



NOT REPORTABLE

CASE NO: SA 99/2020

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

NAMIBIA PROTECTION SERVICES (PTY) LTD

Appellant

and

PIS SECURITY SERVICES CLOSE CORPORATION

First Respondent

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

Second Respondent

CENTRAL PROCUREMENT BOARD OF NAMIBIA

Third Respondent

REVIEW PANEL

Forth Respondent

**NAMIBIA UNIVERSITY OF SCIENCE AND
TECHNOLOGY**

Fifth Respondent

Coram: SMUTS JA, FRANK AJA and ANGULA AJA

Heard: 20 March 2023

Delivered: 5 April 2023

Summary: The Central Procurement Board of Namibia (the board) invited tenders on behalf of and for the provision of security services for to Namibia University of Science and Technology (NUST). Nineteen bidders responded. PIS Security Services Close Corporation (PIS) was identified as the successful bidder. Namibia

Protection Security Services (Pty) Ltd (NPS), being one of the unsuccessful bidders, was dissatisfied with the selection and took the board's decision on review. The Review Panel found the bidding process and evaluation to be flawed and recommended that the procurement proceedings start afresh. PIS took this decision on review to the High Court. NPS brought a counter-application to declare the procurement proceedings under Bid No.: NCS-ONB-CPBN-02/2019 null and void and to compel the board to start the procurement proceedings afresh based on the non-compliance of ss 47 and 55(4)(a) of the Public Procurement Act 15 of 2015 (the Act). The Review Panel did not participate in the review application before the court *a quo* despite being cited as a party. Furthermore, even when the reasons for its findings were requested by PIS, the Review Panel was not forthcoming, and the factual underpinnings for the conclusions reached in regard to s 52 of the Act were not disclosed. (The reasons for the first decision that the 29 day period was insufficient is self-evident from the finding.) The reasons for the second finding with reference to s 52 of the Act remained a mystery as the Review Panel failed to disclose them.

As the interpretation of s 60(c) of the Act could be material to the resolution of the appeal this issue was addressed by both parties. PIS argued that the relevant sections of the Act have been amended since the award and that interpreting the Act as it was when it was awarded the contract is of no benefit. The second and third respondents argued that the appeal is moot because PIS was granted an order to execute its order pending the appeal. NPS argued that PIS should not be able to seek relief as it approached the court with unclean hands due to its non-compliance with the Labour Act 11 of 2007 and its failure to adhere to minimum wages. Additionally, PIS lodged an application (on 6 March 2023) to adduce further evidence on appeal to show that it obtained an order in the High Court allowing it to execute the judgment *a quo* pending the appeal. PIS intended to adduce evidence to show the extent of services rendered and payments received for such services during the appeal. Additionally, the court determined whether the citation of the chairperson of the board and the board in the review application amounted to a misjoinder/double citation.

Held that, the mootness point taken by the second and third respondents is rejected as the lawfulness of the award of the tender to PIS and its consequences are still live issues between the parties.

Held that, the citation of the chairperson of the board and the board amounted to a misjoinder. Rule 76(1) of the Rules of the High Court states that an application should be directed at the chairperson of the tribunal whose decision is sought to be set aside. The separate citation of the tribunal was not necessary. Seeing that the issue was not raised in this matter, courts should not tolerate these misjoinders and should grant adverse cost orders whenever a party is guilty of double citation in the future.

Held that, this court cannot fault the court *a quo* for deciding not to apply the doctrine of unclean hands against PIS. It is not for the court to police PIS's compliance with the Labour Act 11 of 2007. Firstly, it is implied that they employ people to render the services for which they tendered that they will comply with the labour law in respect of their employees. Secondly, they (PIS) gave such an undertaking. Thirdly, compliance can be enforced via the labour legislation and the office of the Labour Commissioner. Fourthly, the possible consequences of non-compliance on service delivery has been set out. Lastly, non-compliance may lead to the cancellation of the contract awarded to PIS. It could thus not be said that the bid by PIS was so contaminated by dishonesty that they could not protect the award of the bid to it in a court of law.

