



REPORTABLE

CASE NO: SA 60/2017

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

PAMO TRADING

First Appellant

ENTERPRISES CC

**CIRCLE HOSPITALITY SERVICES
(PTY) LTD**

Second Appellant

and

CHAIRPERSON OF THE TENDER

Respondents

BOARD OF NAMIBIA AND 90 OTHERS

Coram: SMUTS JA, MOKGORO AJA and NKABINDE AJA

Heard: 18 March 2019

Delivered: 3 July 2019

Summary: This is an opposed appeal against the decision of the High Court dismissing the appellants' application challenging, in the main, the cancellation of the food tender on procedural and substantive grounds. The appellants contented that their fair process rights were violated because they were not afforded an opportunity to be heard and that the Tender Board of Namibia (the Board) failed to comply with statutory prescripts under section 16 of the Tender Board Act 16 of 1996 (Tender Act), *inter alia*, notifying them in writing of the acceptance of their tenders.

The Board awarded a food tender to certain bidders including the first and second appellants (appellants) on 2 October 2014 in respect of the Khomas and Otjozondjupa catering regions, respectively. However, the entire tender was cancelled before the decision to award was communicated to them without being heard. Additionally, the decision to award was not reviewed and set aside.

The appellants unsuccessfully challenged the lawfulness of the administrative decision to cancel the tender in the High Court. They sought an order reviewing and setting aside that decision to cancel the tender and ancillary relief: directing the Board and Minister of Education (Ministry) to conclude agreements with the appellants in respect of the said catering regions (order to compel), as contemplated in section 16(2) of the Tender Act; and an order declaring the agreements entered into by the Board and the Ministry with service providers, after the said award of the tenders to the appellants, *ultra vires* the Board (declaratory relief). The appellants had, initially, asked for an interdictory relief

restraining the Board and the Ministry from continuing with the implementation of the extended catering contracts. This relief was abandoned.

In dismissing the application the High Court held, among other things, that the cancellation was not unreasonable and irrational. Regarding the fair process challenge, the Court *a quo* held that the Board was duty bound to cancel the tender and that when it did so without affording the tenderers (including the appellants) an opportunity to be heard it did not act unfairly because the allegations of impropriety, corruption and irregularity were not levelled against any of the tenderers but against the officials of the Ministry.

In upholding the appeal the Court stressed the need to uphold the rule of law and to protect and enforce entrenched rights. Following an analysis on whether the cancellation of the tender was irrational and unlawful the Court held that the High Court misdirected itself in concluding that the cancellation of the tender was, in the circumstances, rational and, as regards the appellants' fair process rights, that the Board did not act unfairly and consequently dismissing the application.

The Court held that the Board failed to comply and ought to have complied with section 16 of the Tender Act after awarding the tender to the successful bidders, including the appellants: it should have notified them in writing of the award. It held that the Board acted unlawfully in failing to do so. The Court further held that the Board acted in breach of the appellants' fair process right by failing to afford them

hearing (*audi alteram partem*) or at least invite them to make written representations before the tender was cancelled.

The Court held that no reasons were raised as to why the Ministry did not approach a competent Court to review and set aside the tender and the decision awarding the tender to the successful bidders, including the appellants, when the allegations of impropriety and corruption surfaced. The decision awarding the tender thus remained extant. The Court further held that, based on the revealing uneasiness and statements made by the members of the Board at its meeting before the cancellation of the tender, the contention of the appellants that the decision to cancel was that of the Ministry and not of the Board was not far-fetched.

Regarding the ancillary relief sought the Court held that granting of the relief would be inappropriate in the circumstances particularly because the appellants failed to make a case for same.

Consequently, the appeal succeeded in part (with costs against the Government respondents also in relation to the ancillary relief based on the *Biowatch* principles) with the result that the order of the High Court was set aside and substituted with an order setting aside the decision of the Board cancelling the tender and referring the matter back to the appropriate functionary – the successor to the Tender Board of Namibia in terms of the Public Procurement Act, 15 of 2015.

An appropriate costs order against the appellants and in favour of the further respondents who opposed the appeal, particularly in relation to the ancillary relief sought, was made.

APPEAL JUDGMENT

NKABINDE AJA (SMUTS JA and MOKGORO AJA concurring):

Introduction

[1] This appeal lies against the decision of the Court *a quo*¹ dismissing, with costs, the appellants' application for certain relief – in the main the reviewing and setting aside of the administrative decision cancelling a tender awarded in favour of certain bidders including the appellants – including ancillary relief. The High Court held, among other things, that the cancellation was lawful and that the appellants' constitutional fair process right had not been violated when the tender was cancelled. The first to third respondents opposed the appeal. As will be explained later, some of the respondents also opposed the appeal only in relation to the granting of the order to compel the conclusion of an agreement and of a declaratory relief.

¹The High Court of Namibia Main Division-Windhoek. Reported *Pamo Trading Enterprises CC v Chairperson of the Tender Board of Namibia* (A349/2014) [2017] NAHCMD 268(18 September 2017).

[2] The only impugned decision in these proceedings concerns the cancellation of the entire food tender in circumstances where the decision,² to award the tender to the Khomas and Otjozondjupa Regions to first and second appellants – Pamo and Circle respectively, was never communicated to them and not reviewed and set aside.

[3] To perform their administrative obligations organs of State, the Tender Board of Namibia (the Board) in this case – acting as a statutory procurement agent in terms of section 7 of the Tender Board Act³ (Tender Act), must exercise its power or perform its public function in terms of the Constitution of the Republic of Namibia (the Constitution) and the Tender Act. The applicable constitutional and statutory framework is, therefore, the starting point.

Constitutional and statutory framework

[4] The Constitution is the supreme law⁴ of the Republic of Namibia which is founded upon the principles of, *inter alia*, the rule of law and justice for all.⁵ Chapter 3 of the Constitution deals with fundamental human rights and freedoms. Article 5 of the Constitution, entitled ‘protection of fundamental rights and freedoms’ provides:

² Regulations made in terms of Tender Act deal, in regulation 5, with decisions of the Tender Board. Sub-regulation (1) reads: ‘Decisions of the Board shall be obtained by means of meeting, and the Board shall keep minutes of each such meeting.’

³ Act 16 of 1996.

⁴ Article 1(1) of the Constitution.

⁵ Article 1(6) of the Constitution.

'The fundamental rights and freedoms enshrined in this Chapter shall be respected and upheld by the Executive, Legislature and Judiciary and all organs of the Government and its agencies and, where applicable to them, by all natural and legal persons in Namibia, and shall be enforceable by the Courts in the manner hereinafter prescribed.'

