

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-MOT-REV-2021/00294

In the matter between:

BERTHA SECURITY SERVICES CC

APPLICANT

and

CHAIRPERSON OF REVIEW PANEL

1ST RESPONDENT

PUBLIC PROCUREMENT REVIEW PANEL

2ND RESPONDENT

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

3RD RESPONDENT

CENTRAL PROCUREMENT BOARD

4TH RESPONDENT

GOVERNMENT OF THE REPUBLIC OF NAMIBIA

5TH RESPONDENT

VICMAC SECURITY SERVICES CC

6TH RESPONDENT

OMBANDJE SECURITY SERVICES CC

7TH RESPONDENT

WINDHOEK SECURITY SERVICES CC

8TH RESPONDENT

OVAKUATJIVI TRADING ENTERPRISES CC

9TH RESPONDENT

KHAIBASEN SECURITY SERVICES CC

10TH RESPONDENT

PREMIER INVESTMENT NO. 25 CC

11TH RESPONDENT

OMEYA INVESTMENTS CC

12TH RESPONDENT

INDEPENDENT SECURITY SERVICES CC

13TH RESPONDENT

MUKWE SECURITY SERVICES CC

14TH RESPONDENT

NELITO INVESTMENTS CC

15TH RESPONDENT

NAMIBIA PROTECTION SERVICES (PTY) LTD

16TH RESPONDENT

TRIPLE ONE INVESTMENTS CC	17TH RESPONDENT
SHIKUVULE TRADING CC	18TH RESPONDENT
SPLASH INVESTMENTS CC	19TH RESPONDENT
CIS SECURITY SERVICES CC	20TH RESPONDENT
ELI TJIOOLA TRADING ENTERPRISES CC	21ST RESPONDENT
GORESEB TRADING CC	22ND RESPONDENT
SALAMBALA INVESTMENTS CC	23RD RESPONDENT
AFRICAN KING SERVICES CC	24TH RESPONDENT
MARRY'S PROTECTION SERVICES CC	25TH RESPONDENT
AMON SN INVESTMENTS CC	26TH RESPONDENT
MAMPI SECURITY SERVICES CC	27TH RESPONDENT
SPARK SECURITY SERVICES CC	28TH RESPONDENT
SECURITY TRAINING COLLEGE OF NAMIBIA CC	29TH RESPONDENT
NAMIBIA PEOPLES PROTECTION SERVICES CC	30TH RESPONDENT
CHIPPA TRADING ENTERPRISES CC	31ST RESPONDENT
SIRKA INVESTMENTS CC	32ND RESPONDENT
STEFMORY INVESTMENTS CC	33RD RESPONDENT
MAYFIELD PROTECTION SERVICES CC	34TH RESPONDENT
DONNY INVESTMENTS CC	35TH RESPONDENT
NAKAYE TRADING CC	36TH RESPONDENT
ROYAL SECURITY SERVICES CC	37TH RESPONDENT
KAVIOMBO TRADING ENTERPRISES CC	38TH RESPONDENT
NANGURA SECURITY SERVICES CC	39TH RESPONDENT
CHIEF NANGOLO SECURITY SERVICES CC	40TH RESPONDENT
MBUSHA SECURITY SERVICES CC	41ST RESPONDENT
ONAMAGONGWA TRADING ENTERPRISES CC	42ND RESPONDENT
THREE STARS SECURITY SERVICES CC	43RD RESPONDENT
NJANGULA TRADING CC	44TH RESPONDENT
SHINE TECHNOLOGIES SOLUTIONS (PTY) LTD	45TH RESPONDENT
SNIFFERDOG INVESTIGATION AGENCY & SECURITY SERVICES CC	46TH RESPONDENT
OMATUNGO SECURITY SERVICES CC	47TH RESPONDENT
PIS SECURITY SERVICES CC	48TH RESPONDENT
EILANDS WEIDE INVESTMENTS CC	49TH RESPONDENT

REFLECTOR TRADING ENTERPRISES CC	50 TH RESPONDENT
NDK INVESTMENT CC	51 ST RESPONDENT
JUPITER SECURITY CC	52 ND RESPONDENT
KIMPERT INVESTMENTS CC	53 RD RESPONDENT
AFRICA INVESTMENTS CC	54 TH RESPONDENT
MPUNGU SECURITY CC	55 TH RESPONDENT
IML TRADING ENTERPRISES CC	56 TH RESPONDENT
TULIKUMO INVESTMENT CC	57 TH RESPONDENT
CHRIPHER INVESTMENT CC	58 TH RESPONDENT
EASS INVESTMENT CC	59 TH RESPONDENT
ALERT SECURITY SERVICES CC	60 TH RESPONDENT
NICO SECURITY SERVICES CC	61 ST RESPONDENT
OMUMBUDU SECURITY SERVICES CC	62 ND RESPONDENT
WAAKALI SECURITY SERVICES CC	63 RD RESPONDENT
VIHINDA INVESTMENTS CC	64 TH RESPONDENT
KANGARU TRADING EXPRESS CC	65 TH RESPONDENT
MBITJITA KUNENE INVESTMENT CC	66 TH RESPONDENT
NGATUKONDJE TRADING CC	67 TH RESPONDENT
OMLE SECURITY SERVICES CC	68 TH RESPONDENT
TORRA INVESTMENT CC	69 TH RESPONDENT
COMMANDO SECURITY GROUP CC	70 TH RESPONDENT
OZETU SECURITY SERVICES (PTY) LTD	71 ST RESPONDENT
OTJISEPUA TRADING CC	72 ND RESPONDENT
G M SECURITY SERVICES CC	73 RD RESPONDENT
SHILIMELA SECURITY AND DEBT COLLECTION CC	74 TH RESPONDENT
MGEE'S INVESTMENT CC	75 TH RESPONDENT
SHIMWE TRADING ENTERPRISES CC	76 TH RESPONDENT
KARUPMBURA TRADING ENTERPRISES CC	77 TH RESPONDENT
EXTRA DEFENCE PROTECTION SERVICES CC	78 TH RESPONDENT
JARDE INVESTMENT CC	79 TH RESPONDENT
TSARAS TRADING ENTERPRISES	80 TH RESPONDENT
AMUTANGA TRADING ENTERPRISES CC	81 ST RESPONDENT
NKASA SECUIRITY SERVICES	82 ND RESPONDENT
FAN INVESTMENT CC	83 RD RESPONDENT

TYANHWE SECURITY FORCE
TRIPPLE SAFETY SECURITIES CC

84TH RESPONDENT
85TH RESPONDENT

Neutral citation: *Bertha Security Services CC v Chairperson of the Review Panel*
(HC-MD-CIV-MOT-REV-2021/00294) [2022] NAHCMD 115 (15
March 2022)

Coram: ANGULA DJP
Heard: 6 October 2021
Delivered: 15 March 2022

Flynote: Applications and motions – Review application – Administrative action
– Procurement Act 15 of 2015 – Article 18 of the Namibian Constitution, Act 1 of
1990 – Abdication of statutory powers an administrative body – Administrative body
failed to apply its mind – Irrelevant factors taken into account.