Held that, the Review Panel's failure to provide reasons for its decision was unacceptable and a breach of its legal duty as an administrative body (see *Chairperson of the Immigration Selection Board v Frank & another* 2001 NR 107 (SC) at 174I). In the circumstances one can only work from the premise that they had no reasons especially for their second decision and hence it was an arbitrary decision. This is sufficient cause to review and set aside the second decision of the Review Panel. Consequently, it is not necessary to deal with the proper interpretation of the Act and the disputes surrounding such interpretation between the parties.

Held that, the one day short notice to prospective bidders was not fatal to the bidding process. The court *a quo* was correct to dismiss the counter-application.

Held that, there was no need for PIS to bring an application to adduce further evidence as the existence of the order to execute would normally infer that the party in whose favour it was given has been enforcing the order.

The application to adduce further evidence on appeal is dismissed with costs. Similarly, the appeal is dismissed with costs.

APPEAL JUDGMENT

FRANK AJA (SMUTS JA and ANGULA AJA concurring):

Introduction

[1] The Central Procurement Board (the board) on behalf of the Namibia University of Science and Technology (NUST) invited tenders for the provision of security services to it. Nineteen (19) bidders reacted to this invitation. Appellant, the Namibia Protection Security (Pty) Ltd (NPS) and the first respondent, PIS Security Services Close Corporation (PIS) were two of the bidders. PIS was identified as the successful bidder. NPS was dissatisfied with the selection of PIS as the successful bidder and took the selection on review before the Review Panel which found that the bidding process and the evaluation of the bids were flawed and hence determined that the 'procurement proceedings be terminated and start afresh'.

[2] PIS, aggrieved by this decision of the Review Panel, took this decision on review to the High Court which set aside the decision of the Review Panel. The High Court also dismissed a conditional counter-application by NPS to declare the decision of the board null and void based on the non-compliance with ss 47 and

55(4)(a) of the Public Procurement Act 15 of 2015 (the Act). This counter-application was conditional on the Review Panel's decision being set aside in the main application.

[3] The order of the High Court set out above was made on 17 November 2020. It was however not accompanied by reasons and NPS filed a notice of appeal against the whole of that order on 19 November 2020. On 18 January 2021 the court *a quo* handed down a full judgment which contained the reasons for the order. A further notice of appeal with grounds of appeal thus followed on 5 February 2021.

[4] As the notice of appeal suspended the operation of the order of the court *a quo* PIS applied for the immediate execution of the order and such order was granted to it on 17 March 2021. This meant that PIS commenced to render the services tendered for shortly after the granting of this order.

The facts

[5] The board on behalf of NUST solicited bids for the provision of security services to NUST by way of an advertisement to this effect on 5 August 2019. The bids had to be submitted by 3 September 2019. As indicated above a total of 19 bidders responded to the advertisement.

[6] Subsequent to the evaluation of the bids and on 4 December 2019 the board through a letter from its chairperson issued a Notice for the Selection of Procurement Award (the selection notice). This was according to the notice done pursuant to s 55

of the Act and reg 38(1)¹. In this notice, PIS was informed that it was 'selected for the award of the Procurement Contract' and that in the absence of a review within seven days (the standstill period) in terms of s 55(5) of the Act, PIS would be awarded the 'Procurement Contract'. This notice was also forwarded to the unsuccessful bidders who were informed that if they were not happy with the selection notice they could make an application for a review of the selection within seven days failing which the accounting officer of the board would 'award the contract' to PIS.

[7] The selection notice informed all the addressees that the standstill period would apply from 11–17 December 2019. NPS applied for the board to reconsider the selection of PIS. This application was outside the standstill period. The board nevertheless considered the application by NPS but declined it.

[8] On 21 July 2020, the board, through its chairperson, issued a Notice of Procurement Award (the award notice) to PIS. This was according to this notice done pursuant to s 55 of the Act and reg 39(1). All concerned were once again informed that the award notice was subject to any review of it by an unsuccessful bidder or bidders within the standstill period that would be in place from 23–29 July 2020. The award notice, unlike the selection notice, expressly mentioned that such review application would have to be made to the Review Panel pursuant to s 55(5) of the Act.

[9] NPS acting on the award notice filed a review with the Review Panel timeously and on 10 August 2020 the Review Panel made the following decision:

¹ Public Procurement Regulations, GN 47/2017, GG 6255, 1 April 2017.

'The Board failed to comply with Regulation 35 of the Regulations, in that the deadline for the bids to close was 29 days instead of the mandatory 30 days of the publication of the invitation bid.