(Emphasis added.)

[5] In Article 18, the Constitution makes provision for administrative justice. It reads:

'Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal.'(Emphasis added.)

[6] Article 25 of the Constitution, concerning the enforcement of fundamental rights and freedoms, in relevant parts reads:

'(1) Save in so far as it may be authorised to do so by this Constitution . . . the Executive and the agencies of Government shall not take any action which abolishes or bridges the fundamental rights . . . conferred by this Chapter . . .'

(Emphasis added.)

[7] Section 16 of the Tender Act deals with the acceptance of tenders and entry into force of agreements. It reads:

'(1) The Board shall in every particular case –

- (a) notify the tenderers concerned in writing of the acceptance or rejection of their tenders, as the case may be, and the name of the tenderer whose*

tender has been accepted by the Board shall be made known to all other tenderers;

(b) on the written request of a tenderer, give reasons for the acceptance or rejection of his or her tender.

(2) Where in terms of a title of tender–

(a) a written agreement is required to be concluded after the acceptance of a tender, the Board and the tenderer concerned *shall*, within 30 days from the date on which the tenderer was notified accordingly in terms of subsection (1) (a) or within such extended period as the Board may determine, enter into such an agreement;

(b) a written agreement is not required to be so concluded, an agreement shall come into force on the date on which the tenderer concerned is notified in terms of subsection (1)(a) of the acceptance of his or her tender.

(3) If, in the circumstances contemplated in subsection (2)(a), the tenderer fails to enter into an agreement within the period mentioned in that subsection or, if that period has been extended by the Board, within the extended period, or if the tenderer, when required to do so, fails to furnish the required security for the performance of the agreement, the Board may withdraw its acceptance of the tender in question and–

(a) accept any other tender from among the tenders submitted to it; or

(b) invite tenders afresh.’

(Emphasis added.)

Background

[8] During March 2014 the first respondent, the Board, advertised a tender for the provision of catering services to Government school hostels in each of the seven regions of Namibia for the duration commencing on 1 June 2014 to 31 May 2019. In response to the advertisement, the appellants and other bidders submitted their proposals on/before the closing date, 1 April 2014, which proposals

were, seemingly, in compliance with all the requirements. A total of 88 interested parties submitted their tenders.

[9] The first tender process under the Evaluation Committee (Committee) was completed. On 15 July 2014, the Committee made a written recommendation to award the tender to various successful tenderers, including the appellants. This recommendation was, however, sent back to the Committee as there were various issues impacting the tender process which needed to be clarified including questions concerning the bidders' warehouses. During September 2014 officials from the Ministry of Education (the Ministry) conducted site visits at the appellants' sites. The appellants stated that the visits made them optimistic that there were prospects of success on being one of the successful bidders.

[10] During one of its meetings, held on 2 October 2014, the Board awarded the tender for the Khomas Region to the first appellant and for the Otjozondjupa Region to the second appellant. It based its award on the recommendation of the Committee. However, the successful bidders including the appellants were not informed of that outcome.

[11] Before the appellants and other successful bidders were notified of the outcome (as they should have been in terms of section 16 of the Tender Act), serious allegations surfaced and were reported in two separate local newspapers on 10 and 13 October 2014 regarding the tender. The allegations were that the Permanent Secretary, a senior state official in the Ministry, was involved in the

allocation of one of the tenders in respect of one of the regions. The amount involved was in the sum of N\$ 47 million. The allocation is alleged to have been made to a company in which the Permanent Secretary's wife had an interest.

[12] In light of the above, the Ministry requested the Board to cancel the tender. This request was considered at the Board meeting held on 13 October 2014. There were protracted debates at the meetings regarding the appropriateness of the Ministry's request to cancel the tender. The transcription of the meeting of the Board held on 13 October revealed certain misgivings on the part of certain members of the Board regarding the request to cancel and the perceived interference by the Ministry in the work of the Board. I briefly refer to exchanges later when determining whether the decision to cancel was that of the Ministry and not the Board as contended for by the appellants.

[13] After seeking legal advice on the implications of the requests on the powers of the Board, in terms of the Tender Act, the entire tender was cancelled. The cancellation was communicated via facsimile to all the bidders on 15 October 2014 indicating that the Board had a meeting where it resolved to cancel the decision to award the tenders.

[14] Due to the uncertainty that followed, the attorneys for the appellants addressed a letter to the Board, dated 23 October 2014 and stating:

'

Our clients submitted individual tenders for Tender They were not disqualified. . . . [They] complied with all of the tender requirements.

Our client learnt on 15 October 2014 that the tender has been cancelled. They *are clearly materially prejudiced by the cancellation. They were also not consulted at all on the possibility of the Tender's cancellation.*

To enable us to responsibly advise our clients with respect to their rights, we [therefore kindly require you] to furnish us with the minutes of all meetings, at which the captioned Tender was discussed by the Tender Board, including the meeting at which the decision to cancel was deliberated and taken.

. . . Although the Tender Board Act and Regulations do not make it compulsory for the Tender Board to make available all documents which served before the Tender Board when the meetings referred to took place, our Courts have now on numerous occasions adopted the attitude that Article 18 of the Constitution makes an aggrieved tenderer entitled to have access to such documents (you will recall the High Court's attitude in the Neckartal case). In the light thereof, we request you to make such documents also available. . . .'

On 4 November 2014 the appellants received a response from the Board indicating that the letter was forwarded to the Government attorney's office.⁶

High Court proceedings

⁶ This response prompted the launching of an urgent application in the High Court on 5 November 2014 by the appellants. The matter was originally set down for hearing on Monday 10 November 2014. The respondents were afforded time to file answering papers. According to the appellants the matter was urgent because the newspaper report had quoted the Minister as having said that the new tender will be advertised and finalised by the end of December. On 14 November 2014 the High Court ordered the Tender Board to furnish the Appellants with the requested minutes. Despite the Court order the Tender Board has allegedly failed to produce the minutes. The appellants addressed another letter to the Government Attorneys asking whether they were going to comply with the Court order and whether they were going to proceed to re-advertise and finalise the tender by end of December as reported in the newspaper. Due to the urgency of the matter the deadline for the response was 24 November 2014. Again the Government Attorneys remained tight-lipped. Instead a notice of appeal was noted. In the further correspondence the Government Attorneys confirmed that they would not comply with the Court order pending their appeal to this Court but stated that they would not re-advertise and finalise the Tender afresh by end of December.

