



REPORTABLE

CASE NO: SA 81/2016

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

CHICO/OCTAGON JOINT VENTURE

Appellant

and

ROADS AUTHORITY

First Respondent

CHAIRPERSON OF THE ROADS AUTHORITY

BOARD TENDER COMMITTEE

Second Respondent

UNIK/THONI JOINT VENTURE AND OTHERS

Third Respondent

Coram: FRANK AJA, MAINGA JA and HOFF JA

Heard: 29 June 2017

Delivered: 21 August 2017

Summary: The Roads Authority which is the body charged with the management of the national roadwork in Namibia invited bids for the construction of a freeway between the towns of Swakopmund and Walvis Bay. Twenty-three tenderers responded to the bid.

A tender evaluation committee consisting of engineers evaluated all the bids against the criteria stipulated in the bid invitation (tender requirements) and disqualified fourteen tenderers. The remaining nine tenderers were then evaluated with reference to, what is termed the 'Technical Score' requirements spelled out in the tender requirements. This left six tenderers who managed to reach the benchmark of 70 percent stipulated in respect of the 'Technical Score'.

The technical scores and prices were then combined to obtain a ranking of tenders in respect of a 'Tender Index'. When this was done the appellant was ranked first and the third respondent ranked second. The technical evaluation committee, based on the 'Tender Index' concluded that the appellant was the preferred bidder and recommended that it be awarded the tender. This recommendation was forwarded to the management committee who endorsed this recommendation and in turn forwarded it to the board tender committee (the Board).

The Board considered the matter on 28 April 2016 and awarded the tender to third respondent. The appellant being aggrieved by the award of the tender to third respondent communicated its concern to the Roads Authority in an attempt to persuade the authority to retract its decision and award the tender to it. When this came to nought appellant launched an application to review and set aside the decision of the Roads Authority. This application was coupled with an application for an urgent interdict preventing the implementation of the tender pending the review application. The parties agreed to expedite the proceedings in the review application and the urgent application was abandoned by appellant despite neither the Roads Authority nor the third respondent giving any undertaking that they would not

implement the award. The High Court dismissed the review application with costs. The appeal was against this order.

The Board justified the award to the third respondent, despite its bid being higher than that of the appellant, on a threefold basis. First, that the project was a complex one and the third respondent had a higher technical score. Second, that Chico as a joint venture partner in an entity known as Chico/Palladium was awarded another tender of a similar nature and concerns arose as to the appellant's capacity to duly complete the tender under consideration. In other words the appellant might be overstretched if awarded the tender. Third, that the Board was of the view that an award to the third respondent would ensure an equitable and wider spread of work between tenderers.

The appellant alleged that as the preferred bidder the Board had to award the tender to it. The failure to do so, especially in view of its lower price and given that it was technically competent, the decision of the board was irrational. The appellant also maintained that it had not been given a hearing with regard to its capacity to properly execute the project nor was it forewarned about the criteria relating to the securing of a wider spread of work between tenderers.

The respondents raised a point *in limine*. They challenged the competence of the appellant to bring the application and the application to file further affidavits on the basis that the purpose of the joint venture agreement fell away when the award of the tender was made to third respondent and hence that its deponent could not have been authorized by the joint venture agreement to bring the review application on its

behalf and to oppose the application by the respondents to submit further affidavits.

The court held that the joint venture parties were clearly entitled to agree, for the purposes of seeking redress in the court so as to be entitled to the award of the tender and its concomitant contract, to keep the joint venture agreement alive and to add this to the purposes for which the joint venture was established. The court further added that the joint venture is not a legal entity distinct from the parties to the joint venture agreement.

On the merits it was held that the Board could not be said to have acted irrationally as the reasons for not awarding the tender to the appellant were relevant and connected to the proper execution of the tender. That a fair process did require that the appellant should have been given a hearing in respect of the concerns raised about its capacity and that the reasoning relating to the equitable and wider spread of work was not a relevant consideration as this was not communicated to the tenderers and accordingly the process was not fair.

On the question of the remedy it held that the default remedy is to set aside the challenged act and to remit the matter to the decision maker for a decision afresh. It held further that in order for the court to exercise its discretion when it comes to a remedy other than the default remedy, facts must be placed before it. The appellant had abandoned its application for interim relief compelling the third respondent to proceed with the work. 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 of this nature and scope had probably

materialized. No facts were placed before the Court as to the extent of the disruption (and extra costs) to the contract should the tender be set aside and a different tenderer complete the tender. Where the facts indicate that the default remedy is not apposite but does not go far enough so as to enable the court to fashion a remedy that will bring finality to the matter and will be somewhere in between the default remedy and allowing the invalid award to be implemented, then the court will have no option but to allow the invalid award to stand. The appeal was thus dismissed.

APPEAL JUDGMENT

FRANK AJA (MAINGA JA and HOFF JA concurring):

Introduction

[1] The Roads Authority¹ which is the body charged with the management of the national roadwork in Namibia invited bids for the construction of a freeway between the towns of Swakopmund and Walvis Bay. Twenty-three tenderers responded to the bid.

[2] A tender evaluation committee consisting of engineers evaluated all the bids against the criteria stipulated in the bid invitation (tender requirements) and disqualified fourteen tenderers. The remaining nine tenderers were then evaluated with reference to, what is termed the 'Technical Score' requirements spelled out in the tender requirements. This left six tenderers who managed to reach the benchmark of 70 percent stipulated in respect of the 'Technical Score'.

¹ The Roads Authority is a statutory body established pursuant to s 2 of the Road Authority Act, No 17 of 1999.

[3] The technical scores and price scores were then combined to obtain a ranking of tenders in respect of a 'Tender Index'. When this was done the appellant was ranked first and the third respondent ranked second. The technical evaluation committee, based on the 'Tender Index' concluded that the appellant was the preferred bidder and recommended that it be awarded the tender. This recommendation was forwarded to the management tender committee which endorsed this recommendation and in turn forwarded it to the board tender committee (the Board).

[4] I interpose here to mention that the reference to the board tender committee is a misnomer as this 'committee' consists of all the members of the Board of the Roads Authority and hence is the Board under the guise of a committee. Nothing turns on this as this aspect was not an issue of dispute between the parties. It seems that the Board conducts separate meetings where tenders are discussed and then refers to itself (wrongly) as the board tender committee.

[5] The Board considered the matter on 28 April 2016 and the minutes reflect the resolution by the Board to award the tender to third respondent and not the appellant as follows:

- '1. The Committee acknowledged that they have received the copies of registration documents of Sino Hydro Namibia (Pty) Ltd and agree that Sino Hydro Namibia (Pty) Ltd should have submitted their Registration Certificate/Founding Statement: Letter of Good Standing from the Receiver of Revenue and from the Social Security Commission; and the certificate of Affirmative Action compliance as per the Roads Authority Tender Rules. Accordingly, the Committee agrees with the disqualification of Sinohydro/Otjomuise Joint Venture.

