terms of section 55 of the Procurement Act, 2015 (Act No.15 of 2015) you have been selected for the award under subsection (4) of that section.

- (b) You are informed that in the absence of any application for the review of the selection award referred to in paragraph (a) within 7 days of this notice, the accounting officer of the public entity will award the contract to you.

- (c) The period of 7 days referred to in paragraph (b) starts on ... and ends on'
(My underlining)

[35] It is to be noted that the notice refers to an 'application for the review' and not a request 'to reconsider' mentioned in regulation 38(2)(c). This in my view, is significant. This is because the 'application for the review' in the notice is linked to the 7 days standstill period mentioned in s 55(5). There is, after all, a difference in law between 'review' and 'reconsideration' of a decision. According to *Black's Law Dictionary* 'review' means the 'plenary power to direct and instruct an agent or a subordinate, including the right to remand, modify or vacate any action by the agent or subordinate or to act directly in place of the agent or subordinate'. On the other hand 'a request for reconsideration' means 'an applicant's submission of further arguments after initial rejection'; 'to discuss or take up a matter again'. What I gather from the definitions by Black's Law Dictionary is that 'a review' of a decision or action is conducted by another person or body and not by the decision-maker. A 'reconsideration' on the other hand is conducted by the decision-maker. The difference is important because Regulation 38(2) appears to use 'reconsider' and, 'review' interchangeably in the same sentence.

[36] It is further significant to note that s 55(4) stipulates that the successful bidder and other bidders must be advised about the successful bidder that he or she has been selected for the award; and in respect of the unsuccessful bidders that they be advised about the name and address of the successful bidder's name and address and the price of the contract. What Regulation 38(2)(c) then impermissibly does is to create a right for a bidder to request the board or a public entity to 'reconsider' its selection for the award within the standstill period. That right is not provided for in s 55(4). This in my judgment, and on the *Moodley* authority, amounts to impermissibly using Regulation 38 to enlarge the meaning of s 55 which was not provided for and not envisaged by the Legislature. If the Legislature intended to create such right for a bidder it would have done so in s 55(4) and in clear and unambiguous language.

[37] In the light of the foregoing conclusion, I do not agree with Ms Shifotoka's submission that Regulation 38 merely 'gives flesh to s 55 in the sense that it provides the procedure to be followed by the Board'. In my judgment Regulation 38 creates a substantive right for an unsuccessful bidder which was not provided by the Legislature in s 55(4). I agree with Mr Corbett that the Legislature intended that any challenge to the board's notice of selection of an award must be made by way of a review in terms of s 55(5) and that that review is to be determined by the Review Panel appointed by the minister in terms of s 58.

[38] Applying the principles referred earlier in this judgment to the facts of the present matter, I am of the view that the interpretation contended for by the respondents' leads to absurdity whereby the board would be in a position to review its own decisions. The interpretation proffered by the respondents is clearly not objective but is subjective and self-serving. The effect of such interpretation not only leads to an 'insensible result' and 'anomaly' but it also offends against the well-established principle namely that one should not be a judge in one's own cause.

[39] My conclusion is therefore that, it is the Review Panel which is authorised by the Act to review the decision of an unsuccessful bidder and not the board. It follows therefore that to the extent that Regulation 38 is in conflict with the provisions of the Act, it is to be considered *ultra vires* and null and void.

The effect of principle of functus officio considered

[40] The applicant's case in this regard is that the board became *functus officio* after it had issued the notice of selection of the award to the applicant. Therefore it was not permissible in law that the board revisited its own earlier decision which resulted in it revoking the award to the applicant and awarding it to Ongoma.

[41] The respondents' case on this point, on the other hand, is that it is only when the board has awarded the contract to a successful bidder (and not when it has issued a Notice of Selection of award) that the bidding process comes to its finality and the board becomes *functus officio*. Therefore, the notice of selection is not final in nature: it is conditional. This is because the notice stated that the contract would only be awarded to the applicant if no application for review had been filed by an unsuccessful bidder or such review application, if filed, is unsuccessful.

[42] In support of above proposition, Ms Shifotoka cited *Pamo* (supra) where the court expressed itself on the application of the principle of *functus officio* in the following words at para 44 to 45:

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

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

[45] Mr Heathcote who appeared for the applicants argued that it is common cause between all the parties that the decision to invite the tenders was made known to all the parties concerned. *Pamo* and *Circle* (the applicants) acted on the invitation and in that

sense the decision to invite tenders became final and the Tender Board *functus officio*. I do not agree with Mr Heathcote, as I have said above in this judgment tendering is not a single event, but it is a process that commences with the invitation by the Tender Board for interested parties to submit tenders and ends with the Tender Board entering into agreements with the parties whose tenders were accepted by the Tender Board.'