[15] Aggrieved by the response of the Board the appellants launched an application in the High Court seeking an order in the following terms:

- ‘1. Reviewing and correcting or setting aside the decision by the Tender Board ... communicated to the [appellants] on 15 October 2014, to cancel Tender No M9-11/2014 for the provision of catering services to Government school hostels for the period 1 June 2014 to 31 May 2019 (“the Tender”).
 2. Directing the [Board] and the [Ministry of Education] to enter into agreements, as contemplated in section 16(2) of the [Tender Act], with the [appellants] in respect of the Khomas and Otjozondjupa catering regions respectively awarded to them on 2 October 2014 by [the Board], within 7 days.
 3. Declaring that the agreements entered into by [the Board] and the [Ministry] with service providers, to extend catering contracts originally concluded after the service providers successfully tendered to provide those services, as alluded to in paragraphs 25 and 26 of the answering affidavit . . . on behalf on the [Board, Ministry and third respondent, Prime Minister of the Republic of Namibia (Prime Minister)] on 10 June 2015, are unlawful as they are *ultra vires* the Board.
 4.
 5. Costs of suit against those respondents opposing this application, jointly and severally, if more than one opposes.
- ...’

In prayer 4 of the amended notice of motion the appellants sought an interdictory relief restraining the Board and the Ministry from continuing with the implementation of the extended catering contracts. This relief has since been abandoned.

[16] The main relief sought (reviewing and setting aside the cancellation decision) was based first, on a procedural ground – that the appellants were denied a right to be heard (*audi alteram partem*) and were prejudiced. Second, on

a substantive ground – that the cancellation was irrational and thus unlawful. Thirdly, it was contended that the Board and the Ministry were *functus officio*.⁷ The appellants contended that section 16 of the Act created an obligation on the part of the Board – to inform the bidders of the decision to award without delay. Fourthly, they contended that the Board and not the Ministry or Prime Minister was the sole agency that could cancel the tender, at best for the former, after affording them *audi*. This contention was based on allegations that the Board was asked to cancel the tender and that the Board simply rubberstamped the already taken decision to cancel.

[17] In the opposing affidavit deposed to by the Permanent Secretary for Finance on behalf the Government respondents, who is also a Chairperson of the Board, the sequence of events as stated by the appellants was not disputed. The deponent stated that before the appellants were advised of the outcomes of the bids (following its decision to award) serious allegations of impropriety and corruption surfaced. The allegations imputed material conflict of interest to, *inter alia*, the Permanent Secretary of the Ministry whose wife was alleged to have been involved as one of the successful tenderers (namely the Cattle Country and Food Services). Seemingly, the Secretary recommended the award of the tender in the Omaheke Hostel catering region to the company in which his wife was involved and later the Board awarded the tender to that company. In light of these developments, the Committee requested the Board to cancel the tender.

⁷ A legal maxim described as meaning that an administrator/decision-maker/official who has once 'discharged his official function' by making a decision is unable to change his mind and revoke, withdraw or revisit the decision (Cora Hoexter *Administrative Law in South Africa* (2 ed) (2012) at p 277.

[18] The Government respondents maintained that the decision to cancel the tender was made by the Board itself after seeking legal opinion on whether it could do so on allegations of impropriety and corruption and that it was incorrect for the appellants to attribute cancellation of the tender to the Ministry and Prime Minister.

[19] According to the Government respondents the Ministry and Prime Minister had a constitutional duty to act on the strength of the allegations of corruption imputed to senior state officials. The Ministry, they said, caused the Committee to deal with the allegations which recommended the cancellation of the tender before the successful tenders were informed of the outcome of the tender. The deponent stated:

'21 . . . [T]he [Committee] and the [Board], as well as the [Ministry] and [Prime Minister] acted responsibly, and in line with their constitutional duty by bringing about the cancellation of the tender in the face of allegations of impropriety and corruption relating to the tender. The award of the tender in these circumstances would be extremely irresponsible and create an impression that the state condones or is indifferent to such wrong-doing.'

[20] It is contended further that the appellants could not be awarded the tender because the tender was a composite one although divided into different regions and that the mere fact that the corruption did not extend to all regions is irrelevant because it relates to the tender as a whole and administered by the Ministry. The deponent stated that the appellants were not materially affected by the cancellation because they had not been notified of the outcome of the tender when the

cancellation was made. Accordingly, so the argument went, the appellants' right to fair process had not been infringed.

[21] The further respondents⁸ also opposed the application particularly in relation to the order to compel and the declaratory relief in paragraphs 2 and 3 of the amended notice of motion, respectively. In essence, these further respondents supported the relief sought for the review and setting aside of the decision to cancel the tender but forcefully opposed the appeal for the said order to compel and the declarator.

[22] The High Court held that the reasons advanced for the cancellation of the food tender were reasonable. It held that the involvement of some of the members of the Committee associated with some of the tenderers was unacceptable and disgraceful.⁹ The Court said that those members disregarded the relevant legal prescripts and abused public authority to facilitate a desired outcome – inconsistent with the principles and values of the Constitution, especially Article 18 that imposes an obligation on officials to act fairly, reasonably and lawfully when exercising public power.¹⁰

⁸ These are the respondents opposing the order to compel and the declaratory relief sought in prayer 2 and 3 of the amended notice of motion. They are the 6th, 32nd, 56th, 62nd, and 83rd respondents (represented by Amupanda Kamanja & Inc); the 83rd respondent (Heritage Caterers (Pty) Ltd whose agreement had been extended in respect of the Otjozondjupa region; the 54th respondent and the 74th respondents (represented by Clement Daniels Attorneys); and the 84th respondent (OKG Food Services (Pty) Ltd, whose agreement had been extended in respect of the Khomas region.

⁹ High Court judgment at para 36.

¹⁰ Id at para 37.

[23] On the fair process aspect, the Court *a quo* relied¹¹ on the 'context part' of the English case of *Doody*¹² where Lord Mustill, among other things, said '[w]hat fairness demands is dependent on the context of the decision and this is to be taken into account in all its aspects.' Having referred to the context aspect the High Court then quizzed: 'What is the context in which the decision to cancel the tender was taken [?]'¹³ The High Court stated that the parties agreed that after the Board had met and resolved on how to award the tender allegations of corruption and irregularities in the award of the tender surfaced. Because of the allegations the Ministry asked the Board to cancel the tender. The Court, relying on the South African Constitutional decision in *Heath*,¹⁴ concluded as follows on this aspect:

'Tender Board was duty bound to cancel the Tender and when it did so without affording the tenderers (this include [the appellants] an opportunity to be heard it did not in my view act unfairly, this was so because the allegations of impropriety, corruption and irregularity were not levelled against any of the tenderers but against the officials of the Ministry.'¹⁵

[24] Regarding the substantive challenge, that the cancellation of the tender was unreasonable and irrational, the Court remarked:

'I have, in detail, quoted above the deliberations which led to the cancellation of the tender by the [Board]. A staff member of the [Ministry] 'confesses' that 'Officials having interests were requested not to participate in the evaluation, but they

¹¹ Id at paras 33 - 34.