Statutory interpretation – Sections 51(4), 52(5) and 55(4) of the Procurement Act, 15
of 2015 – Golden rule of interpretation of statutes applied.

Summary: The applicant (Bertha Security Services CC) sought order in terms
whereof the decision of 9 July 2021 of the second respondent (the Review Panel) is
reviewed and set aside – Further that the matter be remitted to the second
respondent to hear its review application on the merits – The sixteenth respondent
(Namibia Protection Services (Pty) Ltd) whilst not opposing the applicant's
application, also brought a counter application whereby it sought the reviewing and
setting aside of the first and second respondents decision of 9 July 2021 – The
sixteenth respondent urged upon the court to interpret ss 51(4), 52(5) and 55(1) as
obliging the board to furnish it with financial information of all the bidders, including
unsuccessful bidders – Furthermore that, s 55(1) be interpreted as making the
lowest price requirement as an overriding consideration in the assessment of
bidders.

Main application:

Held; that the review panel did not apply its mind to the issue arising before it arising from the applicant's review application.

Held; that the review panel took into consideration irrelevant factors and neglected and failed to take relevant factors into consideration and consider the application.

Held; that by failing or refusing to exercise its statutory review power, the review panel acted unfairly, unlawfully and unreasonably.

Accordingly, the main application succeeded with costs and was remitted to the review panel for hearing.

Counter application:

Held; that the sixteenth respondent did not make out a case that ss 51(4) and 52(5) be interpreted as obliging the board to furnish it with financial information of all the bidders, including unsuccessful bidders. Furthermore, the sixteenth respondent failed to make out a case that, s 55(1) should be interpreted as making the lowest price requirement an overriding consideration in the assessment of bids by the board evaluation committee or the board.

Held; that the said sections must be interpreted applying the golden rule of statutory interpretation, namely that words in a statute be given their ordinary, literal and grammatical meaning.

Held; that the sixteenth respondent failed to make out a case that the literal interpretation would lead to manifest absurdity, inconsistency, injustice or would be contrary to the intention of the legislature as entitling the court to deviate from applying the literal interpretation.

Accordingly, the counter application was dismissed with costs.

ORDER

Ad main application:

1. The application succeeds.
2. The decision of the first and second respondents of 9 July 2021, is hereby reviewed and set aside.
3. The review application submitted to the first and second respondents in bid procurement under reference number: NCS-ONB-CPBN-05/2019 is remitted to the first and the second respondents for a hearing.
4. The third and fourth respondents are to pay the costs of the applicant, such costs to include the costs of one instructed and one instructing counsel.

Ad counter-application:

1. The counter application is dismissed.
2. The sixteenth respondent is to pay the costs of the third and fourth respondents, such costs to include the costs of one instructed counsel and one instructing counsel.
3. Such costs are to include attendance up to the point of drafting the heads of argument but excluding costs of appearance by instructed counsel at the hearing.

Ad both applications:

1. The applications are removed from the roll and are regarded finalised.
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JUDGMENT

ANGULA DJP:

Introduction

[1] This matter came before me 5 August 2021 as an opposed urgent application. At the hearing of that application, the applicant sought the following relief-

1. An order in terms whereof the applicant's non-compliance with rule 73(1), (3) and (4) of Court, in so far as it pertains to the form and service of this application is condoned, and this application is heard as one of urgency.
2. An order in terms whereof applicant's service of this application in a manner other than contemplated in rule 8 of the Rules of this Courts is condoned.
3. An order in terms whereof, pending the final adjudication and determination of this application, the 3rd and 5th respondents are restrained and interdicted from implementing (including the awarding and conclusion of contract) the first and the second respondents decision dated 09 July 2021, that: ". . . in accordance with section 60(e) of the Public Procurement Act, the decision of the First Respondent (Central Procurement Board) is hereby confirmed, and as such the First Respondent should proceed towards finality of this procurement process" ("the decision").
4. An order in terms whereof, pending the final adjudication of this application, the respondents 6th to 19th respondents, respondents are restricted and interdicted from executing work under the procurement reference number NCS-ONB-CPBN-05/2019.
5. An order in terms whereof, any contract that may have been concluded between the 3rd to the 5th respondents with the 6th to 19th respondents, pursuant to the procurement under reference number NCS-ONB-CPBN-05/2019 is – consequent to paragraphs 5 and 6 hereof declared null and void and accordingly set aside.

6. An order in terms whereof the first respondent's decision dated 09 July 2021, is reviewed and set aside.
7. An order in terms whereof the first and the second respondents' decision dated 09 July 2021 is declared null and void of any legal consequences.
8. An order in terms whereof this matter is remitted back to the first and the second respondents for a re-hearing, alternatively, the third and the fourth respondents for the re-evaluation of the bids submitted in the procurement under reference number: NCS-ONB-CPBN-05/2019.
9. An order in terms whereof the respondents electing to oppose this application are ordered and directed to pay the applicant's costs, being the cost of one instructing and one instructed legal practitioner.
10. Further or alternative relief.'

[2] I heard arguments by the parties on 5 August 2021 after which I reserved judgment for delivery on 27 August 2021 on the issue of urgency. Shortly after the adjournment, the legal practitioner for the applicant filed a status report in which he alerted the court to the fact that a few hours after the matter was postponed for judgement, the third and fourth respondents sent out emails to the successful bidders which constituted a procurement acceptance letter. This was done notwithstanding the fact that the said respondents had knowledge that this matter was before court and had been postponed for judgment.

[3] Counsel for the applicant therefore prayed that I grant interim orders, basically prayers 4 and 5 of the notice of motion. I then issued interim orders in terms whereof the third and fourth respondents were restrained and interdicted from implementing the first and second respondents' decision of 9 July 2021. A further order restrained and interdicted the sixth to nineteenth respondents from executing works under procurement reference number: NCS/ONB/CPBN-05/2019. However those orders were granted pending the delivery of the judgement on the issue of urgency on 27 August 2021. After that date the respondents were no longer interdicted in which

event what happened in *Chico/Octagon Joint Venture*¹ may befall the applicant this matter.

[4] In the *Chico/Octagon* matter the appellant had abandoned its application for interim relief pending the finalisation of the proceedings. One year of a three year contract had expired. Work had been done and payments had been made and all the consequences normally flowing from the execution of a contract had taken place. The court had no option but to allow the invalid award to stand.

[5] In any event, on 27 August 2021, I delivered the ruling holding that the urgency, if any, was self-created by the applicant. In respect of the counter-application I held that the founding affidavit did not make the necessary averments to make out a case for urgency. Accordingly, both applications were struck from the roll.