2. The Committee acknowledged that the preferred tenderer is China Henan International Cooperation (CHICO)/Octagon Joint Venture. However, the Committee resolved not to award the tender to the preferred tenderer on the basis that CHICO/Octagon Joint Venture was recently awarded tender RA/MC-MRP/07-2015 (OTJ) for the Otjiwarongo Region for an amount of N\$321,886,276.40 and for a contract period of 3 years.
3. The Committee resolved to award Tender No. RA/DC-CR/05-2015: construction of MR44, MR36 and TR2/1 between Swakopmund and Walvis Bay to Freeway Standards Phase 1 between TR2/2 and Farm 58 to the UNIK/Thohi Joint Venture for an amount of N\$958,408,275.00 (including VAT) and for a contract period of 36 months.
4. The tender index of CHICO/Octagon Joint Venture is 96.87 and UNIK/Thohi Joint Venture is 95.48. However, the technical score of UNIK/Thohi Joint Venture is 86.75 higher than the CHICO/Octagon Joint Venture technical score of 76.75. In view of the complexity of the project a higher technical score will yield a better result.
5. The Committee acknowledged that the tender price of CHICO/Octagon Joint Venture is N\$891,648,678.55 and UNIK/Thohi Joint Venture is N\$958,408,275.00. The tender price of UNIK/Thohi Joint Venture is N\$66,759,596.45 above the tender price of CHICO/ Octagon Joint Venture.
6. The Committee also acknowledged that in comparison to the Engineers estimate, CHICO/Octagon joint Venture tender price is 0.75% above the Engineers Estimate and UNIK/Thohi Joint Venture is 7.66% above the Engineers estimate. The tender prices are within the 15% threshold of the Engineers estimate.'

[6] The appellant being aggrieved by the award of the tender to third respondent communicated its concerns to the Roads Authority in an attempt to persuade the authority to retract its decision and award the tender to it. When this came to nought appellant on 7 July 2016 launched an application to review and set aside the

decision by the Roads Authority. This application was coupled with an application for an urgent interdict preventing the implementation of the tender pending the review application. The parties agreed to expedite the proceedings in the review application and the urgent application was abandoned by appellant despite neither the Roads Authority or the third respondent giving any undertaking that they would not implement the award of the tender.

[7] In the review application the appellant (as applicant) sought the following relief:

- ‘1. Reviewing and setting aside the decision of the first, alternatively the second respondent, taken on 28 April 2016, awarding tender number RA/DC-CR/05-2015 to the third respondent.
2. Declaring the applicant as the preferred and successful tenderer and ordering the first respondent to accordingly award the tender to it (applicant).
3. Directing the first and second respondents to award the tender to the applicant as the preferred tenderer.
4. In the alternative ordering the first and second respondents to have the tender reconsidered in terms of its Procurement Policy and Procedures and in accordance with the terms and conditions set by the Court.
5. In the event of opposition, directing that the respondents pay the cost of this application jointly and severally.
6. Further and/or alternative relief.’

[8] The review application was heard in the court *a quo* on 7 September 2016 and on 8 December 2016 it was dismissed with costs. The appeal lies against this

order. Once again with the assistance of the Registrar of this court and at the request of the parties to this appeal the hearing of this appeal was expedited.

[9] The third respondent did not oppose the review application but abided the decision in the court *a quo* and likewise did not partake as a party in this appeal. For convenience sake, and as the second respondent identified himself with the Board in both the court *a quo* and in this court, I refer to the first and second respondents in this judgment as the respondents. Where the third respondent features in this judgment it is referred to as such, ie third respondent.

Review Application

[10] The applicant bears the onus to satisfy the court that the review grounds raised by it is based on facts and is of such a nature that it is entitled to the relief (review) sought.²

[11] The review grounds relied upon were the following:

- (a) An averment that the tender was 'unfair and unlawfully awarded to third respondent'. The complaint is that it was so awarded on 'unlawful and irrational grounds' seeing appellant was found to be the 'preferred bidder'.
- (b) It is alleged that seeing the difference in price between the appellant and third respondent the award to the latter was 'shocking and unconscionable . . . not prudent' and on 'sketchy and irrational grounds'.
- (c) It is alleged that to decline to award the tender to appellant (Chico/Octagon) on the basis that Chico/Palladium had been awarded a contract was a misdirection of fact as the two joint ventures are separate legal entities and leads to an inference of ulterior purpose. Furthermore the Board has done this

² *Christian v Metropolitan Life Namibia Retirement Fund* 2008 (2) NR 753 (SC) para 15.

in the past and to use this reason against appellant meant its actions were inconsistent.

- (d) Appellant was not given a hearing in respect of the capacity issue raised in respect of the contract awarded to Chico/Palladium.
- (e) The tender requirements and criteria did not provide for penalising tenderers who had been awarded other tenders.
- (f) As the tender criteria referred to the 'Tender Index' and not the 'Technical scores' it was not open to the Board to rely on the technical score of third respondent to give it preference over appellant.
- (g) That the Board was not entitled to have regard to criterion other than those stipulated for the evaluation, ie what was termed extraneous grounds.'

[12] Before I set out the responses by the Roads Authority to the above review grounds it is apposite that the award to Chico/Palladium be put in context. It is clear from the record that the technical evaluation committee's conclusion (22 March 2011) and the recommendation by the management tender committee to the Board (5 April 2016) was made prior to the award to Chico/Palladium (15 April 2016). This could thus not be considered and factored into the recommendation to the Board as far as the tender under consideration was concerned. The Board however knew of this as it on 15 April 2016 made the award to Chico/Palladium whereas the award to third respondent was made on 28 April 2016.

[13] It further needs to be stated that no issue is taken with the process and the evaluation done by the technical evaluation committee, the determination of appellant as the preferred bidder and the recommendation by the committees to the Board that appellant should be awarded the tender. The validity or otherwise of the

award of the tender to the third respondent hinges on the sufficiency of the reasons proffered by the Board for this course of action.

[14] In regard to the reason that appellant had recently been awarded another tender it is explained as follows in the answering affidavit:

‘The entity is already involved in another tender awarded to it by first respondent. It is a legitimate concern for the applicant that . . . (Chico) would be overstretched and would thus be unable to meet the strict requirement’s performance and completion of the two projects.’

[15] With respect to the reliance on the third respondent’s higher technical score the response on behalf of the Board is as follows:

‘ . . . the Board’s desire to ensure an equitable and diverse spread of the work, in other words, not concentrate two major projects in the hands of . . . (Chico) together with the Board’s view that a higher technical score on this project should be given more weight was the reason that the Board decided not to follow the’ recommendation.’

and

‘By ensuring a wider spread of work between tenderers, the Board was of the view that this would facilitate getting the best out of each tenderer and would result in the most efficient completion of the projects.’