Non-compliance with s 52 of the Act – the Board used an evaluation criteria and methodology that was not set out in the bidding document. The evaluation of the bids was not completed in accordance with the criteria set out in the bidding document.'

[10] Based on the above findings of the Review Panel, it in accordance with s 60(f) of the Act ordered that the procurement proceedings be terminated and start afresh.

[11] PIS approached the High Court to set aside the said order of the Review Panel. NPS and the board opposed the application. NPS brought a conditional counter-application to declare the procurement proceedings null and void and to compel the board to start the procurement proceedings afresh. The counter-application was conditional on the decision of the Review Panel being set aside.

[12] Whereas the Review Panel was requested for the reasons for its two findings this was not forthcoming. Furthermore, the Review Panel did not enter into the fray in respect to the application to review its decision despite being cited as a party to those proceedings and neither was an affidavit filed on its behalf in the said proceedings. The reasons for the finding by the Review Panel that the 29 day period was not sufficient is self-evident from the finding and can be dealt with as such. The reasons for the other finding with reference to s 52 of the Act remains a mystery as the factual underpinnings for the conclusions reached in this regard were not disclosed by the Review Panel.

Parties to the review of PIS

[13] In the application by PIS to review the decision of the Review Panel, the chairperson of the board was cited as the first respondent and the board as second respondent. Nothing was made of this citing of the respondents but as it has become common to do this and even extends to the citing of sub-committees and their chairpersons, it is necessary that it should be restated that this is not correct and amounts to a misjoinder.

[14] Rule 76(1) of the High Court makes it clear that when it comes to reviews, such applications must be directed at the 'chairperson of the tribunal' whose decision is sought to be set aside. To cite the chairperson in his or her official capacity as such is sufficient as he or she is the representative of the Tribunal. The separate citation of the Tribunal is not necessary. This has been the position for decades².

[15] In a review application, the Notice of Motion is thus directed at the chairperson of the tribunal (the board) in his or her representative capacity for and on behalf of the tribunal and the citation of the tribunal (the board) as a separate party is not necessary. An applicant who cites both the chairperson in his or her representative capacity and the tribunal (the board) should thus be held liable for any wasted costs of this double citation³.

² *Safcor Forwarding (Johannesburg) (Pty) Ltd v National Transport Commission* 1982 (3) SA 654 (A) at 671A-671F. See also *Seagull's Cry CC v Council of the Municipality of Swakopmund & others* 2009 (2) NR 769 (HC) paras 7-8, *Firetech Systems CC v Namibian Airports Company Limited & others* 2016 (3) NR 802 (HC) paras 24-36 and *Babyface Civils CC JV v //Kharas Regional Council* 2020 (1) NR 1 (SC) para 10.

³ *South African Railways and Harbours v Chairman, Bophuthatswana Central Road Transportation Board & another; South African Transport Services v Chairman, Bophuthastwana Central Road Transportation Board & another* 1982 (3) SA 629 (B) at 632E.

[16] As the issue was not raised in this matter I take it no further save to state that I hope courts will in future not simply tolerate these types of misjoinder but grant the adverse costs orders mentioned above whenever a party is guilty of double citation.

Mootness of the appeal

[17] One of the disputes between the parties involves the interpretation of s 60(c) of the Act which is problematic and may be material to the resolution of the dispute between the parties to this appeal. As it was material to the reasoning of the judge *a quo*.

[18] On behalf of PIS it is pointed out that the relevant sections of the Act have been amended quite extensively by virtue of the Public Procurement Act 3 of 2022 and these amendments spell out the process when it comes to public procurement, in much clearer details.

[19] It is thus submitted on behalf of PIS that to interpret the Act as it was at the time when PIS was awarded the contract would be an exercise 'that establishes no practical benefit to the jurisprudence of Namibia' and will be of no benefit to parties in future litigation.

[20] The submission on behalf of PIS in this regard is summarised in the Heads of Argument as follows:

'The interpretive exercise will not establish any practical benefit to the parties and in view of the amendments to the Act the issues raised are no longer important. We

submit the dispute in relation to the interpretation of the provisions that we referred to has become moot.'

[21] According to PIS the principles relating to mootness find application because there is no live and existing controversy.