[6] Subsequent thereto, the parties approached me in chambers and indicated that they were desirous of proceeding with the matter in the ordinary course. I then called the parties to a case management conference at which the date for hearing was determined and agreed upon by the parties being 6 October 2021. On that date I heard arguments and postponed the matter to 15 March 2022 for the delivery of judgment.

[7] I now proceed to consider the parties' respective cases. I will first deal with the main application and thereafter the counter-application.

The parties

[8] The applicant is Bertha Security Services CC, a close corporation, registered in terms of the laws of the Republic of Namibia, engaged in what appears to be extremely competitive business of rendering security services. It has its principal place of business located at Fuulukulo, Oshakati Main Road, Oshakati, in the Republic of Namibia.

¹ *Chico/Octagon Venture v Road Authority and Others* (81 of 2016) [2017] NASC 34 (21 August 2017).

[9] The first respondent is the Chairperson of the Review Panel, a major person appointed in terms of s 58(2) of the 'Act with his or her office located in Moltke Street, Windhoek, care of the Government Attorney, 2nd Floor, Sanlam Center, Independence Avenue, Windhoek in the Republic of Namibia.

[10] The second respondent is the Review Panel, a statutory body, established in terms of s 58 of the Act with its office located at Moltke Street, Windhoek, care of the Government Attorney, 2nd Floor, Sanlam Center, Independence Avenue, Windhoek in the Republic of Namibia.

[11] The third respondent is the Chairperson of the Central Procurement Board (the 'board'), a major person, appointed in terms of s 11(2)(a) of the Act, with his or her office located at Mandume Park 1, Teinert Street, Windhoek, in the care of the Government Attorney, 2nd Floor, Sanlam Center, Independence Avenue, Windhoek in the Republic of Namibia.

[12] The fourth respondent is the Central Procurement Board, a statutory body, established in terms of s 8 of the Act, with its office located at Mandume Park 1, Teinert Street, Windhoek, care of the Government Attorney, 2nd Floor, Sanlam Center, Independence Avenue, Windhoek in the Republic of Namibia.

[13] The fifth respondent is the Government of the Republic of Namibia, herein represented by the Minister of Health and Social Services, alternatively, the Executive Director in the Ministry of Health and Social Services located at 123 Robert Mugabe Avenue, Windhoek, care of the Government Attorney, 2nd Floor, Sanlam Center, Independence Avenue, Windhoek in the Republic of Namibia.

[14] The sixteenth respondent is Namibia Protection Services (Pty) Ltd ('NPS') a company registered in terms of the laws of Namibia, with its addresses listed in Annexure "A" to the founding affidavit.

[15] The rest of the respondents are tenderers/close corporations/companies registered in terms of the close corporations/companies laws of the Republic of Namibia, with their addresses listed in Annexure "A" to the founding affidavit. They

submitted bids in respect to tender number NCS-ONR-CPBN-05/2019. They have been cited for the interests they may have in this matter.

[16] The third and fourth respondents opposed this application and filed their answering affidavit in that regard. The sixteenth respondent indicated that it supported the applicant's application. It however filed a counter application, which as I have indicated above, I will consider later in this judgment. For completeness, I should however mention that the counter-application was also opposed by the third and fourth respondents.

[17] The applicant was represented by Mr Muhongo, assisted by Mr Ndaitwah, whilst the third and fourth respondents were represented by Mr Ludwig. The sixteenth respondent was represented by Mr Heathcote. Counsel filed heads of argument and the court is appreciative for their assistance.

Brief background

[18] The background of this matter as set out here below is based upon the common cause facts as between the parties. During February 2020, an invitation for bids titled 'Rendering of Social Security Services for the Ministry of Health and Social Services under procurement reference number NCS-ONB-CPBN-05/2019' was advertised by the fourth respondent (the 'board'). The deadline for submission of bids was initially 4 March 2020, but was extended to 20 July 2020 for reasons not relevant for the purpose of this judgment.

[19] On 5 November 2020, a notice of selection of award was issued by the board in terms of s 55 of the Act and regulation 38. The notice was dated 05 November 2020 and was addressed to the successful bidders as well as the unsuccessful bidders.

[20] The notice of selection of award informed the unsuccessful bidders, including the applicant that they were unsuccessful bidders and further that should they take issue with the selection, they may file an application for the review of the decision within seven days calculated from 10 November 2020 at 08h00 and expiring on 16

November 2020 at 17h00. The notice further informed the bidders that should there be no application for review, the bids would be awarded by the accounting officer to the successful bidders.

[21] The applicant's bid was rejected. The reason for the rejection of its bid was that it had, on the third and fourth respondents' version, submitted an invalid social security certificate of good standing ('certificate of good standing'). From the Executive Summary of the Bid Evaluation Report, it appears that the applicant's certificate of good standing was issued on 9 June 2020 and expired on 9 July 2020. For that reason the applicant's bid was disqualified. The applicant did not apply to the Review Panel for the review of board's decision by 16 November 2020 as advised in the notice of selection of award.

[22] Other unsuccessful bidders applied for the review of the board's decision concerning their bids. The sixteenth respondent, NPS, also applied for review of the board's decision to allocate to it lot number 11 instead of lot number 1 which was a bigger lot of the two. That review application was heard by the Review Panel on 26 November 2020 and the Review Panel made an order the same day directing the board to re-evaluate all the bids.

[23] The board then re-evaluated all the bids in compliance with the Review Panel directive. Having re-evaluated all the bids, the board issued a revised notice of selection of award on 3 June 2021. The applicant was once again disqualified for the same reason – an invalid certificate of good standing.

[24] After the notice of selection of award was issued on 3 June 2021, the applicant filed a review application with the Review Panel on 14 June 2021, contending that the good standing certificate has no expiration date and was therefore at all relevant times valid. The board opposed the applicant's review application before the Review Panel.

[25] On 9 July 2021, the Review Panel 'dismissed' the applicant's review application and confirmed the board's decision holding that:

'1. The Review Panel observed that the first and second Applicants were disqualified because of the Social Security Commission Good Standing Certificates. The first and second Applicants were part of the review that was held on the 26 November 2020 but that was the reason they were disqualified concerning the Social Security Good Standing Certificate were already made to them by then they choose not to raise it and in an event that they have raised the issue and the Review Panel omitted them, they have gone to the high court to challenge the decision and they have not done so therefore they cannot come belated and want the Review Panel to deal with the same issue on the information that was before it already about nine months ago.' (Underlining supplied for emphasis)

[26] Thereafter and on 22 July 2021, the board issued a selection of award as well as a revised bid evaluation report.

[27] Aggrieved by the board's decision of 22 July 2021, the applicant launched the present application on urgent basis. That concludes the summary of common cause facts. I turn to consider the parties respective cases.