[16] Apart from the responses on the merits referred to above the respondents also challenged the competency of the appellant to bring this application and the application to submit further affidavits (which application I deal with below) on the basis that the purpose of the joint venture agreement fell away when the award of the tender was made to third respondent and hence that its deponent could not have

been authorised by the joint venture agreement to bring the review application on its behalf and to oppose the application by respondents to submit further evidence. I now turn to deal with this challenge.

Competency of appellant to partake in the proceedings

[17] Appellant is a joint venture between two corporations registered as such in Namibia, namely China Henan International Cooperation Group (Pty) Ltd and Octagon Construction CC. In terms of the joint venture agreement:

‘The parties have agreed to cooperate in a joint venture to be called Chico Octagon Joint Venture on an exclusive basis for the purpose of submitting a joint tender to the Roads Authority of Namibia (in respect of the tender under consideration), and if successful to execute a contract . . . for the performance of the project.’

[18] It is clear from the joint venture agreement that it is created solely for the purposes of the tender and the completion of the project should it be awarded the tender. The parties thereto ‘constitute themselves as partners solely for and in connection with the project’ and it is a ‘condition precedent’ to the joint venture agreement that it will only ‘enter into force and effect’ if the ‘contract in respect’ of the project is awarded to it and such contract has been finalised and signed. The agreement provides that the following two persons would represent the two parties in respect of the ‘handling of all matters and questions in connection with the performance of the contract’ and with full authority ‘in relation to any matters or things in connection with, or arising out of, or relative to the joint venture and in relation to any matters or things involving the performance of the contract’. The persons referred to is Mr Kandeke, who is described as the Managing Director of Octagon and

Mr Yanlei, who is described as the Managing Director of Chico.

[19] Respondents submit that as the tender was not awarded to the joint venture, the joint venture agreement did not realise and hence that the joint venture had not come into existence with the consequence that no-one could act for this joint venture or be authorised by the joint venture. On this basis the review application was unauthorised and so was the opposition to the application to submit further affidavits.

[20] As far as the review application is concerned Mr Kandeke, the deponent on behalf of the appellant in the founding affidavit, describes himself as part of the Managing Committee of applicant and as a Director of Octagon. He alleges he is authorised by applicant to bring the application on its behalf and then states 'I have further been collectively and individually duly authorised by the constituent companies of the applicant to bring this application on behalf of the applicant'. This is confirmed in the confirmatory affidavit by the Managing Director of Chico, Mr Yanlei.

[21] The fact that the agreement states that the joint venture would only come into existence upon the contract being awarded to the joint venture and subsequently being signed by all the parties thereto does not mean there was no agreement between the parties thereto prior to the award being made to the joint venture and the signing of the contract in respect of the tender. They after all prepared a bid which was submitted in respect of the tender. The joint venture agreement solely deals with the relationship between the parties thereto subsequent to the contract being signed. There must have been some agreement between Chico and Octagon relating to putting in a bid as it is clear that the bid was based on an award to the joint

venture. There must also have been some agreement subsequent to not being successful with its bid to bring the review application and this was authorised by the joint venture parties as indicated above.

[22] The joint venture parties were clearly entitled to agree to, for the purposes of seeking redress in the courts so as to be entitled to the award of the tender and its concomitant contract, to keep the joint venture agreement alive and to add this to the purposes for which the joint venture was established. Here it must be borne in mind that the joint venture is not a legal entity distinct from the parties to the joint venture agreement. It is a partnership between those entities and both parties agreed to institute review proceedings. Whether this was done by the two joint venture parties as two joint applicants or in the name of the joint venture (consisting of the selfsame parties) is neither here nor there and seems to be nothing but pedantic formalism without taking cognisance of the substance of the matter, namely that it is common cause between the joint venture parties that the review application had to be instituted and hence authorised it in their own capacities and jointly in their capacities as constituting the joint venture. In short, nothing prevented the joint venture parties subsequent to the award of the tender to third respondent, to expressly or by implication agree to use and extend the life of the joint venture and to do so in the name of the joint venture which after all, is nothing but a vehicle created by agreement between the parties thereto which agreement could be amended by such parties.³

[23] Whereas the affidavit of Mr Kandeke in the opposing affidavit in the application

³ *CSC Neckartal Dam Joint Venture v The Tender Board of Namibia & others* 2014 (1) NR 135 (HC) para 48.

to file further affidavits do not go as far as the founding affidavit in the review application, but simply alleges he was duly authorised by the appellant this must be seen in the context of the litigation up to that stage which even included an appeal lodged against the judgment of the court *a quo*. Seen in this context I am satisfied that he probably did have the authority he alleges as there is nothing to gainsay his word. As pointed out when dealing with the review application in this context above, the inference is clear that the litigation has been vested in the appellant with the assent of both the partners in the joint venture.

[24] It follows that the point *in limine* falls to be dismissed.

Evaluation of the review grounds

[25] Prior to discussing the review grounds raised it is apposite that the process of considering the bids be dealt with in a little more detail.

[26] On receipt of the bids they are evaluated against the requirements of the rules, terms and conditions of the invitation to bid (tender). This is an initial scrutiny to see that all the relevant documentation and information sought has been supplied without an evaluation of the contents of such documents or information. This initial evaluation could perhaps better be called a scrutiny to see whether all the required documentation and information had been supplied. If not, such bid is disqualified without further investigation.

[27] Those tenderers whose documentation were in order and who supplied the necessary information were then evaluated with reference to stipulated evaluation

criteria. These criteria fell in two broad categories in the tender under consideration, namely: price and technical. Price was given more weight. Technical included the following factors, namely; financial resources, staff competence, availability and efficiency of appropriate equipment, experience and Namibian content. The Namibian content refers to the number of Namibians among the key staff and training proposals in respect of Namibians. Once both the price and technical evaluations were done the outcome in respect of the 'price scores' and the 'technical scores' were combined to create a 'tender index score'. The bidder with the highest 'tender index score' was then regarded as the preferred bidder pursuant to the 'evaluation criteria'.

[28] As indicated above, the appellant obtained the highest score when it came to the tender index. It scored 96.87 points compared to third respondent who scored 95.48 points, ie there was a gap of 1.39 points between these two bidders. In respect of the technical scores the roles were reversed. Here the third respondent scored 86.75 points whereas the appellant scored 76.75, ie a gap of 10 points between these two bidders. It follows that the appellant's lower price propelled it above third respondent in the 'Tender Index'.

[29] The tender rules are also clear that the Board has the final say on the award of the tenders and that what is presented to them are recommendations. Further, the Board need not award the tender to the bidder with the lowest price or the highest tender index score. For were it otherwise there would be no reason to make recommendations to the Board as it would simply be compelled to award the tender to the bidder with the highest tender index score, who would also be the preferred

bidder as determined by the process already described.