¹² *R v Doody v Secretary of State for the Home Department and Other Appeals* [1993] 3 All ER 92 (HL) at 106d-e, cited with approval by Corbett CJ in *Du Preez v TRC* 1997 (3) SA 204 (A) at 231I-234D'(*Doody*).

¹³ High Court Judgment at para 34.

¹⁴ *South African Association of Personal Injury Lawyers v Heath and Others* 2001 (1) SA 883 (CC) at para 4 (*Heath*).

¹⁵ High Court Judgment at para 39.

participated and did not declare their interest' this was not only improper but sheer corruption. I fail to understand how counsel for the [appellants] could, without putting up facts contradicting the statement by the 'technical person' representing the Ministry at the [Board] argue that these allegations by the technical person are simply 'rumours' and conjured reasons.

I repeat, the minutes of the meeting of 13 October 2014 . . . *disclose corruption* and incompetence on the part of the officers in the [Ministry]. The basis upon which the decision to cancel the tender was made was the corrupt and irregular process followed by the [Committee] and the question this Court must answer is whether it was irrational or unreasonable for the [Board] to have sought to address the situation in the manner it did. On the evidence before me the cancellation of the tender cannot be said to be unreasonable or irrational.¹⁶

[25] Concerning the challenge that the Board was *functus officio*, the High Court remarked that the Board's decision taken at the meeting of 2 October 2014, in respect of the Khomas and Otjozondjupa Regions, had not been communicated to the appellants.¹⁷ The non-communication, the Court held, was occasioned by the fact that the decision was not final.¹⁸ The Court relied on the decision of the Constitutional Court of South Africa in *SARFU*.¹⁹

[26] On the question of the lawfulness of the extension of the agreements (allegedly being *ultra vires* the powers of the Board), the High Court held that

¹⁶ Id at para 40 - 41.

¹⁷ Id at para 43.

¹⁸ Id at para 44.

¹⁹ *President of the Republic of South Africa and Others v South African Rugby Football Union (SARFU) and Others* 2000 (1) SA 1 (CC) where the Constitutional Court remarked at para 44:

'In law, the appointment of a commission only takes place when the President's decision is translated into an overt act, through public notification. . . . The President would have been entitled to change his mind at any time prior to the promulgation of the notice and nothing which he might have said to the Minister could have deprived him of that power.'

Hoexter sums the position as follows at p 278:

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

reliance by the appellants on the decision of the South African Supreme Court of Appeal in *Contractprops*²⁰ was misplaced because the facts in that case were distinguishable and that the lack of authority did not arise in *casu*.²¹

On appeal

[27] The key issue is whether the cancellation of the tender was lawful or not. Subsidiary to this issue are questions including whether (a) even if the Board had authority to cancel the tender (which is denied), the reasons advanced entitled it to cancel the tender. The appellants contended that it was a false claim that they did not cater for the special needs students; (b) the Board could itself reverse its own decision without having applied to Court for the review and setting aside of the decision to award the tenders to the appellants; and (c) the decision to cancel was that of the Ministry at the instance of the Prime Minister and not the Board itself. It is submitted that the Board simply rubberstamped the decision already taken to cancel the tender. The appellants submits that the Ministry and Prime Minister had no authority to direct the Board to cancel the Tender. I deal with the issues but not necessarily in the order of this sequence.

Was cancellation rational or lawful?

[28] Organs of State such as the Board, performing public functions, utilise public funds. There can be no doubt that decisions relating to procurement of services ordinarily qualify as administrative action under the Constitution and,

²⁰ *Eastern Cape Provincial Government and Others v Contractprops 25 (Pty) Ltd* 2001 (4) SA 142 (SCA).

²¹ See High Court Judgment at para 48-54.

specifically, in terms of Article 18 of the Constitution.²² This case is distinguishable from the South African Supreme Court of Appeal case in *Grintek*,²³ (referred to in oral argument) in which the Court correctly found that the decision to cancel was made in the exercise of executive authority and that it did not constitute administrative action. The reasons for cancellation were therefore, held not to offend the principle of legality.

[29] Procurement steps taken by public officials and agencies like the Board must therefore be lawful and procedurally fair. This is particularly so because public money is used by public officials and bodies/agencies in the public interest.²⁴ These administrators, including the Board as the procurement agency, are therefore held to a more stringent standard to ensure, among other things, that rights are not adversely affected.

[30] The foundational pillars and values that underpin the grand edifice of a democratic and unitary State (Republic of Namibia) include supremacy of the Constitution,²⁵ the rule of law and justice for all.²⁶

²² See in this regard *Permanent Secretary of the Ministry of Finance and Others v Ward* 2009 (1) NR 314 SC at para 26; see also *Logbro Properties CC v Bedderson NO and Others* 2003 (2) SA 460 (SCA) and *Umfolosi Transport (Edms) Bpk v Minister van Vervoer* [1997] 2 All SA 548 (A) 552]-553a (*Umfolosi*).

²³ *SAAB Grintek Defence (Pty) Ltd v South African Police Services and Others* [2016] 3 All SA 669 (SCA).

²⁴ In the decision of the South African Constitutional Court in *AllPay Consolidated and Others Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency* 2014 (1) SA 604 (CC) at para 4, the Court stressed that because procurement palpably implicate socio-economic rights of people, the public has interest in procurement tendering being conducted in a fair, equitable, transparent, competitive and costs-effective manner.

²⁵ Article 1(6) of the Constitution.

²⁶ Article 1(1) of the Constitution.

[31] This Court in *Rally for Democracy*²⁷ per Shivute CJ, had the following to say regarding the principle of legality, the sub-set of the rule of law, and the exercise of any public power:

'The rule of law is one of the foundational principles of our State. One of the incidents that follows logically and naturally from this principle is the doctrine of legality. In our country, under a Constitution as its "Supreme Law", it demands that the exercise of any public power should be authorised by law – either by the Constitution itself or by any other law recognised by or made under the Constitution. "The exercise of public power is only legitimate where lawful". If public functionaries purports to exercise powers or perform functions outside the parameters of their legal authority they, in effect, usurp powers of State constitutionally entrusted to legislative authorities and other public functionaries. The doctrine, as a means to determine legality of administrative conduct, is therefore fundamental in controlling – and where necessary, in constraining – the exercise of public powers and functions in our constitutional democracy.'