The applicant's case

[28] In a nutshell, the applicant's gripe is that it was disqualified on account of non-existent criteria. Further, that it should not have been an issue for the Review Panel the fact that it had not applied for review of 5 November 2020 board's decision. In this regard the applicant contends that the Review Panel misdirect itself on the facts and the law on the issue before them thereby acting unfairly and unreasonably. It is further the applicant's contention that in acting in the manner they did, the Review Panel violated its common law rights as well as its constitutional right to fair administrative action in terms of Article 18 of the Constitution². In addition, the applicant contends, that the Review Panel violated the provisions of s 2 of the Act.

[29] For the ease of reference, I paraphrase the mentioned article and section. Article 18 provides for administrative of justice. It provides that administrative bodies and administrative officials shall act fairly and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation.

² The Constitution of Namibia, Act 1 of 1990.

Furthermore persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before competent court or tribunal.

[30] Section 2 of the Act stipulates the objectives of the Act. It reads:

'The objectives of this Act are: (a) to promote integrity, accountability, transparency, competitive supply, efficiency, fair-dealing responsiveness, informed decision making, consistency, legality and integration in the procurement of assets and services, including among others, to (i) harmonise procurement policies, systems and practices that apply to public entities and maximise economy and efficiency in public procurement to obtain best value for public expenditures; (ii) set and review standards and practices for the public procurement system in Namibia; (iii) monitor compliance by public entities; and (iv) build procurement capacity in Namibia.'

The third and fourth respondents' case

[31] The chairperson of the board, Mr Patrick Swartz, deposed to the answering affidavit on behalf of the board.

[32] Mr Swartz is of the view that the relief sought by the applicant in this application has been overtaken by events in that the board has already awarded the contract to the successful bidders on 22 July 2021 and the Review Panel has completed its mandate and ceased to exist thereafter.

[33] In response to the applicant's challenge to the board regarding the decision of the board to disqualify the applicant's bid on the basis of an expiry certificate of good standing, the chairperson states that the board requested clarity from the Social Security Commission regarding the social security good standing certificate. Thereafter the Social Security Commission wrote to the board in response and in a letter dated 24 September 2020 indicated that the good standing certificate is only valid for thirty (30) days. He further points out that the applicant was disqualified in terms of s 50(2)(b) of the Act and s 111(1.4) of the evaluation criteria of the standard bidding documents.

Issue for determination

[34] It would appear to me that the issue for determination in this matter is whether the applicant has made out a case that the Review Panel acted unfairly and unreasonably in dismissing its application on the basis of an expired certificate of good standing. For avoidance of doubt, this court is not called upon to decide whether the certificate of good standing submitted by the applicant was valid or not. That is the issue which should have been determined by the Review Panel. It is because of that the issue that the applicant wants the matter to be referred back to the Review Panel for consideration in respect of its decision of 9 July 2020.

Applicable law and analysis

[35] In *Kapika v Kapika and Other* SA 17/2018 delivered on 20 July 2020, the Supreme Court stated as follows:

‘The right in Art 18 entrenches the common law principle of natural justice but is not necessarily limited to it.³ This principle is buttressed in the Latin maxims *audi alteram parte* and *nemo iudex in sua causa*. It is worthy to mention that under the common law procedural fairness had always been distinguished from substantive fairness and the said right remained restricted to the procedural fairness and not to the merits of the decision.⁴

[36] It is important to mention also that judicial review of administrative action ensures that the exercise of the discretion by a functionary is procedurally judicious. Likewise, the common law does not seek to scrutinise the correctness or otherwise of the decision or the merits of the matter but the fairness, regularity and reasonableness of the procedure. Differently put, the review court does not and ought not to concern itself with the substantive fairness of the impugned decision. This aspect was made plain in *Bel Porto School Governing Body & Others v Premier, Western Cape & Another (Bel Porto)* that:

³ See in this regard the decision of the South African Constitutional Court in *Bel Porto School Governing Body & Others v Premier, Western Cape & Another* 2002 (3) SA 265 (CC) at para 84 (*Bel Porto*). See also *Chairperson of the Immigration Selection Board v Frank & another* 2001 NR 107 (SC) at 170 – 171 (J-A) and *Minister of Health and Social Services v Lisse* 2006 (2) NR 739 (SC) para 25).

⁴ See *Bel Porto* para 86-87.

'The unfairness of a decision in itself has never been a ground for review. Something more is required. The unfairness has to be of such a degree that an inference can be drawn from it that the person who made the decision had erred in a respect that would provide grounds for review. . . .

The role of the Courts has always been to ensure that the administrative process is conducted fairly and that decisions are taken in accordance with the law and consistent with the requirements of the controlling legislation. If these requirements are met, and the decision is one that a reasonable authority could make, Courts would not interfere with the decision.⁵

[37] In *Trustco Insurance Limited*⁶ this Court held that a contextual enquiry will constitute reasonable administrative conduct for purposes of Article 18 and whether such conduct is reasonable will depend on the circumstances of each case. A review court may interfere if the exercise of discretion by the administrative functionary or decision-maker was based on a wrong appreciation of the facts or wrong principles of law. The court further said:

'A court will need to consider a range of issues including the nature of the administrative conduct, the identity of the decision-maker, the range of factors relevant to the decision and the nature of any competing interests involved, as well as the impact of the relevant conduct on those affected. At the end of the day, the question will be whether, in the light of a careful analysis of the context of the conduct, it is the conduct of a reasonable decision-maker. The concept of reasonableness has at its core, the idea that where many considerations are at play, there will be often be more than one course of conduct that is acceptable. *It is not for judges to impose the course of conduct they would have chosen.* It is for judges to decide whether the course of conduct selected by the decision-maker is one of the courses of conduct within which the range of reasonable course of conduct available.' (Emphasis added.)

[38] Further, in *Nelumbo and Others v Shikumwah and Others* (SA 2015/27) [2017] NASC 14 (13 April 2017) the Supreme Court said –

⁵ *Bel Porto School Governing Body & Others v Premier, Western Cape & Another* 2002 (3) SA 265 (CC).

⁶ *Trustco Insurance Limited t/a Legal Shield Namibia & Another v Deeds Registries Regulation Board & Others* 2011 (2) NR 726 (SC) (*Trustco*) para 31. See also the South African Constitutional Court decision in *Giddey NO v JC Barnard & Partners* 2007 (5) SA 527 (CC) at p 535 quoted with approval by this Court in *Shaanika & Others v Windhoek City Police & Others* 2013 (4) NR 1106 (SC).

'Reasonableness deals with the substantive part of administrative justice: a decision which no reasonable decision-maker could have taken is reviewable.'

Application of the law to the facts

[39] In the present matter the applicant's main contention is that the conduct by the Review Panel in dismissing the applicant's review application is 'irregular, unfair unlawful and unreasonable'. As regard the alleged unfairness we have seen in *Bel Porto School Governing Body & Others* that: 'The unfairness of a decision in itself has never been a ground for review. Something more is required.'

[40] The applicant correctly, in my view, points out that the Review Panel did not file an affidavit explaining the reason why it did not deal with the merits of the applicant's review application before dismissing it.