[30] When it comes to price the following undisputed rules or policy applied. An estimate of the costs of the works was compiled internally for the Roads Authority. Any bid with a price below 30 percent of this estimate had to be disqualified as such price was deemed to be unrealistic. All bids within 15 percent of this estimate would be considered reasonable taken the nature and scope of the work that had to be tendered for.

[31] On the papers the stance of the appellant is that it is a necessary consequence of it being determined the preferred bidder that it be awarded the tender. This is not the position as the Board still had a discretion to award the bid to another tenderer as already pointed out. In view of the purpose for determining a preferred bidder based on pre-existing criteria known to tenderers, the Board must have legitimate reasons not to award the tender to the preferred bidder. This much was conceded by counsel for the appellant (and correctly so in my view) who submitted that the reasons proffered for not awarding the tender to appellant was not legitimate if regard is had to the grounds advanced by the Board for not awarding the tender to appellant.

[32] In terms of Art 18 of the Namibian Constitution, administrative decisions must be fair and reasonable. It is trite that the reference to fair in this context primarily refers to the process whereas the reference to reasonable primarily refers to the reasons for the decision. In essence a decision will only be regarded as unreasonable if no reasonable person could have come to the conclusion that the

decision-maker came to.⁴ The fact that there were more than one conclusion a reasonable person could come to or that the court would have come to another decision is irrelevant provided the actual decision was not unreasonable in the sense stated. In this context, I infer that it is in this sense that reference is made to an irrational decision, namely a decision which is not rationally connected to the objective. In the present matter it must thus be determined whether the considerations or reasons proffered for not accepting the lowest bid (price) of the preferred bidder were rationally connected to the services tendered for and not whether the court agrees with these reasons. In my view the reasons advanced by the Board are reasonable or rational given the meaning these concepts have in law. The question of overstretching and its impact on capacity is clearly relevant to the timeous performance of the work and hence a relevant concern. Similarly, a preference for the technical score where the project is 'complex' cannot be stated to be an irrelevant consideration or categorised as one not rationally connected to the capacity to do the work timeously. The fact that no detail is given in this context by the Board cannot be held against it. If this reason is not on the face thereof unreasonable or irrational, which it is not. It was for the appellant, who bears the onus, to have put up facts to demonstrate that this reasoning by the Board was indeed irrational or unreasonable in the context of the tender.

[33] The issue of price on its own also does not avail appellant. The Board was clearly aware of the differences in price, considered it and for the reasons given by it decided it was worthwhile to nevertheless award the tender to third respondent. Although appellant alleges the award to third respondent with its high price is

⁴ Trustco Ltd t/a Legal Shield Namibia & another v Deeds Registries Regulation Board & others 2010 (2) NR 726 (SC) para 31.

unconscionable the evidence show that it is well within the parameters of what a reasonable price would be compared with the estimated price established by the Roads Authority. In short, the price of the third respondent was reasonable although higher than that of the appellant and the reasons advanced by the Board for awarding the tender to third respondent instead of appellant despite this price difference, cannot be said to be irrational or unreasonable.

[34] The Board had to make the decision to whom to award the tender. As mentioned above, this does not mean it could ignore the evaluation it stipulated in the tender requirements. All bidders were informed as to the criteria for such evaluation and that the outcome of this evaluation would determine the preferred bidder. The Board by publishing the fact of the evaluation and the valuation criteria fettered its own discretion when it came to awarding the tender and was bound to endorse the outcome of the evaluation unless it was satisfied that the evaluation was flawed and hence did not reflect the correct outcome with reference to the laid down criteria. In other words the Board in the present matter was bound by the outcome of the evaluation unless there was good reason for regarding the evaluation as flawed. None of the parties to this matter have questioned the outcome of the evaluation process and it must be accepted that the appellant was determined to be the preferred bidder by a proper application of the pre-determined criteria sanctioned by the Board. In these circumstances there was no basis for the Board not to award the tender to applicant.

[35] The two issues that remain are whether the stance of the Board that the award of the other tender to Chico/Palladium raised a legitimate concern that

appellant would be overstretched which might impact on its capacity as well as the stance that it could, to ensure an equitable and wider spread of work between tenderers, award the tender to third respondent. Whereas these considerations may be rational the question that arises is whether a fair process required some warning of this approach and in respect of the first mentioned consideration, whether appellant should have been afforded a hearing prior to concluding its capacity may become overstretched if awarded the tender.

[36] When it comes to the overstretching issue it must be borne in mind that the technical evaluation unambiguously indicated that appellant had the capacity to execute the contract. At the time of this evaluation Chico/Palladium had not yet been awarded the other tender. The impact of awarding a second tender to an entity of which Chico was the lead partner was not considered by the evaluation committee, the management tender committee or addressed by appellant in its bid. This was so because the situation had by then not arisen. The Board was the first entity faced with this situation. In these circumstances I am of the view that appellant should have been granted an opportunity to address this issue.⁵ Appellant, after all, could not address this in their bid and nor could the evaluation committee, as the issue was not alive at that stage. It is further clear that the question of capacity was a relevant factor in the evaluation of the bids. This must also be seen in the context of the decision to allow a more equitable or wider spread of the work which I turn to deal with next.

[37] Policy considerations must likewise, as a general rule, be brought to the

⁵ *National and Overseas Modular Construction (Pty) Ltd v Tender Board, Free State Provincial Government & another* 1999 (1) SA 701 (O).

attention of bidders.⁶ This allows bidders to either justify the award to them despite the policy or decide not to enter a bid. The higher the costs to prepare a bid, the more important the disclosure of policies are. In such cases it would be unfair to expect bidders to incur costs (sometimes substantial costs) which they will lose if unsuccessful in their bid especially where they lose the bid based on policy considerations which had not been disclosed. Although the costs of the bid are not disclosed by appellant, I am prepared to accept, seeing the nature and scope of the project, that it was not insubstantial. The consideration relating to 'an equitable and diverse spread of tenders' is either a policy that was not disclosed or if an *ad hoc* decision it amounted to a policy that was decided upon there and then which could only apply prospectively and hence such policy was extraneous and irrelevant to the bid under consideration seeing the bidders were not forewarned about this requirement which had nothing to do with their prices, capacity or reputation in the industry relevant to the tender. It raised criteria that fell outside the realm of construction operations and of which the bidders (construction companies) had no knowledge and which the bidders could not reasonably have expected to play a role in the decision making process.