These remarks endorse the fundamental principle that administrators must have lawful authority for everything they do or undo.

[32] Following the aforementioned fundamental principles, individuals should be entitled to rely on government decisions and be able to function and plan their lives around such decisions, insulated at least to some degree from the injustice that would result from a sudden change of mind on the administrator's act in a way that may result in illegality. Needless to say fair procedure is designed to prevent arbitrariness in the outcome of any administrative decision that may result in unfairness.

²⁷ *Rally for Democracy and Progress and Others v Electoral Commission of Namibia and Others* 2010 (2) NR 487 (SC) at para 23 (*Rally for Democracy*).

[33] That is what the Constitutional Court of South Africa cautioned about in *De Lange*.²⁸

'The time-honoured principle that no-one shall be the judge in his or her own matter and that the other side should be heard [*audi alteram partem*] aim towards eliminating the proscribed arbitrariness in a way that gives content to the rule of law. They reach deep down into the adjudication process, attempting to remove bias and ignorance from it. . . . *Everyone has the right to state his or her own case*, not because his or her version is right, and must be accepted, but because, in evaluating the cogency of any argument, the arbiter, still a fallible human being, *must be informed about the points of view of both parties in order to stand any real chance of coming up with an objectively justifiable conclusion* that is anything more than chance. *Absent these central and core notions, any procedure that touches in an enduring and far-reaching manner on a vital human interest . . . points in the direction of violation.* (Emphasis added.)

[34] The following remarks by Francis Neate,²⁹ in relation to the aforementioned foundational values, also bear relevance:

'For lawyers throughout the world, the Rule of Law, is our compass, our gravity. It ensures predictability, stability and fairness. Without it, we cannot function. Individuals cannot flourish. Business cannot flourish. Society cannot grow. Anywhere it is under attack, lawyers [and I might add, the populace] everywhere are threatened.'

²⁸ *De Lange v Smuts NO and Others* 1998 (3) SA 785 (CC) at para 131 (*De Lange*) quoted by the same Court in *Stopforth Swanepoel & Brewis Incorporated v Royal Anthem Investments 129 (Pty) Ltd and Others* 2015 (2) SA 539 (CC) 26.

²⁹ Francis Neate, *The Rule of Law: Perspective from around the Globe* (Lexis Nexis) 2009, at p 22.

[35] The Government respondents did not deny that the successful bidders, including the appellants, were not heard or at least afforded an opportunity to make written representation before the cancellation of the tender after the award. The Board did not deny that it failed to comply with its statutory obligation to inform the successful bidders of its decision to award. Instead, the Government respondents made much of the fact that the appellants and other successful bidders were not informed.

[36] Clearly, the Board cannot rely on its failure when performing a mandatory function and assert that the successful tenderers were not informed. The Government respondents contended that because of the impropriety and allegations of corruption the Board and the Ministry acted responsibly and in line with their constitutional duty by bringing about the cancellation of the tender to obviate any impression that the State condoned or is indifferent to such wrongdoing. Once it is accepted that the tenderers should have been informed, they were entitled to be heard when the Board afterwards considered cancellation of the tender, even in an attenuated manner, such as inviting the affected tenderers to make written representations within a certain period. This, also, did not happen.

[37] The Government respondents thus submitted that a rational basis existed for the cancellation of a tender and that the appellants were thus not entitled to be heard. In light of the core notions articulately set out by this Court, per Shivute CJ, in *Rally for Democracy* and the Constitutional Court of South Africa in *De Lange* the Government respondents' approach is unquestionably untenable. That

approach, borrowing the words used in *De Lange*, touched in an enduring and far-reaching manner on vital human interest that pointed in the direction of violation.³⁰

[38] The High Court relied on *Heath*,³¹ in concluding, on the procedural aspect, that the Board was bound to cancel the tender without affording the appellants an opportunity to be heard and that it did not act unfairly because of the allegation of impropriety and corruption.³² *Heath* does not countenance illegality of this kind. It is distinguishable from this case. In any event, the Government respondents maintained that the appellants were disqualified because they did not comply with one important condition: that each tenderer must include in its bid special school hostels per region.

[39] As evident from their opposing papers, The Government respondents remained steadfast that the successful bidders had no right, in law or under the Constitution, to the award of a tender because a tender is an invitation to do business and not a right to be awarded a contract. This proposition is, under the circumstances of this case, demonstrably flawed: The issue is not whether the appellants had a right to be awarded a tender contract. It is about the fair process rights aimed towards eliminating the proscribed arbitrariness in a way that gives contents to the rule of law.

³⁰ Above at [33].

³¹ Above note 15.

³² High Court Judgment at para 4.

[40] The reliance by the Court *a quo* on the ‘context in *Doody*,³³ was also incorrect. Obviously, the High Court overlooked the complete gamut of the principles in that part of *Doody* which is more equally critical. In that part Lord Mustill remarked:

‘[F]airness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representation on his own behalf either before the decision is taken with a view to producing a favourable result or after it is taken with a view to procuring its modification, or both’³⁴

[41] Whilst one recognises that the duty to act fairly is not a rigid principle imposing obligations upon administrative officials and agencies in an inflexible way as this Court, per O’Regan AJA, said in *Petroneft*,³⁵ I think that here the Board – acting as a statutory procurement agent in terms of section 7 of the Tender Act – ought to have discharged its obligations under Article 18 of the Constitution and the peremptory prescripts in terms of section 16 of that Act.³⁶ It did not. This much was accepted by the Board. Obviously, the Board failed to exercise its power or perform its public function, not only under the Constitution but also in terms of the empowering legislation, the Tender Act. In effect, the Board violated the legality principle that reigns supreme under the Constitution³⁷ – on both the right to fair process and lawfulness of its actions and/or omission.

³³ See above note 13.

³⁴ The passage is cited by this Court in *Vaatz v Municipal Council of the Municipality of Windhoek* 2017 (1) NR 32 (SC) at para 25.

³⁵ *Minister of Mines and Energy and Others v Petroneft International Ltd and Others* 2012 (2) NR 781 (SC) at para 38.

³⁶ See above [7].

³⁷ See in this regard *Rally for Democracy* at para 23.

[42] More to the point and following *Doody* and at the risk of repetition, the Board should have allowed the appellants to make representations. It failed to do so despite the fact that the appellants had, in the letter dated 23 October 2014, alerted the Board of their predicament particularly that they had been materially prejudiced by the cancellation without having been consulted and that but for knowing about the award in the newspapers, they had not been notified of same.