[41] In my view there appears to be no clear delimitation of power between the board and the Review Panel. According to Mr Swartz, the Review Panel is an *ad hoc* Committee of the board. The board appears to be answerable to the Review Panel in that the Review Panel can overrule the board's decision. Ordinarily a sub-committee of a board for instance an audit committee or a remuneration committee would, not have the power to override the main board's decision. It would for that reason not have the capacity to be sued or to institute legal proceedings apart from the main board. I find the way the Act has been structured very curious and not in accordance with the normal dictates of corporate governance.

[42] From the way the Act has been structured it was necessary for the Review Panel to have filed an answering affidavit. It was not for the chairperson of the board to speak on behalf of the Review Panel. It does not appear from the structure of these entities that the chairperson of the board is a member of the Review Panel. If he is not, then he is not qualified to speak on behalf of the Review Panel. It is in my view impermissible that the Review Panel takes decisions which affects the rights of an individual on *ad hoc* basis and simply dissolves leaving it to the board to fend off and defend the Review Panel's decision.

[43] It is therefore not an answer as Mr Swartz attempts to intimate that even if this court were to remit the applicant's review application to the Review Panel, such body no longer exists because it is in terms of the Act it was appointed *ad hoc* by the minister. With due respect to the drafters of the Act this does not make sense legally or otherwise. One cannot have a body such as the Review Panel existing on an *ad hoc* basis. It makes decisions which affect the rights of persons such as the applicant in the present matter, and it simply ceases to exist and cannot for its actions and decisions. This is legally untenable.

[44] In the light of the foregoing discussion and reasoning, I therefore agree with the applicant's submission that the Review Panel ought to have filed an answering affidavit particularly because, in its reasons for its decision of 9 July 2021, it merely 'observed' that the applicant's bid was disqualified by the board, because according to the board, the applicant's social security good standing certificate had expired and was thus invalid. It failed to make its own independent assessment and finding as to whether the board was correct in its finding. It thus follows in my view that that the evidence on behalf of the Review Panel by Mr Swartz constitutes inadmissible hearsay evidence. This finding is premised on the fact that Mr Swartz is not a member of the Review Panel.

[45] The Review Panel did not consider whether the decision by the board was wrong or correct. In this regard, I am of the considered view that it ought to have considered the evidence and submissions placed before it. Neither did the Review Panel consider whether the board's decision was based on reasonable grounds supported by facts. In fact it would appear from the applicant's application that the issue whether the certificate of good standing was valid or not was the only issue the Review Panel was called upon to decide in respect of the applicant's application for review. The Review Panel however failed to consider the issue before it.

[46] In my view the Review Panel's refusal or failure to consider the application had a prejudicial effect on the right of the applicant to a fair hearing by an impartial tribunal as guaranteed by the Constitution. In my view this alone constitutes a good

ground for the review and setting aside of the Review Panel's decision of 9 July 2021.

[47] It appears from the Review Panel's reasoning that it dismissed the applicant's application for two reasons. The first reason why it did not consider the applicant's application before it, was because the applicant had failed to file an application for review during November 2020 following the board's decision of 5 November 2020. The second reason was that, it could not be expected 'to deal with the same issue on the information that was before it already about nine months ago'.

[48] In my view, as regards to the first reason, it should not have mattered, to the Review Panel the fact that it had previously dealt with the same issue. The Review Panel was under a statutory duty to consider the merits of the application before it and made a decision thereafter give reasons for its decision to dismiss the application. The Review Panel ought to have enquired into whether the board's decision to disqualify the applicant's bid because the applicant had submitted an invalid certificate of good standing, was correct or not. In doing so it had to consider or enquire into the facts or factors that were taken into account by the board in arriving at its decision, and whether such factors were reasonable and acceptable

[49] I do not think there is a denial by the board that the Review Panel is an administrative body and therefore its proceedings and decisions are subject to Article 18 of the Constitution. The provisions of Article 18 were set out in detail earlier in this judgment. The Review Panel was therefore required to act fairly and reasonably and comply with requirements imposed upon it by the common law and the Act. In my view, it failed to do so.

[50] In *Frank*⁷ the court was asked to set aside the decision of the Immigration Selection Board for the reason that in refusing Ms Frank's application for permanent residence because the said board acted contrary to the provisions of Article 18. The court found that the Immigration Selection Board was motivated by factors which it should not have taken into account and that some relevant factors were not taken into account. In the course of its judgment the court referred to cases dealing with

⁷ *Frank & Another v Chairperson of the Immigration Board* 1999 NR 257 at p 266 A-C.

the relevant common law principles regarding the review. Levy AJ quoted with approval a thread cases at p 266 A-B there it was said:

' . . . where there is a statutory duty on a public officer and, in giving his decision or acting in pursuance thereof, he acts mala fide or fails to apply his mind or takes into account irrelevant or extraneous facts or is prompted or influenced by improper or incorrect information or motives, the High Court of Namibia has inherent jurisdiction (see art 78(4) of the Constitution of Namibia) to review the decision or ruling, to set it aside and to return the matter to the public officer or simply to correct it. The Free Press of Namibia (Pty) Ltd v Cabinet of the Interim Government of South West Africa 1987 (1) SA 614 (SWA) at 625A-D, 626B-I; Shifidi v Administrator-General for South West Africa and Others 1989 (4) SA 631 (SWA) at 646, 647-8; Mweuhanga v Cabinet of the Interim Government of South West Africa 1989 (1) SA 976 (SWA) at 990D-E; Cabinet for the Interim Government of South West Africa v Bessinger and Others 1989 (1) SA 618 (SWA) at C 627.'

[51] In the present matter it is clear that the Review Panel failed to apply its mind to the issue for decision which was before it. It further took irrelevant factors into consideration. I say this for the reason that it should not have constituted a valid reason or a relevant factor for the Review Panel to have dismissed the applicant's application merely because it had previously dealt with a similar issue some nine months back. Each application must be considered on its own merits. It is also not a relevant consideration that the applicant did not apply for the review following the board's decision during November 2020. These are irrelevant considerations as a result of which the Review Panel misdirected itself and rendering its decision liable for review and being setting aside.

[52] In my view the Review Panel misdirected itself by unfairly penalizing the applicant merely because it (the 'applicant') did not apply for review against the board's decision of November 2020. I say so because, even though the applicant did not apply for review, other bidders successfully applied for the review and setting aside of the board's decision. Thereafter the Review Panel ordered that all bids be re-evaluated, which included the applicant's bid. The decision of the Review Panel of 26 November 2020 regardless of who of the unsuccessful bidders applied for review of that decision, the fact remains that the Review Panel ordered the board to re-evaluate all the bids albeit at the instance of other bidders' applications for review.

[53] I am of the further considered view, the Review Panel further misdirected itself by having thought it has the power to refuse to 'consider the same issue' it had previously considered. There is no doubt in my mind that such failure or refusal, amounted to an unlawful abdication of its statutory duty. This, alone, constitutes a ground for reviewing and setting aside the Review Panel decision of 9 July 2021.