[38] Appellant complains that the Board failed to appreciate that Chico/Octagon was a different entity to Chico/Palladium and hence that the refusal to grant the tender to Chico/Octagon when Chico/Palladium already had been awarded a tender, is a material misdirection as well as irrational. It is clear that the common denominator in the two joint ventures is Chico. As far as appellant is concerned Chico is a 70 percent partner in the joint venture. However, in the Chico/Palladium joint venture, Chico is only a 40 percent partner. Further in the tender relevant to the

⁶ *Tseleng v Chairman, Unemployment Insurance Board* 1995 (3) SA 162 (T) especially at 178J-179A.

award to Chico/Palladium it appears that tenders were sought for more than one region and it was a requirement that where a bidder tendered in more than one region 'with the intent of successfully acquiring more than one of the resurfacing contracts, a separate plant should have been made available for each contract'. It seems to me two considerations arise. First, as Chico was not the dominant party in the Chico/Palladium contract, the conclusion as to the potential overstretch does not necessarily arise. Second, it seems the policy of a widespread distribution of work between tenderers was a new one which did not previously exist. Both these considerations fortify the conclusions reached above relating to the necessity for a hearing and prior notice of the policy in respect of 'an equitable and diverse spread of the work'.

[39] It thus follows that in respect of both the above concerns the appellant was deprived of a fair process.

[40] It needs to be stated that despite references to the respondents being biased and acting for ulterior purposes there is no evidence to support these allegations. It is clear that the Board acted in good faith when awarding the tender albeit not in the manner required in respect of administrative action.

[41] It follows from what is stated above that the decision complained of does not pass muster when it comes to a fair process and the question that arises is what remedy should follow in the wake of this finding.

Remedy

[42] In terms of the common law administrative action not authorised by the law is invalid and as *Baxter* puts it 'This is the axiomatic consequence of the principal of legality.'⁷ It thus follows that once it is concluded that a ground or grounds for review has or have been established the default remedy is to set aside the challenged act and to remit the matter to the decision maker for a decision afresh. Where this is done the effect of invalidity is retrospective as was pointed out by Friedman J as follows:

'In my earlier judgment, I set aside the decision of the first respondent, upon the basis that the first respondent in reaching his decision did not comply with the *audi alteram partem* principle. I did not enter upon any consideration of the merits of the case; in fact, I expressly disavowed any intention of so doing. The first respondent's decision was set aside, because it seemed to me to lack legal validity. Counsel has today debated the question of whether or not the first respondent's previous decision was void or merely voidable. For the purpose of this judgment, I shall assume that Mr Law is correct when he says that the previous expulsion order was one which was voidable, and which therefore had legal consequences until such time as it was set aside by this Court. It seems to me, however, that, where something which is voidable is set aside, it is set aside with all its consequences; both the decision itself falls away, and the consequences of that decision.'⁸

[43] I point out that the debate as to whether administrative acts are void or voidable has been overtaken by the approach spelt out in the *Oudekraal* case which this court has also endorsed and which is to the following effect:

'[26] For those reasons it is clear, in our view, that the Administrator's permission was unlawful and invalid at the outset. Whether he thereafter also exceeded his powers in granting extensions for the lodgement of the general plan thus takes the matter no further. But the question that arises is what consequences follow from the conclusion that the Administrator acted unlawfully. Is the permission that was granted

⁷ L Baxter: Administrative Law p 355.

⁸ *Naidoo v Director of Indian Education; Naidoo v Director of Indian Education & another* 1982 (4) SA 267 (W) at 277E-G.

by the Administrator simply to be disregarded as if it had never existed? In other words, was the Cape Metropolitan Council entitled to disregard the Administrator's approval and all its consequences merely because it believed that they were invalid provided that its belief was correct? In our view, it was not. Until the Administrator's approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked. The proper functioning of a modern State would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside.⁹

[44] As is apparent from the quoted portion from *Oudekraal* above the common law position as to the effect of setting aside an administrative act (declaring it invalid) has not changed. This is so because such act only remains effective in fact 'for so long as the unlawful act is not set aside'.

[45] The default position or default order is not cast in stone and the court retains an overall discretion to fashion a remedy that is fair in all circumstances. The position was summarised by Cameron J as follows:

[32] On the other hand, a court asked to set aside an invalid administrative act in proceedings for judicial review has a discretion whether to grant or withhold the remedy:

"It is that discretion that accords to judicial review its essential and pivotal role in administrative law, for it constitutes the indispensable moderating tool for avoiding or minimising injustice when legality and certainty collide. Each remedy thus has its separate application to its

⁹ *Oudekraal Estates (Pty) Ltd v City of Cape Town & others* 2004 (6) SA 222 (SCA) para 26.

appropriate circumstances and they ought not to be seen as interchangeable manifestations of a single remedy that arises whenever an administrative act is invalid.”

[34] In *Bengwenyama* this court explored the *Oudekraal* paradox, that an unlawful act can produce legally effective consequences. The apparent anomaly, Froneman J noted, ‘is not one that admits easy and consistently logical solutions’:

“But then the law often is a pragmatic blend of logic and experience. The apparent rigour of declaring conduct in conflict with the Constitution and PAJA unlawful is ameliorated in both the Constitution and PAJA by providing for a just and equitable remedy in its wake. I do not think that it is wise to attempt to lay down inflexible rules in determining a just and equitable remedy following upon a declaration of unlawful administrative action. The rule of law must never be relinquished, but the circumstances of each case must be examined in order to determine whether factual certainty requires some amelioration of legality and, if so, to what extent. The approach taken will depend on the kind of challenge presented — direct or collateral; the interests involved and the extent or materiality of the breach of the constitutional right to just administrative action in each particular case.”

[35] In *AllPay* the same judge, speaking on behalf of the court, took this further. He noted that there was a ‘clear distinction’ between ‘the constitutional invalidity of administrative action’, on the one hand, and, on the other, ‘the just and equitable remedy that may follow from it’. It was for this reason that the court declared invalid a tender whose award was riddled with suggestive irregularities, while nevertheless suspending the declaration of invalidity pending determination of a just and equitable remedy. Upsetting the award might have had disastrous consequences for millions of vulnerable grant recipients. Hence it was just and equitable to keep the unlawful award temporarily in place by the exercise of the broad remedial powers the Constitution has vested in this court.

[36] Hence the central conundrum of *Oudekraal*, that ‘an unlawful act can produce legally effective consequences’, is constitutionally sustainable, and indeed necessary. This is because, unless challenged by the right challenger in the right proceedings, an unlawful act is not void or non-existent, but exists as a fact and may provide the

basis for lawful acts pursuant to it.¹⁰

[46] Whereas reference to the Constitution and PAJA in the quoted passage above is a reference to the South African Constitution and South African legislation which reinforces the reasoning in relation to the court's discretion when it comes to the remedy, it does not follow that a similar conclusion is not justified in the common law. The remedy of review and setting aside invalid or unlawful administrative acts has always been recognised as a discretionary one and whereas the Namibian Constitution does not deal with this aspect directly, it also does not fetter the court's jurisdiction in this regard.¹¹ In view of the virtually endless scenarios that courts will face the discretion exercised in respect of the appropriate remedy is the only practical manner to ensure a just and equitable remedy in each case. What would be just and equitable in any given situation must be ascertained with reference to the facts of every particular case. The court is not faced with either the default position or with maintaining the existing position. The apposite remedy may lie somewhere in between these two extremes.¹²

[47] What is clear, is that good reasons must exist for a court to depart from the default remedy. In this matter appellant seeks the award of the tender to it whereas on behalf of the respondents it is submitted that this is a case where the court should not set the award aside despite its invalidity, but allow the third respondent to complete the project awarded to it.