[22] I do not agree with the submissions advanced on behalf of PIS. The interpretation is a live issue between the parties and may be material to the resolution of the appeal. Furthermore, such interpretation will have practical effect on the parties as it may decide the matter one way or another. The fact that it may not be helpful to other parties in the future is neither here nor there. If it is necessary for the resolution of the dispute between the parties it will be important to them and will furthermore have a practical effect once determined. Parties are entitled to have their disputes heard and determined irrespective of whether such disputes entail matters that would be to 'the potential benefit to the jurisprudence of Namibia'. This happens on a daily basis where courts must decide factual issues rather than legal ones.

[23] Second and third respondents whom I have pointed out above are actually the same party (ie the board) also submit that the appeal is moot. On their behalf however, this is based on the fact that the High Court on 18 March 2021 granted PIS an order to execute pending the appeal. In other words, PIS was allowed to commence with security services to NUST despite the pending appeal.

[24] I am afraid the submissions on behalf of the board are also meritless. How the fact that PIS is busy executing a contract renders the dispute academic is not explained. Should the appeal succeed there is a real possibility that PIS's contract

will be set aside or that NPS will, at the minimum, be granted a cost order in its favour. Both the lawfulness of the award of the tender to PIS and what the consequences should be if it was awarded unlawfully are still live issues between the parties.

[25] In the result, the mootness point taken on behalf of the respondents is rejected.

Unclean hands

[26] One of the attacks mounted by NPS in the application to review and set aside the decision of the Review Panel was that PIS should not be able to seek the relief as it approached the court with unclean hands. The conduct complained of was that PIS did not comply with the labour legislation and it failed to adhere to the minimum prescribed wages.

[27] The court *a quo* found that the instances where the minimum wages were allegedly not adhered to were isolated instances unrelated to the bid and were in some cases disputed and further that the alleged non-compliances were not of such a nature to disqualify PIS from seeking the relief it seeks.

[28] It is submitted on behalf of NPS that the court was wrong in this approach and that it should have found that PIS was acting dishonestly. In this regard reliance is placed on the principle that something done contrary to a direct prohibition of the law is void and of no effect⁴.

⁴ *Schierhout v Minister of Justice* 1926 AD 99 at 106-107 and *Auas Diamond Company (Pty) Ltd v Minister of Mines and Energy* 2017 (2) NR 418 (SC) at 426D-F.

[29] If the bid of PIS is premised on the payment of unlawfully low wages to its employees then it will be a ground for the review of the decision. In such instance it would be unlawfully undercutting the bids of others, would probably have to cut corners in the execution of the work as its workers would not tolerate being paid such low wages and may even have issues from the Labour Commissioner and face industrial action. In short, the consequences will be such that the smooth rendering of the services it is supposed to render simply will not take place. In such circumstances the lowest bid (based on wages below the minimum) will simply not be a sustainable bid as it would not be likely to deliver what was promised.

[30] Where a bid is of such a nature that it will have to be performed by employees of a bidder it is implied that the applicable labour legislation relevant to such employees will be adhered to as everyone is supposed to obey the law. It seems an undertaking was given in this matter by all the bidders in terms of s 138(2) and (3) of the Labour Act 11 of 2007. Any non-compliance with the Labour Act may thus cause an order by the Labour Court compelling compliance with the minimum wages which would compel a bidder to pay the minimum wages. Such an order will not only affect such employer's reputation in respect of any future bids envisaged, but will also render the continuance of the tender unaffordable or, at least less profitable.

[31] In view of the above considerations it is highly unlikely that PIS, seeing its size, market, scale of operations and clientele, would have deliberately and dishonestly decided to ignore the legal minimum wage when submitting its bid.

[32] It is not for the court to police PIS's compliance with labour legislation. Firstly, it is implied that if they employ people to render the services for which they tendered that they will comply with the labour law in respect of their employees. Secondly, they gave such an undertaking. Thirdly, compliance can be enforced via the labour legislation and the office of the Labour Commissioner. Fourthly, the possible consequences of non-compliance on service delivery has been set out above. Lastly, non-compliance may lead to the cancellation of the contract awarded to PIS.