[43] The principle was again reinstated by the Supreme Court this month in *Hashagen v Public Accounts and Auditors Board*¹⁰ where the court said the following at paras 27 to 29:

'Essence of functus officio doctrine

[27] *An administrative decision is deemed to be final and binding once it is made. Once made, such a decision cannot be re-opened or revoked by the decision maker unless authorised by law, expressly or by necessary implication. The animating principle for the rule is that both the decision maker and the subject know where they stand. At its core, therefore, are fairness and certainty.*¹¹

[28] *As Pretorius aptly observes:*¹²

"The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter. This rule applies with particular force, but not only, in circumstances where the exercise of such adjudicative or decision-making powers has the effect of determining a person's legal rights or of conferring rights or benefits of a legally cognizable nature on a person. The result is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker."

[29] *What that means then is that once an administrative body has exercised an administrative discretion in a specific way in a particular case, it loses further jurisdiction in*

¹⁰ (SA 57-2019) NASC 5 August 2021.

¹¹ *Pamo Trading Enterprises CC & Another v Chairperson of the tender Board of Namibia & Others* 2019 (3) NR 834 (SC).

¹² DM Pretorius: *The Origin of the functus officio doctrine, with specific reference to its application in Administrative Law*, 2005 SALJ Vol. 122 at 832-833.

the matter. It cannot go back on it or assume power again in respect of the same matter between the same parties.'

[44] On my reading of *Pamo* judgment, particularly the paragraphs relied upon by Ms Shifotoka, I do not think that it supports the respondents' contention on this point. At best it is distinguishable from the facts of the present matter. I say so for the reason that in that matter the decision by the board was not communicated to the tenderers whereas in the present case the applicant was notified in writing that it had been selected for the award of the contract. In addition, the unsuccessful bidders in this matter were also notified. Thus, on the authority of *Heshagen* 'an overt act' took place 'through public notification to both the successful bidder and unsuccessful bidders'.

[45] I therefore hold that the principle of *functus officio*, as explained in *Hashagen* matter finds application to the facts of the present matter. I do not agree with the argument that the decision of the board contained in the notice of selection of award is not final but conditional. In my judgment the board's decision is final as between the board and the successful bidder. This is so because s 59(2) provides that an application for review filed by an unsuccessful bidder does not suspend the award unless the application has been resolved in favour of suspension. This to my mind means that if the review application has not been resolved in favour of suspension then it remains in force. This further means that if the award is not suspended by the application then it cannot be said to be conditional. It could only be conditional if it was suspended by the application for review and thus conditional upon the outcome of the application for review. It is in any event common cause in the present matter that no application for review was filed by any of the unsuccessful bidders. It follows therefore that the board as the 'decision maker' is not allowed in law to revoke its decision which was final as between it and the applicant and the board. It became *functus officio*.

[46] If the phrase 'award the procurement contract' is to be understood to mean to conclude a procurement contract between the successful bidder and the board which then brings the bidding process to an end, as submitted on behalf of the respondents, that would mean that the Review Panel would not be in position to consider a review application submitted by a bidder or supplier in terms of s 59

because to do so would be in contravention of s 60(1). Such a scenario could never have been intended by the Legislature. The argument is flawed as I will demonstrate further later in this judgment.

[47] To conclude on the question which of the two bodies – the board or the Review Panel is empowered to consider the application for review filed by an unsuccessful bidder in terms of s 59, I have found that the board is not empowered by its enabling Act to review its own decision. I also found that Regulation 38 on which the board claims to derive the power to review its own decisions or actions is *ultra vires* the provisions of the Act to the extent it is in conflict with the provisions of the Act. Finally, I have found that the decision by the board to make an award and notify the successful bidder is final in nature and therefore thereafter the board became *functus officio*. I turn to consider the power of the Review Panel vis-a-vis the power of the board.

Review's Panel review powers vs 'Review powers' of the Board

[48] The applicant's case on this point is that the board may consider matters referred to it by the Review Panel in terms of s 60 of the Act. In this connection the applicant supports the Review Panel's ruling of 20 May 2021, to the effect that the board 'is not clothed with the power enabling it to reconsider and set aside its administrative decisions or actions'.

[49] The respondents, for their part, contend as the basis for their counter-application seeking to review and set aside the Review Panel's decision of 20 May 2021, that the Review Panel was improperly appointed; and that it improperly conferred powers on itself to adjudicate the applicant's application. In this regard the deponent to the respondents' answering affidavit (which also served as founding affidavit in respect of the counter-application) states in para 21 that: 'The Review Panel is empowered to review the board decisions or actions for the reward of a procurement contract'. Thus there must be a decision by the board to award a procurement contract to a bidder. The respondents' point out there was no decision of the board to award a procurement contract. It is thus the respondents' contention that the decision of the Review Panel of 20 May 2021 is unlawful and inconsistent with the provisions of the Act and the Regulation and should be set aside.

[50] In this regard counsel for the respondents argues that the 'review' in s 55 is concerned with the procurement of awards to bidders and that process can only be carried out by the board. On the other hand the 'review' mentioned in s 59 which is located in Part 7 of the Act is review of proceedings that only come into play to determine whether the board's decision to award a procurement contract was in accordance with the Act and the Regulations.