¹⁰ *Merafong City v Anglogold Ashanti Ltd* 2017 (2) SA 211 (CC) paras 32, 34, 35 and 36.

¹¹ *Baxter*, above at 712-713; *Oudekraal* case above para 36 and *Chairperson, Standing Tender Committee & others v JFE Sapela Electronics (Pty) Ltd & others* 2008 (2) SA 638 (SCA) paras 28 and 29.

¹² *AllPay Consolidated Investment Holdings (Pty) Ltd v CEO, South African Social Security Agency* 2014 (4) SA 179 (CC) par [39].

[48] To consider the submissions by the respective parties it is necessary to briefly mention some salient features relating to the tender and its execution. The work to be performed is substantial and was projected to be completed over a period of 3 years commencing in June 2016. It involves the construction of a road (freeway) for an amount of nearly N\$990 million. The funding is exclusively from public sources and the road will also be in the public interest as it is a new link between the two primary coastal towns of Walvis Bay and Swakopmund. Neither the appellant nor the third respondent was involved in any improper conduct in respect of their bids or in relation to the process leading up to the award of the tender to third respondent. There is thus no culpable conduct on the part of either of them. They put in their bids and awaited the outcome of the process. The nature of the impugned acts by the Board do not involve serious misdemeanours such as fraud, bias or improper purpose but can rather be typified as administrative missteps. All the parties agreed to expedited proceedings in the court *a quo* and also to an expedited hearing of this appeal so as to obtain certainty in respect of the matter. Nevertheless it is already more than a year after the third respondent commenced with the contract. Appellant abandoned the interim interdict it initially sought and third respondent thus has to perform in terms of the contract entered into between it and the Roads Authority. It follows from the nature and scope of the project that people had to be employed, a site had to be established, machinery and equipment had to be moved to the site and agreements had to be entered into with suppliers. In terms of the originally envisaged timeframe about a third of the three year term has already expired. It also follows that as work has been ongoing for just over a year payments would have been made by the Roads Authority to the third respondent and further payments are probably currently due.

[49] The respondents filed an application to submit further affidavits together with its heads of argument in respect of this appeal ten days prior to the hearing thereof. These additional affidavits were tendered so as to bring this court up to date with regard to the implementation of the contract and according to the respondents the facts deposed to in the affidavits 'cannot be disputed by the appellant as the information lies within the peculiar knowledge of the first and third respondents and there is no basis to doubt the information which had been given under oath'. The affidavits are tendered because it would be relevant to the remedy that ought to be granted should the appeal succeed. Counsel for appellant conceded that the facts relating to the progress of the project which was ongoing was relevant in this context but submitted that the appellant was not given sufficient time to investigate the facts stated in the tendered affidavits properly. This was also the stance of the appellant in its opposing affidavit to this application. In the opposing affidavit on behalf of appellant it is stated that 'Previous experience has shown that the allegations of contractual implementation put up by the respondents cannot be trusted' with reference to a payment certificate which apparently turned out not to have been paid yet at that stage.

[50] The appellant was given short notice but as a tenderer it knew what the provisions of the contract were as these would follow the bid requirements and it would have been relatively easy for them to, at least, confirm what progress was envisaged in terms of the contract and which payments should have been made had the contract followed its normal course. To simply plead lack of time in this regard is not helpful. Be that as it may, so as to allow respondents in situations such as this to

properly investigate and respond such applications should, as a rule, be filed by the time the appellant's heads of argument is due. This will allow for answering affidavits to be filed by the time the heads of argument of the respondent is filed and replying affidavits by at least five days prior to the hearing.

[51] It is common cause that the project was implemented and that work started on the project which work is still ongoing. Neither the contract entered into with third respondent or the record of the tender process has been placed before court and hence the general comment with regard to the progress of the project made above which follows from the fact that the contract was and is implemented and the nature and scope of the contract as appears from the record. For the purpose of this judgment it is not necessary to refer to the detailed facts regarding the implementation which is contained in the affidavits accompanying the application to file further affidavits.

[52] Appellant seeks an order that the decision to award the tender to third respondent be set aside and that the Roads Authority be directed to award the tender to it. This is not the default order and hence there must be good reasons for such an order. It is clear that its tender was a compliant one and subsequent to the evaluation was determined to be the 'preferred bidder'. Furthermore it is also clear that the decision of the Board boiled down to a choice between appellant and third respondent. Even assuming that appellant is still prepared to execute the tender, a year later and only in respect of the balance of the work that still must be performed, one simply does not know what the impact of this would be on the project and the pricing. Certain costs, such as site establishment costs, will be duplicated. Whether

the machinery and equipment tendered by appellant will be able to seamlessly continue with the work plan of third respondent cannot be stated. What delays (if any) will be caused by such takeover is not addressed in the papers. It is also now apparent (which was not the case when the tender was awarded) that appellant intends to use the same equipment that was listed in the tender awarded to Chico/Palladium to perform the tender under consideration. This may indeed cause capacity concerns and even affect the work plan which in turn may cause delays. In these circumstances it would not be correct to simply substitute the appellant for third respondent. Appellant has thus not provided the court with sufficient reasons to deviate from the default remedy.

[53] The respondents' stance in the court *a quo* and in this court was also that the default remedy was not an appropriate remedy seeing the circumstances relevant to this matter. It was also to this end that it was sought to file further affidavits in this appeal. I now turn to this aspect.

[54] Firstly, the flaw in the decision amounts to administrative missteps and can be typified as innocent but negligent mistakes. No question of favouritism (bias) or improper purpose or even worse arise.

[55] Secondly, when it comes to the award of the tender there was no culpable conduct by either appellant or the third respondent. They are thus both innocent parties as far as the award of the tender is concerned.

[56] Thirdly, the fact that work started on the project was not the fault of third

respondent. Appellant criticises the third respondent for continuing with the project in the face of the review application and appeal and submits this means that it took this risk and must thus live with the consequences. I disagree. Appellant was well aware of the fact that it could seek protection in this regard by obtaining an interim interdict. This relief, was however, abandoned without any undertaking by any of the respondents not to implement the award. Third respondent had entered into a multi-million dollar contract and had to perform in terms thereof or face consequences which could potentially be dire. That urgent interim interdictory relief can be obtained in situations such as the present, is well established.¹³ As is evident from this matter, even where the matter is expedited it can still take substantial time when compared to the duration of the contract under consideration. In my view and seeing the nature of the current contract this was a matter where the appellant should have known that the implementation of the project could potentially affect the outcome when it came to the remedy. In short, this was a case where interim relief should have been sought. In this regard the blame for the work continuing on a project can be attributed to the appellant and not to the respondents.