[54] In the light of the foregoing reasons and considerations, I agree with the submissions made on behalf of the applicant that the Review Panel acted in an unfair, unlawful and unreasonable manner. For that reason its decision of 9 July 2021 to refuse and to consider the applicants application stands to be reviewed and set aside.

Counter-application

[55] The sixteenth respondent is Namibia Protection Services ('NPS'). NPS was a successful bidder and was awarded lot number 11 which is bigger than lot number 1. It was thus the unsuccessful bidder for lot number 1. NPS's however is of the view that it was the lowest bidder and should have been awarded lot number 1 because such allocation would have given the Government of the Republic of Namibia (the 'Government') the greatest value for money and saving the government as much as N\$2.5 million in the process. With this counter application NPS seeks *inter alia* an order remitting the matter to the board for re-evaluation of the bids.

[56] The following orders are sought by NPS:

- '1. The 16th respondent's non-compliance with the forms and service provided for by the Rules of this Honourable Court is condoned and the matter is heard as one of urgency as contemplated by rule 73.
2. The 1st and 2nd respondent's decision dated 9 July 2021 is reviewed and set aside and the matter is referred back to the 3rd and 4th respondent for the re-evaluation of all bids subject to the directions set out in paragraph 3 hereof.

3. It is declared that section 55(1) read with section 2(a)(i) of the Public Procurement Act, 15 of 2015, require that in awarding separate sections of one bid 2 to different bidders, the selection of the bidders must be done so that the awarding of the separate sections, viewed as a whole, obtains best value for government expenditure.
4. It is declared that section 51(4) read with section 52(5) of the Public Procurement Act, 2015, require that every bidder be provided with the name of a bidder and the total amount of each bid and an arithmetical error has been corrected, also the total corrected amount of each bid.
5. The 3rd and 4th respondents are ordered, with respect to bid NCS/ONB/CPBN-05/2019, to provide the 16th respondent, with respect to all 80 bidders, the name and the total corrected amount of each bid alternatively the unit price of every bidder, for each and every of the three years and for each and every one of the 13 lots.
6. The 3rd and 4th respondents are ordered, together with those parties who oppose this counter-application, to pay the 16th respondent's costs of bringing this counter-application, including one instructing and one instructed counsel, and including those costs of drafting the papers in case number: HC-MD-CIV-MOT-GEN2021/00300.
7. Further and/or alternative relief.'

[57] In order to provide context, it is necessary to mention that when NPS was informed that it was a successful bidder in respect of lot number 11 instead of lot number 1 which was comparatively larger than lot number 11. NPS argued that it had the lowest price for both lots. However despite its bid being lower than that of Vicmac Security CC the (sixth respondent) which was awarded lot number 1 and the board awarded it lot number 11. It is not satisfied with this allocation. It contends that it should have been awarded the bigger lot being lot number 1.

[58] During November 2020, NPS applied to the Review Panel for the review of the board's decision. Before the Review Panel, NPS argued that it was the lowest bidder for lot number 1 and lot number 11, but that the board awarded it lot number

11 instead of lot number 1 for which it was the lowest bidder. The Review Panel in dismissing NPS application reasoned that-

'The bidding documents [stipulated] that no more than one lot will be awarded to a bidder. The first respondent (the Board) proceeded in the manner consistent with the above and awarded to the Applicant one of the lots for which the Applicant qualified.'

[59] The complete decision of the Review Panel of 9 July 2021 was emailed to the bidders on 21 July 2021. NPS alleges that it had, since the award was made, consistently requested the board to provide it with prices for successful bidders for years two and three as well as the prices of qualifying bidders on all the lots and the prices of the disqualified bidders. I interpose here to mention that the contract is valid for a period of three years hence the request to be provided with the prices for years two and three. The board did not however provide NPS with the requested information.

[60] Aggrieved by that decision of the Review Panel, NPS brought an urgent application on 28 July 2021 before this court. That application served before Geier J. The application was struck from the roll for the reason that the court was satisfied that the requirement of rule 73(4)(b) had been met. It reasoned further that NPS could obtain substantial redress should it bring the present counter-application in the present application.

[61] In its notice of motion for the counter-application NPS does not support the main relief sought by Bertha namely that the bids be remitted to the first and second respondents (the 'Review Panel') for re-hearing. It however supports the order sought in the alternative that the matter be remitted to the board and that the board be ordered to re-evaluate the bids. NPS further supports the relief sought by Bertha that the disqualification due to an invalid certificate of good standing, be set aside. According to NPS the setting aside should only apply to the unsuccessful bidders who were disqualified because of having submitted invalid certificates of good standing.

[62] What then NPS did do to support the relief it seeks? It simply prepared a five pages founding affidavit to which copies all the papers in respect of the application that served before Geier J are attached. The deponent then stated that he incorporates the contents of all the papers are annexed. I should immediately state in this connection that this is not permissible. See: *Nelumbo and Others v Shikumwah and Others* (SA 2015/27) [2017] NASC 14 (13 April 2017).

[63] Notwithstanding NPS's non-compliance with rules of pleadings, given the fact that the application was now being brought in the normal cause, I took the view that striking the matter from the roll once again for non-compliance would only prolong the agony of those who are involved in this bitter and protracted dispute. I was also of the view that it is in the interest of justice and in accordance with overriding objects of rules of this court to bring to an end the dispute in this matter. I therefore reluctantly exercised my discretion and decided to deal with the matter notwithstanding the no-compliance referred to earlier.

[64] As has been noted from the main application most of the facts are common cause. What the court is called upon to do in respect of the counter-application is to interpret ss 51(4) and 52(5) namely what is labelled by NPS as 'the disclosure requirement', and s 55(1) labelled as 'the lowest price requirement'.

[65] In respect of the disclosure requirement, NPS argues that the full disclosure means that all financial information of all bidders be disclosed. Furthermore such disclosure is to include the bidders whose financial bids were not considered because they have been disqualified for not meeting the bid criteria. As regards the lowest price requirement (contained in s 55(1)), NPS argues that the purpose of the lowest bid requirement is to maximize saving costs for the Government in public procurement.

Opposition by the respondents

[66] Mr Swartz has been cited in his capacity as chairperson of the Central Procurement Board, the fourth respondent. He has also been cited as the third

respondent. He deposed to the answering affidavit on behalf of both third and fourth respondents.

[67] He denies that the board is obligated to make a full disclosure of financial information to all bidders. He points out that the Act criminalizes the disclosure of information to a third party without the authorization of the Review Panel. I interpose here with reference to my earlier criticism of the structure of these entities and pose a question: How can the Review Panel authorise the access to information if it is an *ad hoc* body and ceases to exist once it works is done?

[68] In any event, according to Mr Swartz, NPS, is on a fishing expedition by seeking disclosure of information not related to the award of its tender. In this regard he points out that the bidding documents state that the information relating to the examination, clarification, evaluation and comparison and recommendation of the award of a contract shall not be disclosed to bidders or any other person not officially concerned with such process.