[51] As regards the respondents' submission relating to s 55, I have already found that Regulation 38 upon which the respondents based their claim that the board has the power to review its own decisions is *ultra vires* the provisions of the Act. In respect of the submission relating to s 59, I am of the view that such submission is flawed. Section 59(1) provides that a bidder or a supplier may apply to the Review Panel for 'a review of a decision or an action take by the board'. There is nothing in the section that indicates, on a proper interpretation thereof, that the only decision or action of the board that can be challenged on review is a 'decision for the award of a procurement contract.

[52] On a proper reading of s 60 of the Act which stipulates what decisions or actions the Review Panel can take after hearing the review application, it is clear that the Review Panel can do many things. It can dismiss the application; it can set aside in whole or in part a decision or an action of the board; it can refer the matter back to the board for reconsideration; it can correct the decision of the board; it can confirm the decision of the board; and it can order that the procurement proceedings be terminated and start afresh.

[53] In *Central Procurement Board v Nangolo NO & Others*¹³, Masuku J correctly pointed out at para 52 that: '[T]he 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 the decisions or actions in relation to processes leading to an eventual award.' I fully associate myself with the learned judge's interpretation of s 60 of the Act.

¹³ *Central Procurement Board v Nangolo NO & Others* 2018 (4) NR 1188 (HC).

[54] During the hearing, the court was provided with a copy of the judgment by Schimming-Chase AJ (as she then was) in *PIS Security Services CC v Chairperson of the Central Procurement Board of Namibia*¹⁴. In that matter the board had issued a notice of selection of the award. Thereafter, two of the unsuccessful bidders applied to the Review Panel to review and set aside the award. After the hearing, the Review Panel set aside the board's decision. The successful bidder then lodged an urgent application to set aside the decision of the Review Panel for want of compliance with s 60(c), which provides that the Review Panel may not set aside the decision or order that brings a procurement contract in force. It was alleged that the bidding documents stipulated that the notice of award would create a contractual relationship between the bidder and the board. Accordingly, the court held that the decision of the Review Panel was in conflict with the provisions of s 60(c) and set aside its decision.

[55] In my view, that judgment is not applicable to the facts of the present matter. It is not the respondents' case that the notice created a contractual relationship between the parties. On the contrary the respondents' case is that no decision to award the contract had been made and for that reason the Review Panel was not entitled to review and set aside the board's decision of 20 May 2021.

Conclusion

[56] It was conceded during hearing that the respondents did not make out a case in support of their prayer that the decision of the minister to constitute and appoint the Review Panel be declared as null and void and be set aside. In respect of the remainder of the prayers, I have found against and rejected the interpretation advanced by the respondents and upon which the counter-application was based. It follows therefore for the reasons and considerations set out in the body of this judgment, that I find that the applicant has made out a case for the relief sought. The respondents counter-application on the other hand, must fail.

Costs

¹⁴ *PIS Security Services CC v Chairperson of the Central Procurement Board of Namibia* (HC-MD-CIV-MOT-GEN-2020/00321) [2021] NAHC 1 (18 January 2021).

[57] Both parties pray for an order of costs against each other in the event of being successful. In this regard the normal rule is that costs follow the result. I see no reason why that rule should not apply in this matter. Even though Mr Corbett appeared alone when the matter was heard he reminded me that when the matter initially started he was assisted by Mr Hengari. He therefore proposed an order of costs which includes the costs of one instructing counsel and the costs occasioned by the employment of the services of two instructed counsel. I agree with counsel in that regard.

Order

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

1. The applicant, first respondent and second respondent's non-compliance with the Rules of this Court, if any, relating to the service and time limits as set out in rule 73(3) of the Rules of this Court are dispensed with and the matter is heard as one of urgency.
2. The first and/or second respondents are directed to comply with paragraph (c) of the sixth respondent, the Review Panel's, ruling/order of 20 May 2021 to the following effect:

'That the First Respondent [the second respondent in these proceedings] is hereby ordered to proceed in the manner consistent with Section 55(5) of the Public Procurement Act 2015 (Act No. 15 of 2015), for there has never been an Application for Review in terms pursuant to the Notice of Selection for Award dated 16 October 2020.'

3. The first and/or second respondents are directed to comply with the order, as set out in paragraph 2 above, within the bid validity period due to expire on Friday, 27 August 2021.
4. The first and second respondents' counter-application is dismissed.

5. The first and second respondents are ordered to pay the costs of this application and those of the counter-application and such costs are, to include the costs of one instructing and two instructed legal practitioners, jointly and severally, the one paying the other to be absolved.

6. The matter is removed from the roll and is considered finalised.

H Angula
Deputy Judge-President

APPEARANCES:

APPLICANT:

A CORBETT SC

Instructed by Tjombe-Elago Inc., Windhoek

FIRST and SECOND

RESPONDENTS:

E SHIFOTOKA

Instructed by Office of the Government Attorney,
Windhoek