[57] Fourthly, the probable impact of the default position on the relevant stakeholders concerned needs to be considered. I deliberately refer to stakeholders as in the present matter the impact would be wider than only on the direct parties involved. As already mentioned there are likely to be immediately-affected third parties such as employees and suppliers of third respondent. Further, the public purse is involved and the interest of the general public also needs considering seeing the nature of the project. Thus, the courts in South Africa have been loath to apply the default remedy where tenders (found to have been wrongly awarded) were

¹³ *Safcor Forwarding (Pty) Ltd v National Transport Commission* 1982 (3) SA 654 (A) at 675C-D.

implemented by innocent, successful bidders at significant public expense.¹⁴ It is also clear that additional expenditure will be incurred if, say appellant, must take over the project. Thus, eg site establishment costs will be duplicated even if only to a certain extent. There will probably be a delay caused by the takeover with its concomitant claims for extra time. Third respondent must have been paid for certain work done and further work has probable been certified. This follows from the nature of the contract and the fact that more than a year has already elapsed since the commencement of the contract. If regard is had to the answering affidavit filed in the review application by the end of August 2016 an amount of just over N\$103 million was already due (including N\$20 million for site establishment) and it would be reasonable to assume by June 2017 further substantial amounts became due and owing. A setting aside of the award will leave third respondent with an enrichment claim only and will expose it to claims from its suppliers. This through no fault of its own. Employees will have to be retrenched and third parties will obviously likewise face the melancholy prospects of having to seek damages from third respondent and may also have to retrench employees. It needs repeating that most, if not all, of these adverse consequences could have been averted by an interim interdict. Unfortunately none of the parties in the proceedings made any attempt to establish the additional costs or duplication of costs that will arise from the setting aside of the award and assuming the project would be taken over by another tenderer.

[58] I have already commented on the approach of appellant in respect of the application by the respondents to file further affidavits. In fact the whole approach by appellant in this regard is to blame third respondent for proceeding with the contract, which is a repetition of the response in the court *a quo*. What appellant does not do

¹⁴ *AllPay* and *Millenium Waste* cases.

is to provide any facts as to why a takeover by it (and by parity of reasoning by any other bidder) would not cause a material disruption or a material increase in the costs of the project. This would have been a proper response to the averments by the respondents that a substitute for third respondent would mean the costs already incurred 'would go to waste'.

[59] Taking cognisance of the facts and factors set out above I am of the view that counsel for the respondents is correct in his submission that this is not a case where the default position is apposite. The question thus arises as to what would be a just and equitable order in the present matter. Is there a practical way to make an order that will do justice in this matter which does not in effect validate the wrongful award to third respondent?

[60] It is clear from the minutes of the board meeting that two considerations counted against the appellant when the resolution was taken not to award the tender to the appellant and, but for these concerns, the tender would have been awarded to it. The one was the decision to distribute the work more widely which consideration was not conveyed to the bidders when the bids were invited. This consideration should not have featured at all. Capacity was a consideration and the concern raised in this regard with reference to the Chico/Palladium award in place at the time was legitimate, but should have been relied upon only after allowing appellant an opportunity to address this concern. In fact, subsequent to the resolution of the Board it emerged that the same equipment was listed in the Chico/Palladium award as those listed in respect of the tender under consideration. The capacity issue thus remains a live issue. One, of course, does not know what the result would have been

had the appellant been given a hearing in respect of the capacity issue. The concern might have been addressed in the opinion of the Board or not. As a live issue this court cannot ignore it.

[61] Third respondent as an innocent party in the whole tender process became obliged to perform and has performed the services that it tendered for and it is also currently performing such services. In addition it has employed people and has entered contracts with suppliers that it is contractually bound to honour. It may even have purchased equipment and machinery for the project. Third respondent, like appellant, must have structured its bid so as to recover the capital, running costs and still make a profit. One does not know how third respondent will be affected if the contract terminates about third way through its term. Third respondent is entitled, at least, to be paid for the work done by it.

[62] When it comes to the public purse the position is not clear from the papers. I have pointed out above that the contract of third respondent has not been disclosed nor has the full invitation to bid (the tender), which would have included relevant (if not complete) information in this regard. Nor has any evidence been provided as to the financial impact of substituting appellant for third respondent. It is not for the court to embark on this course. The question of an appropriate remedy (other than the default position) was an issue from the outset. Despite this, the question of the financial impact was not fully canvassed. As pointed out above apart from the fact of third respondent continuing with the project and the consequence thereof which is material to the issue, no other facts have been provided. Whether a substitution for third respondent while preserving third respondent's right to be fairly compensated

for work done will wipe out the original price differences between the bid of appellant and third respondent is not addressed at all in the papers. In view of the duplication of costs and disruption that such substitution will cause, it is clear substantial costs will be incurred on top of which an inevitable delay to the project must be factored in. Here it must be borne in mind if the matter is referred back for reconsideration of appellant's tender with instructions to granting it a hearing in respect of the capacity issue and the impact on the total costs further issues may arise. Thus where sub-contractors or suppliers had to be disclosed in the bid (it is not known whether this was indeed a requirement but seeing the nature and scope of the project this could well have been a requirement) it will have to be determined whether these persons are still willing to perform what they undertook if the scope of the work is materially reduced. How much time must appellant be afforded to reinstate the guarantee that it understandably allowed to lapse pending the litigation? What would a reasonable time be to allow for the take-over? The length of the delay to the project may be such that it becomes a factor and this will be more so when it has material cost implications. The matter needs to be finalised and the potential of further reviews following a new determination by the Board and whatever follows in its train should be avoided. This court cannot make the decisions for the Board nor can it micro-manage such reconsideration. Without the necessary facts it is not possible to make an order which will have the result of potentially substituting the appellant for the third respondent on a basis that will ensure finality to this matter save for allowing third respondent to complete the project in terms of the current contract.

[63] In short, despite all the facts and factors referred to the appellant did not seek interdictory relief and thus allowed the work to commence and continue up to a stage

where the default order is no longer apposite. Further, no evidence was tendered as to a seamless takeover (or one not as disruptive as appears at first blush) and that the additional costs would not be of such a magnitude as to raise real concerns from a public purse perspective. In these circumstances there is no basis for an order that may involve the substitution of third respondent at this stage of the project.

[64] In order for a court to exercise its discretion when it comes to a remedy other than the default remedy, facts must be placed before it. This does not mean any party has an onus in this regard but without facts indicating that a remedy other than the default remedy should be considered, the court obviously cannot consider another remedy. Where the facts indicate that the default remedy is not apposite but does not go far enough so as to enable the court to fashion a remedy that will bring finality to the matter and will be somewhere in between the default remedy and allowing the invalid award to be implemented, then the court will have no option but to allow the invalid award to stand. This is the position in the present matter.