[69] Mr Swart further points out the Bid Evaluation Committee which is appointed on *ad hoc* basis retains the full custody of the bidding information until the evaluation process is completed. That concludes the case for the third and fourth respondents.

[70] As mentioned earlier whether the counter-application succeeds or fails, depends on the interpretation propounded by NPS in respect of the relevant provisions of the Act relied upon by NPS for the declaratory orders sought.

[71] It is trite law that in granting a declaratory the court exercises a discretion. In doing so the court must be satisfied that the applicant is a person interested in an existing, future or contingent right or obligation and if so, the court must decide whether the case is a proper one for the exercise of its discretion. In order for the applicant to succeed with a declarator such order must resolve the dispute over the existence of some legal right or entitlement.⁸

Relevant statutory provisions

⁸ Herbstein and Van Winsen: *The Civil Practice of the High Courts and Supreme Court of Appeal of South Africa*, 5th ed, p 1438-1440.

[72] Section 51(4) of the Act provides that:

‘At a bid opening session, the name of the bidders, the total amount of each of the bids, any discount or alternative offered, and the presence of any bid security, if required, is read out and recorded, and a copy of the record is made available to any bidder on request.’

[73] Section 55(1) on the other hand provides as follows:

‘The Board or a public entity must award a procurement contract to the bidder having submitted the lowest evaluated substantially responsive to the bid which meets the qualification criteria specified in the pre-qualification or bidding documents, following the steps outline in subsection (3) and (4).’

[74] Section 52 (5) reads:

‘Where a bid discloses an arithmetical error, the Board or public entity concerned must correct the error and notify the bidder.’

[75] The cardinal rule of interpretation is well-established. That is: words of a statute must be given their ordinary, literal or grammatical meaning if the words are clear and unambiguous, unless it is apparent that such literal construction would lead to manifest absurdity, inconsistency, injustice or would be contrary to the intention of the legislature.⁹

[76] The approach to be adopted by a court when it has to interpret a statutory provision was laid down by Supreme Court in *Torbitt*¹⁰ when it has to interpret the provisions of s 86(18) of the Labour Act, 2007. In that matter the court at para [26] quoted with approval from the judgment of the South Africa Supreme Court of Appeal in *Natal Joint Municipal Pension Fund*¹¹ where the SCA stated the following with regard to the current legal position in respect of the interpretation of statutes:

⁹ *Minister of Justice v Magistrate Commission* 2012 (2) NR 743 (SC).

¹⁰ *Torbitt and Others v International University of Management* (SA 16/2014) [2017] NASC 8 (28 March 2017) para 26.

¹¹ *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] 2 All SA (SCA). See also, *Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distribution CC* (SA 9/2013) [2015] NASC (30 April 2015) para [18].

[26] In Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) ([2012] 2 All SA 262; [2012] ZASCA 13), the Supreme Court of Appeal in South Africa expressed itself as follows regarding the current legal position in respect of the interpretation of statutes, in para 18:

“The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to 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.”

[And continues in para 26:]

An interpretation will not be given that leads to impractical, unbusinesslike or oppressive consequences or that will stultify the broader operation of the legislation or contract under consideration.'

[77] The court will only go beyond the ordinary grammatical meaning in the event the ordinary meaning of those words generates an absurd or repugnant interpretation which undermines the intention of the legislature or which is unconstitutional.¹²

[78] Keeping in mind the principles set out in case law referred to above, I now proceed to consider whether the interpretation of the provisions in the above quoted sections of the Act bear the meanings propounded by NPS. I start off with s 51(1).

[79] The heading of the section is 'Opening of bids' it proceeds to stipulate what happens at the opening session of the bids. Section 51(1) tells the reader when bid envelopes are to be opened. In other words, the time and place of opening of bids

¹² *Ohorongo Cement (Pty) Ltd vs Jack Trading CC & Others* (SCR 1/2013) [2020] NASC (20 May 2020).

stated in the bidding documents. It further tells the reader who is allowed to attend the bid opening session, namely the bidder or a person authorised by the bidder.

[80] On proper reading of s 55(1) it does not in the slightest degree accord with the interpretation NPS sought to impose on its wording. The lowest price is not the only consideration to be taken into account by the Bids Evaluation Committee or the board. The board must also consider whether the bid meets the qualification criteria specified in the bidding documents. I agree with the submission that the purpose of the lowest price requirement is to maximise saving in public procurement, but that is not the only consideration.

[81] In the present matter the Bid Evaluation Committee took into account amongst other things: regional presence of the bidder. In other words where the bidder is based and operates; using local manufacture goods; and allocation of only one lot per bidder. In my view to interpret s 51(1) in the manner argued by NPS would unduly restrict the power and wider discretion vested upon the Bid Evaluation Committee and the board.

[82] Considerations will also depend on the Government objectives where a lower price might not necessarily be an overriding objective. For instance s 2 of the Act provides *inter alia* for preferential treatment in the allocation of procurement contracts to Namibian registered small and medium enterprises; categories of Namibian manufacturers, suppliers and service providers; and Namibian natural persons or categories of persons including persons who have been economically or educationally disadvantaged by past racial discriminatory laws and practices. If lower price were to be the overriding consideration the intention of the legislature envisaged in s 2 would not be capable of being achieved.

[83] Section 52(5) consists of one short sentence. It merely provides for a correction of an arithmetical error which has been discovered by the board in the bid and corrected by the board. In such an event the board must notify the bidder. It does not vest any right in the bidder. This is clear when it is read with s 52(7) which provides that should a bidder refuse to accept a correction made pursuant to ss 5, his or her bid is rejected and the bid security is forfeited in terms of s 45(2)(b). If s

52(5) had vested a right in a bidder in respect of his or her bid, the board would not have been able to simply unilaterally reject the bid. This in my view negates NPS's argument that the section must be interpreted as vesting a right in NPS to be provided with financial information of other bidders

[84] I am not persuaded that ss 51(1) and 52(5) should be interpreted as entitling NPS to be provided with the unit price or adjusted total amount of every bidder including those who have been disqualified. NPS has not proved that it has any right prospective or contingent in this regard. It is clear that the proposed interpretation is not in line with the well-established canons of interpretation of statutes. In my view the words in s 51(1) and 52(5) have to be given their ordinary literal and grammatical meaning.

[85] I turn to consider what is termed 'the full disclosure requirement' based on the interpretation of s 55(4) of the Act. Subsection (4) simply states that at that session the names of the bidders, the total amount of each bid are read out and recorded. If a bidder has offered a discount or has made an alternative offer that is also read and recorded. If the bidding document required the furnishing security, the furnishing of security or failure to do is likewise read and recorded. Any bidder is entitled to a copy of record of the proceedings upon request.