[33] Whereas the response by PIS to the allegations that they would not adhere to the payment of minimum wages is not satisfactory and in the nature of a bare denial coupled by evasively referring to the financial criteria in the bid document, it is still not clear that PIS intentionally lodged a bid based on unlawful minimum wages seeing the potential negative fallout from such action. I am thus of the view that it cannot be said that the defence of the bid awarded to them by challenging the decision of the Review Panel is contaminated by dishonesty to the extent that the doors of the court should be closed to PIS⁵. I thus cannot fault the court *a quo* for deciding not to apply the doctrine of unclean hands against PIS.

Sufficient time granted to potential bidders

[34] As pointed out above, potential bidders were given 29 days instead of 30 days as prescribed in the regulations to present their bids. This the Review Panel gave as one of its grounds to order that the process had to start afresh. Counsel for NPS supports this approach and submits that the non-compliance with the regulations was fatal to the case of PIS and its intended review of the Review Panel's decision.

⁵ *Minister of Mines and Energy & another v Black Range Mining (Pty) Ltd* 2011 (1) NR 31 (SC) para 50.

[35] The court *a quo* after considering s 47 of the Act held that the prescribed time period of 30 days was directive and not peremptory and hence did not agree that the 29 days' notice instead of 30 days was fatal to the whole bidding process. In coming to its conclusion, the court *a quo* referred to the decisions of this court to the effect that not all non-compliances with statutory provisions necessarily lead to invalidity⁶. Where non-compliance with a statutory provision does not necessarily lead to invalidity such provision is referred to as being 'directory'. It should be pointed out that the word 'directory' used in this context does not mean it is left open for a party to decide whether the provisions should or should not be adhered to. As it is part of a statute or regulations it must be adhered to by all. The question is what is to happen when it is not adhered to. If the non-adherence does not lead to invalidity then the word 'directory' is the legalese to describe this effect.

[36] Section 47(1) of the Act reads as follows (I quote only the portion relevant to this appeal):

'The Board . . . must set a deadline for the submission of bids . . . so as to allow sufficient time for the preparation and submission, with a view to maximizing competition, which may not be less than the prescribed minimum period.'

[37] Regulation 35 prescribes the minimum period which 'may not be less than 30 days from the date of such invitation'.

[38] The Act provides no minimum time but leaves this for the minister to determine in the regulations. The Act even makes it clear what the objectives are

⁶ *Auas Diamond Company* para 25 and *Torbitt & others v International University of Management* 2017 (2) NR 323 (SC).

which must be met when setting a deadline. Such deadline must ensure time for the proper preparation of bids and be such that all potential bidders interested in the bid will put in proposals. This is to ensure proper competition among bidders.

[39] On the facts of this matter all the objectives spelled out in s 47(1) of the Act were attained. Nineteen bidders partook without a single complaint about the time afforded them to prepare their bids. There is also no suggestion that more bidders would be forthcoming had one more day been given to potential bidders. In such circumstances the day short notice, when regard is had to the regulations, cannot be said to have been fatal to the bidding process. The short notice was thus properly not regarded as being fatal by the court *a quo*. Here it must be noted that in this matter there was no prejudice to potential bidders. There is no express provision in the Act that renders any act contrary to the prescribed time period a nullity nor has any such provision in the regulations been referred to by counsel. As was stated by Malan J in *Volschenk v Volschenk*⁷:

'I am not aware of any decision laying down a general rule that all provisions with respect to time are necessarily obligatory, and that failure to comply strictly therewith results in nullifying all acts done pursuant thereto. The real intention of the Legislator should in all cases be enquired into and the reasons ascertained why the Legislator should have wished to create a nullity. An important consideration should be whether by failure to adhere to a strict compliance with the time provision substantial prejudice would result to the persons or classes intended to be protected and if prejudice may result whether it is irremediable or whether it may be cured. . . .'

[40] As is evident from the facts and the wording of s 47(1) all the factors mentioned in *Volschenk* points to the non-compliance in the present matter with the

⁷ *Volschenk v Volschenk* 1946 TPD 486 at 490.

30 day time period to be non-fatal. I point out finally that in this country this has been the approach for a long time⁸.

[41] In the result, the reliance on strict compliance with the time period contained in reg 35 does not avail NPS and did not amount to a fatal irregularity in the procurement process as submitted on behalf of NPS.