[43] The Government respondents submitted that the appellants were not materially affected by the cancellation simply because they had not been notified of the award. They contended further that there was no legitimate expectation created by the Board or the Committee and as a result the appellants' right to fair process was not infringed. It is incorrect to suggest that the appellants were not adversely or materially affected by the cancellation. In their supplementary papers the appellants explicitly contended that they expended vast amounts of time, money and effort in preparing their tenders including but not limited to conducting all of the site visits and being operationally ready as were necessary to fulfil the tender requisites. Notably, the Government respondents did not take issue with these averments. Interestingly, the Government respondents do not deny that Article 18 of the Constitution conferred a fair process right to the appellants. They do not deny also that the Board failed to discharge its obligation in terms of section 16 of the Tender Act. In fact, they admit non-compliance with the empowering legislation.

[44] Article 25 of the Constitution³⁸ enjoins agencies of Government – the Board in this case – not to take any action which breaches the fundamental rights conferred by the Constitution, including the rights under Article 18. Unquestionably, as aforementioned the Board and the Ministry acted in breach of the implicated right contrary to Article 25.

[45] The High Court correctly recognised that ‘the Constitution, in Article 18, imposes an obligation on officials to act, fairly, reasonably and lawfully when exercising public power.’³⁹ It remarked that ‘from the deliberations quoted [in the judgment], it is clear that the initial evaluation of the tender was not based on a lawful and fair process as enjoined by the Constitution. . . .’ It is therefore astounding that the Court, despite the acknowledgment for non-compliance with statutory prescripts (the section 16 obligations) by the Government respondents, did not act in terms of Article 5 of the Constitution to protect the rights of the appellants. Langa CJ, in the decision of the Constitutional Court of South Africa in *Chirwa*,⁴⁰ cautioned that litigants are entitled to the full protection of all and any applicable rights and that is why Courts should not presume to determine that the essence of a claim engages one right more than another.⁴¹

[46] In seeking to defend the decision a quo the Government respondent relied, in their written submissions, on section 15 of the Tender Act and submitted that in any event (the corruption ground aside)–

³⁸ Above at [6].

³⁹ High Court Judgment at para 37.

⁴⁰ *Chirwa v Transnet Ltd and Others* 2008 (4) SA 367 (CC).

⁴¹ *Id* at para 175.

'the revelations by the technical person that the tender specifications and conditions required that all tenderers include in their chosen region special school hostels, and if not, such a tenderer would be disqualified was important, and *in fact decisive*, as section 15(2)(a) of the Act prohibits the Tender Board from considering any tender that does not meet any or all of the requirements under a tender title. The decision to cancel was rational because of certain non-compliance with the requirement set out in the Tender.' (Emphasis added.)

[47] In my view, section 15(2)(a) does not assist the Government respondents. The appellants maintained that the Board or Ministry had no authority to cancel the tender and that even if it did, the reasons advanced did not entitle it to cancel. They said that it was a false claim that they did not cater for the special needs students. The government respondent did not take issue with this contention.

[48] It is correct that conflicting reasons (and somewhat vague reasons hence repeated request for clarification and more information by the Board) supporting the request for cancellation of the tender were given.⁴² The Government respondent's case for cancellation, buttressed by the High Court, was based (although vaguely because of the varied grounds), 'on the recommendation that was influenced by the corrupt interference and incompetence by officers of [the Ministry]⁴³ and not as submitted in argument (the section 15(2)(a) defence). In any event, despite the fact that the alleged corrupt activities were and are still properly under investigation by the Anti-Corruption Commission, the Court *a quo* concluded

⁴² The transcript reveals that the Ministry was serious on wanting to cancel the tender but reasons were not given to the Board. The Ministry was not forthcoming with the reasons for cancellation. The reason advanced for cancelling the tender as per the opposing papers of the first to third respondent was that of the alleged 'revelations of the allegations of impropriety and corruption.' The transcription of the meeting of the Board mentions information of lapses of integrity and conflict of interests and non-compliance with the tender for catering for the special needs students.

⁴³ High Court Judgment at para 37.

that the corrupt interference and incompetence by officials of the Ministry [constituted] 'corruption'.⁴⁴ Explicitly, the Court *a quo* said:

'From the deliberations quoted above, it is clear that the initial evaluation of the tender was not based on a lawful and fair process as enjoined by the constitution, but certain recommendations were influenced by the corrupt interference and incompetence by officers of the Ministry of Education. There is no doubt in my mind that this is corruption.'⁴⁵ (Emphasis added.)

[49] It is difficult to understand why, despite the fact that the allegations of corruption surfaced in the media almost eight and ten days after award, the Minister – who is alleged to have been 'furious' when reading the newspaper articles – failed to go to Court and sought an order reviewing and setting aside the award and cancelling the tender. In fact, the Government respondents did not provide any reason whatsoever why it was not necessary for the Minister, armed with the evidence that the Permanent Secretary who defied his instructions not to be involved participated in the decision making process and failed to declare an interest and the allegations of corruption in the award of the tender, to approach a Court to review and set aside the award particularly because transparency and accountability are fundamental principles of public procurement system.

[50] More to the point regarding the lawfulness of the decision to cancel is the challenge based on the contention that the decision to cancel was that of the Ministry and not the Board. The appellants argue that the Ministry had no authority

⁴⁴ Above note 42.

⁴⁵ *Id.*

to direct the Board to cancel the Tender. Although the Government respondents deny that the decision to cancel was made by the Ministry, the appellants' argument is not far-fetched: Strikingly, in their opposing papers these respondents maintained, on one hand, that from the rendition of the relevant facts neither the Ministry nor the Prime Minister dictated to the Board to cancel the tender but unambiguously stated, on the other, that the Ministries had a duty to act on the strength of those allegations because of their constitutional obligations and that it was precisely for that reason that they 'caused' the Committee to deal with the allegations. The committee then resolved to recommend cancellation.

[51] In any event the debates and disquiet expressed by members of the Board, when the request for 'withdrawal' or cancellation of the tender was made at the instance of the Ministry by its technical person at the Board's meeting of 13 October 2014, are telling. The members of the Board explicitly demonstrated open uneasiness about the Ministry's meddling in the Board's procurement function or process. To avoid prolixity it is not necessary to refer, in detail, to the relevant parts of the transcript to demonstrate this point.