[65] In similar situations the South African courts have come to the same conclusion. Thus in the *Sapela* case¹⁵ the Supreme Court of Appeal concluded that 'by reason of the effluxion of time (and intervening events) an invalid administrative' act should not be set aside. In the *Moseme* case¹⁶ which also involved a road construction matter the Supreme Court of Appeal per Harms DP dealt with the position as follows:

[19] The judgment in *Millennium Waste* pointed out that the difficulty that is

¹⁵ *Sapela* case above para 29.

¹⁶ *Moseme Road Construction CC & others v King Civil Engineering Contractors (Pty) Ltd & another* 2010 (4) SA 359 (SCA) paras 19-21.

presented by invalid administrative acts is that they have often been acted upon by the time they are brought under review (. . .):

“That difficulty is particularly acute when a decision is taken to accept a tender. A decision to accept a tender is almost always acted upon immediately by the conclusion of a contract with the tenderer, and that is often immediately followed by further contracts concluded by the tenderer in executing the contract. To set aside the decision to accept the tender, with the effect that the contract is rendered void from the outset, can have catastrophic consequences for an innocent tenderer, and adverse consequences for the public at large in whose interests the administrative body or official purported to act.”

[20] Against that background I proceed to consider the appropriateness of the learned judge's premise, that it was not impracticable to set aside the decision, because, although the work had begun, it was a 're-measurable' contract, which meant that King would not be paid for something it had not done and, presumably, that Moseme would be paid for the work it had completed. I believe that the High Court did not consider fully the implications of the order in the context of a contract that has to be measured. First, each tenderer will weigh and price different items differently. Any particular costed item will as a matter of course differ from tender to tender. Then there are items, such as preliminaries and establishment, which in themselves provide no value for the employer and for which each contractor would in principle be entitled. But it goes further. The setting aside of a contract has a number of consequences. The first contractor may not be able to claim under the revoked contract and be left with an enrichment claim, and the employer may not have a claim for defective workmanship. The second contractor may even have a claim for damages against the employer in respect of loss of profit on the executed part of the contract because it has now become contractually entitled to the whole contract.

[21] These problems may not be of any consequence in the case of corruption or fraud, or where the successful tenderer was complicit in the irregularity. But, as said, that is not the case. The learned judge, in reaching his conclusion, failed to have any regard to the position of the innocent Moseme. He also did not consider the degree of the irregularity. He assumed incorrectly that King was entitled to the contract and he underestimated the adverse consequences of the order. I therefore conclude that he erred in the exercise of his discretion. This means that King, in spite of the imperfect

administrative process, is not entitled to any relief. Not every slip in the administration of tenders is necessarily to be visited by judicial sanction.'

Application to submit further evidence

[66] Respondents sought leave to file a further affidavit so as to bring this court up to date as to the stage of implementation or progress on the project. I have set out the stance of the appellant in the judgment above. Because of the stance of appellant it was not necessary for the purposes of this judgment to refer to the new affidavits that were sought to be introduced.

[67] As the evidence sought to be introduced, in the circumstances of the present matter, cannot advance the case of the respondents any further or detract from the case of appellant as advanced in both the court *a quo* and in this court the application is declined.

[68] By reason of the fact that appellant's approach to the application was simply to seek time to verify the averments which were not within its knowledge and not to provide counter facts so as to show that despite the progress and payments (to whatever extent this may have been established) it would be feasible to set the award of the tender aside at this stage of the construction project, I am of the view that no order as to costs should be made in respect of the refusal of this application.

Disposal

[69] The appellant was entitled to fair and reasonable administrative action in the award of the tender. This did not eventuate for the reasons articulated above. Because of the project proceeding for more than a year and the probable

consequences involved in substituting the third respondent with another bidder it will not be just and equitable to set the award aside.

[70] The court *a quo* should have concluded that the award of the tender to the third respondent was invalid, as a fair process was not followed. Whether that court would have in such circumstances and at that time have applied the default remedy or not cannot be stated. It will be assumed in favour of respondents that it would not have. The appeal however has been successful to the extent that it established that the award to the third respondent was indeed flawed. In view of these circumstances I am of the view that it would be apposite that no cost order should have issued in the court *a quo* as appellant would have been successful in its stance that the award was unlawful and respondents, in their stance that, despite this, the award should not be set aside. As far as costs on appeal are concerned the appellant was substantially successful and respondents should pay the costs.

[71] In the result, the following order is made:

1. The order in the court *a quo* is substituted with the following order:

'The application is dismissed.'
2. The application to file further affidavits is dismissed.
3. The appeal is dismissed with costs. Such costs is to be paid by the first and second respondents jointly and severally, the one paying the other to be absolved.

FRANK AJA

[72] I have had the privilege of reading the judgment of my colleague Frank AJA. I agree with the reasoning and the order as to costs in this court (paras 71 (2) and (3)), but I do not agree with the cost order he proposes in para 71 (1).

[73] It was our resolve that the appellant was entitled to a fair and reasonable administrative action in the award of the tender, which did not eventuate. We also found that the court below should have concluded that the award of the tender to the third respondent was invalid, as a fair process was not followed. Crucial in this appeal in my opinion, the appellant established that the award to the third respondent was indeed flawed. The Board through its incompetence, flouted the first respondent's tender rules by invoking irrelevant considerations to award the tender to the third respondent. That alone, in my opinion, is sufficient reason for the respondents to pay the appellant's costs in this court and in the court below.

[74] Given, the effluxion of time and the intervening events, this court exercised its discretion to decline to set aside or permitted an invalid administrative act to stand. On the case before this court the appellant had every reason to challenge the award to the third respondent, when the respondents seized on the effluxion and intervening events to defend a decision founded on the incompetence of the Board. I associate myself with the sentiments of Ueitele J in *Centani Investment CC v Namibian Ports Authority (Namport) and another*, Case No A 247/2011, delivered on 05 August 2013, para 42 where, with approval, the learned Judge referred to the

sentiments of Theron AJA in *Moseme* above, para 25 where the following was said:

'In appropriate circumstances, a court should be innovative and use its discretion as a tool "for avoiding or minimising injustice". Courts should not shy away from carefully fashioning orders which meet the demands of justice and equity.'

[75] This case is such a case. Its special circumstances dictates appropriately for the respondents to be ordered to pay the appellant's costs in the court below as well and I propose the order as follows:

1. The order in the court *a quo* dismissing the appellant's (applicant then) application under the circumstances is confirmed but the order as to costs is set aside and substituted therefore with the following:

'The respondents (first and second) are ordered to pay the costs of the appellant, which costs includes costs of one instructing and one instructed counsel.'

MAINGA JA

HOFF JA

APPEARANCES

APPELLANT: I V Maleka, SC (with him S
Namandje)
Instructed by Sisa Namandje &
Co. Inc.

FIRST and SECOND RESPONDENT: R Bhana (with him T C Phatela, S
Scott and P U Kauta)
Instructed by Dr. Weder, Kauta &
Hoveka Inc.