[86] The words of the subsection are simple and clear and have to be given their ordinary literal and grammatical meaning. In my view the subsection does not require interpretation. The 'disclosure requirement' NPS is attempting to impose on s 55(4) is so contrived so much that it constitutes a misfit. The section simply provides for the process of reading out the amount of each bid and the recording of such bid amounts. The words and the grammar used are simple. It is not NPS's case that the words used lead to any absurdity, inconsistency or repugnancy.

[87] It is clear that NPS is seeking pre-litigation discovery under the guise of purportedly interpreting ss 55(4) as embodying disclosure requirement. In *Chairperson of the Tender Board of Namibia v Pamo Trading Enterprise CC and Another*¹³, Pamo as the applicant sought pre-litigation discovery of the minutes of the

¹³ (SA 87/2014) [2016] NASC 8 (17 November 2016)

board where the tender process was cancelled relying on Articles 12 and 18 of the Constitution. The Supreme Court held that Article 18 does not provide for a right of access to information from a decision making body; and that it protects a person's right to administrative justice and reasonable administrative action. The court then proceeded to consider whether the respondents had made out a case for the development of the common law so as to provide pre-litigation discovery. It found that the respondent had not. The court pointed out when the rules of the court were reformed during 2014 such reform did not introduce pre-litigation discovery. The court thus pointed out that would be an aspect for the rules giver to consider.

[88] Quite apart from the view expressed by the Supreme Court in *Pamo* which I fully agree with, as I have earlier indicated, I am not persuaded that the interpretation NPS wishes to impose on the provisions of s 55(4) does not accord with normal interpretation applying ordinary, literal or grammatical meaning of the words used in the s 55(4).

[89] According to NPS the full disclosure requirement requires that the financial information of all the bidders be disclosed, including the bidders whose financial bids were not considered because they were disqualified for not meeting the bid criteria. NPS argues that at bid opening session the financial bids of all bidders must be disclosed and all bidders must be entitled to have access to that information.

[90] NPS complains that it was awarded the smaller lot whilst the bigger lot for which it also had the lowest price was awarded to a bidder who was more expensive than NPS. It argues in this connection that that lowest price requirement requires that all thirteen lots and all prices of all qualified bidders should be holistically compared to maximize cost saving for the government over the thirteen lots viewed as a whole.

[91] It is NPS's further case that to be able to accurately carry out a holistic assessment, it requires that the board makes a full disclosure of the financial information of the bid in question, which will include in respect of every bidder, the unit price for each three years in respect of all thirteen lots.

[92] According to NPS in response to its repeated requests to the board it was eventually provided with the first year financial information which was already in possession of all the bidders. NPS laments that it has not been provided financial information of the qualifying bidders for the second and third years. The board further failed to provide it with financial information of the disqualified bidders, NPS complains.

[93] It would appear that NPS seemed to have forgotten that when it decided to submit the bid it agreed whether expressly or impliedly that it would abide by the terms and conditions contained in bidding documents. It knew or ought to have known that it would not be entitled to the information it now seeks. In this regard NPS has not been able to direct the court to a term or condition in the bidding documents which entitled it to the information it now seeks. For instance NPS laments that it was allocated a lot which was smaller than the one allocated to its competitor. But the bidding conditions were clear that it would only be entitled to be allocated one lot whether small or big. It is not NPS's case that the board acted with caprice or malice in exercising its discretion in awarding it the lot it did.

[94] It appears further that NPS wants play the role of the bidder and the evaluator at the same time. I say this for the reason that it wants to be provided with 'all prices of all qualified bidders (and that such prices) should be holistically compared to maximize cost saving for the government'. It is not NPS's obligation to ensure that the government obtains value for money during public procurement. That is the statutory duty and obligation of the Bid Evaluation Committee. In this regard s 52(9) of the Act provides that every bid is evaluated according to the criteria and methodology set out in the bidding documents and the evaluated cost of each bid is compared with the evaluated cost of other bids to determine the most economically advantageous bid. Section 52(13) provides that the committee must prepare an evaluation report detailing the examination and evaluation of bids and identify the lowest evaluated bid that meets the qualification criteria.

[95] As regards NPS's demand to be provided with the financial information of all the bidders including the bidders whose financial bids were not considered because they were disqualified for not meeting the bid criteria, I consider the demand or

request rather unconventional in the area of tenders. As the chairperson of the board correctly points out the financial information of bidders is subject to confidentiality. The bidders have a right to expect that the board, the Bid Evaluation Committee and the Review Panel, protect their trade secrets from access by competitors. There is no dispute that all the bidders operate in the security sector which entails the protection of properties by providing security guards. They are thus competitors. The duration of the tender which is the subject matter of this application appears to be three years. It is thus highly likely that after that period a new bid will be advertised and the current bidders will no doubt submit their bids again. If their trade secrets are shared between the board and NPS without the affected bidders' consent that would amount to a serious violation of those bidders' rights which would be actionable as against the board. The bidders' competitiveness would also be severely prejudiced and impaired.

[96] What further militates against the granting of the order sought by NPS, is the fact that according to Bertha, its bid must still be considered by the Review Panel. The bid process is thus not yet finalised. In my view, in addition to other reasons I have stated elsewhere in this judgment, granting the order sought by NPS would prejudice and compromise the whole bidding process and may have a chilling effect on bidders putting in bids in the future.

Conclusion

[97] I have therefore arrived at the conclusion that the interpretation of ss 51(1), 51(4) and 52(5) as propounded on behalf of NPS would lead 'to impractical, unbusinesslike' and 'will stultify the broader operation of the legislation' in this case (the 'Act'). NPS has thus failed to demonstrate that lower price is the only overriding consideration in evaluation of the bids. It has further failed to make out a case that it has any right, prospective or contingent in respect of the financial information of all the bidders.

[98] It follows therefore that for all those reasons and considerations the main application must succeed and that the counter-application stands to be dismissed.

Costs

[99] The normal rule that costs follow the event, shall apply. The applicant has been successful and is entitled to be reimbursed for its costs against those respondents who opposed its application. On the other hand the applicant in the counter-application has failed. It is liable to reimburse the third and fourth respondents' costs occasioned by their opposition to the counter-application.

Order

[100] In the result, I hereby make the following order:

Ad main application:

1. The decision of the first and second respondents of 9 July 2021 dismissing the applicant's review application is hereby reviewed and set aside.
2. The matter is referred back to the Review Panel for hearing of the applicant's review application.
3. The third and fourth respondents are to pay the applicant's costs, such costs to include the costs of one instructed and one instructing counsel.

Ad counter-application:

1. The counter application is dismissed.
2. The sixteenth respondent is to pay the costs of the third and fourth respondents, such costs to include the costs of one instructed counsel.
3. Such costs are to include attendance up to the point of drafting the heads of argument but excluding costs of appearance by instructed counsel at the hearing.

Ad both applications:

1. Both applications are removed from the roll and regarded finalised.

H ANGULA
Deputy Judge-President

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