[52] It suffices to mention the following revealing, among other things, uneasiness on the part of the Board regarding the Executive's perceived meddling in the work of the Board; The Minister was said to have wanted the Board to brief him on the tender before the 'Board could mitigate the tender'; The Board was steadfast that the matter was a procurement issue; The Board, through one of its outspoken members, disagreed that the Executive was entitled to be briefed

because the only body to take the decision was the Board. Mention was also made by the technical person that this was for 'internal consultation' and that it was 'for Courtesy' for the 'Ministry to give direction'. The Board cautioned that procurement law does not prescribe the participation of the Executive in such procurement matters. It correctly said that the law empowers only the Board to do procurement, be it evaluation which is referred to sub-adjudication and award; repeatedly members cautioned that the Board will be creating a precedent in allowing consultation with the Executive when executing its procurement obligations. Forthrightly, a point was raised that allowing consultation with the Executive the Board 'will be entering a very dangerous [zone]' and that it 'will be weakening itself and will be subjecting answers to any things'. All these remarks are indeed revealing.

[53] In any event the Government respondents' own words in their opposing papers show that the decision was not only of the Board. They stated that 'the Committee and the Board, *as well as the [Ministry] and [Prime Minister]* acted responsibly and in line with their constitutional duty *by bringing about the cancellation of the tender.*' It is thus not unexpected that the appellants, given the request to cancel the tender and coupled with the information regarding what the Minister wanted, considered that the Board merely rubberstamped the already taken decision.

[54] In its challenge, the appellants submitted that the Board, having awarded the tender to the successful bidders was *functus officio* apropos its decision to

cancel the tender. In the view I take of the matter, it is not necessary to decide this issue.

[55] All things said and done, the cancellation of the tender in these circumstances was irrational and unlawful.

Appropriate relief

[56] Ordinarily, a breach of administrative justice attracts public law remedies. The appellants sought relief as set out in the amended notice of motion.⁴⁶ As alluded to above the appellants judiciously jettisoned the interdictory relief in terms of which the Government respondents were to be restrained from continuing to implement the extended catering contract. The interdictory relief, if it were to be granted, would have had no practical effect as the extended contract ran out in May 2019. Besides, it would have had unintended disastrous consequences for the poor learners.

[57] A determination of what constitutes an appropriate remedy – given the constitutional and statutory breaches on one hand and the effluxion of time of the tender on the other, is somewhat tricky. The determination is a discretionary matter which discretion must be exercised judicially upon consideration of certain factors in the circumstances, including consideration of fairness to all concerned.⁴⁷

⁴⁶ See above [15].

⁴⁷ See in this regard *Minister of Health and Social Services v Lisse* 2006 (2) NR 739.

[58] In *JFE Sapela Electronics*,⁴⁸ the South African Supreme Court of Appeal quoted with approval its earlier pronouncement in *Oudekraal*,⁴⁹ that the discretion of a Court 'constitutes the indispensable moderating tool for avoiding or minimising injustice when legality and certainty collides.' It is correct that a Court, in the exercise of its discretion to determine an equitable remedy, may be confronted with challenges and may decide not to set aside the impugned decision (in this case cancelling the tender) for example: where doing so may not achieve practical purposes or where doing so will be disruptive to the provision of services. In my view, the setting aside the decision cancelling the tender will not have catastrophic consequences especially for the learners and the current extended agreements which came to an end in May 2019. Moreover, the Government respondents (bearing in mind that the further respondents did not oppose the setting aside of the decision to cancel) have not shown that any shattering result will follow if the cancellation decision is set aside.

[59] In fact, the setting aside of the cancellation decision will not be disruptive of the ongoing provision of food to the learners. It will be fair to those concerned and will be in the interest of justice as the functionary will then be able to afford the appellants *audi*, to safeguard their fair process right; will be able to observe the principle of legality and will also give effect to the extant decision awarding the tender to the successful bidders including the appellants. It is not insignificant that that decision (awarding the tender) has not been reviewed and set aside.

⁴⁸ *Chairperson, STC v JFE Sapela Electronics (Pty) Ltd* 2008 (2) SA 638 at 650 (SCA) (*Sapela*), quoted with approval in *Fire Tech Systems CC v Namibia Airports Co Ltd and Others* 2016 (3) NR 802 (HC) at para 61.

⁴⁹ *Oudekraal Estate (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) at para 36 (*Oudekraal*).

Effectively, the decision to award still stands. All things considered, the principles enunciated in *Sapela* and *Oudekraal* will thus not find application here.

[60] It follows therefore that the Court *a quo* erred and misdirected itself in dismissing the application and, specifically, refusing to set aside the decision to cancel the tender. In the circumstances, the appeal must be upheld and the relief sought in para 1 of the amended notice of motion – setting aside the decision to cancel the tender must be granted.

The appropriateness of the further relief sought

[61] The next question that arises is whether the appellants are entitled to the further relief sought in paragraphs 2 and 3 of the amended notice of motion. To recap, these relating to first, an order directing the Board and Ministry to conclude agreements (as contemplated in section 16(2)) with the appellants and, second, the order declaring the current extended service agreements unlawful, respectively. Essentially, the appellants want this Court to substitute its own decision for that of the Tender Board.

[62] It will not be just and equitable to grant the further orders sought in the circumstances. Courts are generally loath to substitute their own decisions to that of functionary unless exceptional circumstance exists,⁵⁰ including that the functionary concerned has exhibited bias or incompetence to such degree that it would be unfair to require the appellants to submit to the same authority/agency. It must also be shown that the Court is in as good position to make the decision

⁵⁰ See *SA Jewish Board of Deputies v Sutherland NO and Others* 2004 (4) SA 368 at 390B.

itself.⁵¹ The loathness finds support in the decision of this Court in *Trustco, per Oregon AJA*,⁵² where this Court remarked that a Court will only concern itself with whether an administrative decision was arrived at rationally when confronted with administrative decisions that are policy-laden.

[63] In *Waterberg*⁵³ this Court, per Shivute CJ, held that a measure of judicial deference, which involves the typically complex task of balancing competing interests, is called for especially where substitution is not justified.⁵⁴ The Court quoted, with approval, the remarks by the South African Supreme Court of Appeal in *Phambili Fisheries*,⁵⁵ where the appeal Court said ‘Judicial deference is particularly appropriate where the subject-matter of an administrative action is very technical or of a kind in which a Court has no particular proficiency.’⁵⁶ These sentiments apply with equal force here.

⁵¹ See the decision of the South African Westerns Cape High Court in *University of the Western Cape and Others v Member of Executive Committee for Health and Social Services and Others* 1998 (3) SA 124 (C) at 131D-G, cited with approval by this Court in *Waterberg Big Game Hunting Lodge Otjahewita (Pty) Ltd v Minister of Environment & Tourism* 2010 (1) NR (1) (SC) at 32E-H (*Waterberg*).

⁵² *Trustco Ltd t/a Shield Namibia and another v Deeds Registries Regulation Board and Others* 2011 (2) NR 726 (SC). This was endorsed later by this Court in *New Era Investment (Pty) Ltd v The Road Authority, The Chairperson of the Board of Directors – Road Authority* 2017 (4) NR 1160 (SC) at para 36. See also the decision of the South African Constitutional Courts in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) at para 15.

⁵³ See *Waterberg* above note 51.

⁵⁴ It held that judicial deference in the context of that case should be understood to mean—
 ‘. . . a judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies: to admit the expertise of those agencies in policy-laden or polycentric issues; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate. This type of deference is perfectly consistent with a concern for individual rights It ought to be shaped not by an unwillingness to scrutinize administrative action, but by a careful weighing up of the need for – and the consequence of – judicial intervention. Above all, it ought to be shaped by a conscious determination not to usurp the function of administrative agencies, not to cross over from review to appeal.’

⁵⁵ *Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd* 2003 (6) SA 407 (SCA) 432 at para 53.

⁵⁶ See *Waterberg* above note 51.

[64] The appellants have not shown that any such exceptional circumstances exist or are shown: that the Tender Board has exhibited bias or incompetence for this Court to perform the administrative functionary's function. In any event, were it not for the fact that the extended agreements between the Tender Board and service providers came to an end, the granting of the relief in para 2 and 3 of the amended notice of motion would have and may still, assuming the further extension is granted, disrupt the current supply of catering to schools. This is so because the period for the extended agreement ended in May 2019 but one cannot exclude a possibility of a month to month extension of the current agreements so that learners in Government school hostels are not left without food while the functionary takes steps in light of this judgment. For these reasons, I would refuse to grant the relief sought in paragraphs 2 and 3.

Costs

[65] Ordinarily, costs follow the results. An award of costs is a discretionary matter. The discretion must be exercised judicially with due consideration of all relevant factors. In *Biowatch*,⁵⁷ the Constitutional Court of South Africa had occasion to deal with the question of costs in constitutional litigation and held, among other things, that the primary consideration – in such litigation – is the way in which a costs order would hinder or promote the advancement of constitutional justice.⁵⁸ That Court further held that private parties that lost in constitutional litigation against the State (for example, where litigation was to oppose the State's

⁵⁷ *Biowatch Trust v Registrar Genetic Resource and Others* 2009 (6) SA 232 (CC) (*Biowatch*) as quoted by this Court in *Kambazembi Guest Farm CC v Minister of Lands and Resettlement* 2018 (3) NR 800 (SC).

⁵⁸ *Id* at para 14 at 241J – 242B.

posture) should not as a rule be mulcted with costs rather than ordering each party to pay its own costs.⁵⁹

[66] In this litigation the appellants sought costs of one instructing and two instructed counsel. The appellants have been partly successful (in relation to the main relief) and partly unsuccessful (in relation to the further and ancillary relief). Appellants sought to vindicate their right to fair process and to uphold the rule of law – legality principle. They have succeeded in vindicating their fair process right and upholding constitutional principles (legality) as well as compliance with legislative prescripts (section 16 of the Tender Act). They have, however, been unsuccessful in relation to the ancillary relief sought. Even so, I would order the Government respondents to pay the appellants' costs in this Court and in the High Court. This is particularly so because of the posture of the State, not approaching a Court for review and setting aside the tender and the impugned decision to cancel when the allegations of corruption surfaced is not insignificant. Instead of approaching a Court, the State (through its agency - the Board which discharged its administrative function by awarding the tenders) may not, in law, have revoked its own decision.

[67] The ancillary relief sought has been successfully opposed by the Government and further respondents (non-governmental respondents). In my view, the appellants should pay the costs of the further respondent in opposing the appeal regarding further relief.

⁵⁹ Id at paras 21- 22.

Condonation

[68] The appellants' heads of argument were filed out of the prescribed period in terms of the Rules of this Court. They therefore sought condonation for the late filing of their heads. The application is not opposed. I am satisfied that a case has been made out for condoning the delayed lodgement. I would thus condone the delayed filing.

Effect of the New Procurement Act

[69] Belatedly during oral argument and, supposedly, as an afterthought the Government respondents urged this Court to consider the Public Procurement Act,⁶⁰ (new Procurement Act) which came into effect from 1 April 2017. It is not clear to this Court why the new Procurement Act was raised at that stage. One can only speculate that they did so in case this Court was minded to grant an order compelling the Board and Ministry to conclude contracts with the appellants. As mentioned above, the appellants have failed to make a case for granting the said further relief. It follows that the new Procurement Act will not, under the circumstances, have any impact save, conceivably, for the substitution of the Board with the Central Procurement Board under it.

Order

[70] For the reasons set out above, the following order is made:

⁶⁰ 15 of 2015.

1. The late filing of the appellants' heads of argument is condoned.
2. The appeal is upheld only in relation to the review and setting aside of the cancellation decision.
3. The order of the Court *a quo* is set aside and the following is substituted in its place:
 - '(i) The decision by the Tender Board of Namibia, communicated to the appellants on 15 October 2014, to cancel Tender No M9-11/2014 for the provision of catering services to Government school hostels for the period 1 June 2014 to 31 May 2019, is reviewed and set aside.
 - (ii) The matter is referred back to the appropriate functionary – the successor to the Tender Board of Namibia in terms of the Public Procurement Act, 15 of 2015.
 - (iii) The first, second and third respondents must pay the applicants' costs, jointly and severally, including costs of one instructing attorney and of two instructed counsel.
 - (iv) The applicants must pay the further respondents' costs jointly and severally, including costs of one instructing attorney and of two instructed counsel, if any.'
4. The first, second and third respondents are ordered to pay the appellants' costs on appeal including costs of one instructing attorney and two instructed counsel.
5. The appellants are ordered to pay the further respondents' costs on appeal jointly and severally, including costs of one instructing attorney and of two instructed counsel, if any.

NKABINDE AJA

SMUTS JA

MOKGORO AJA

APPEARANCES

APPELLANTS:

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Instructed by Engling, Stritter & Partners

1st – 3rd RESPONDENTS:

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Instructed by Government Attorney

6th, 32nd, 56th, 62nd, and 83rd

S Akweenda (with him E Nekwaya)

RESPONDENTS:

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