Review Panel's failure to provide reasons

[42] The Review Panel's absence when it came to the review of their decision was commented on *a quo* and it was pointed out that the refusal by the Review Panel to provide reasons for their decision either prior to the review application being lodged or in an affidavit in answer to the review application was unacceptable. It is also clear from the judgment *a quo* that this was not the first time that this happened. The explanation for this given by the chairperson of the board is that the Review Panel consists of persons appointed for this task on an *ad hoc* basis in respect of tenders if and when the need arise for this. Once a decision is made by the Review Panel, the persons who constitute such panel then disperse and hence that specific Review Panel ceases to exist.

[43] I am afraid that the explanation is not acceptable. The erstwhile members of a Review Panel do not disappear into thin air once their job is done. The chairperson of the panel, or failing the chairperson, one of the members of such panel must provide the reasons for the decision made by the Review Panel on which he or she served. The fact that they no longer are members of the Review Panel does not absolve them from this duty where a decision to which they were parties is being

⁸*Suidwes-Afrikaanse Munisipale Personeel Vereniging v Minister of Labour & another* 1978 (1) SA 1027 (SWA) at 1038B-C.

sought to be reviewed in a court. If they are not informed of this duty prior to being appointed to the Review Panel they should be so informed in future.

[44] It is important from the perspective of accountability and transparency that such reasons are given. In fact, there is a legal duty to give reasons by bodies such as the Review Panel. As was pointed out by Strydom, CJ in *Chairperson of the Immigration Selection Board v Frank & another*⁹ 'there can be little hope for transparency if an administrative organ is allowed to keep the reasons for its decision secret' and it is wrong to expect persons aggrieved by decisions of such organs to 'start off on an unfair basis because the administrative organ refuses to divulge reasons for its decision'.

[45] In the present matter the reasons of the Review Panel in respect of the time period are self-evident from the decision and hence were dealt with above. The second part of the decision however amounts to a conclusion without any reasons as to what facts were considered to come to this conclusion. This is tantamount to not giving any reasons at all. Furthermore, the Review Panel was on two occasions requested to provide reasons for this conclusion to which there was no response. A third opportunity was granted to the Review Panel when the application to review the decision was filed and again there was no response from it.

[46] In the circumstances set out above, one can only work from the premise that it had no reasons for its decision and hence that it was an arbitrary decision. This is sufficient to review and set aside the second conclusion of the Review Panel.

⁹ *Chairperson of the Immigration Selection Board v Frank & another* 2001 NR 107 (SC) at 1741.

[47] This means that the setting aside of the decision of the Review Panel by the court *a quo* was correct as both legs thereof cannot stand.

[48] It is thus not necessary to deal with the proper interpretation of the Act and the disputes surrounding such interpretation between the parties.

[49] As a result of what is stated above, the appeal against the judgment *a quo* to the effect that the decision taken by the Review Panel on 10 August 2020 has to be set aside is dismissed and as there is no appeal in respect of the costs order made *a quo* such order must also remain in place.

Counter-application

[50] The counter-application was conditional on the review application by PIS being successful and hence it needs to be considered next.

[51] The counter-application was premised on two lines of attack namely that the decision to award the bid to PIS had to be set aside because of the one day short notice to prospective bidders and that the award notice was signed by the chairperson of the board and not the accounting officer of NUST as required by s 55(4)(a) of the Act and that such notice thus amounted to a nullity.

[52] The point that the award notice was a nullity because it was signed by the chairperson of the board was not pursued on appeal and nothing more needs to be said in this regard.

[53] I have dealt with the effect of the non-compliance with s 47 of the Act above and found that the one day short notice was not fatal to the bidding process. This attack in the counter-application must thus accordingly also fail.

[54] It follows that the court *a quo* correctly dismissed the counter-application and as there was no appeal against the costs order of the court *a quo* in this regard such costs order must also remain in place.

Application to adduce further evidence

[55] PIS at a late stage prior to the appeal lodged an application to adduce further evidence. This evidence was to the effect that PIS obtained an order in the High Court allowing it to execute the judgment *a quo* pending the appeal.

[56] It further intended to adduce evidence as to the extent to which it rendered the services involved and the payments received for such services pending this appeal.

[57] The reason for the application was to put facts before this court so as to attempt to persuade us that the default remedy (setting aside the award to PIS) would not be apposite in the circumstances of this case should it be decided that the award to PIS had to be set aside.

[58] Where a court has granted an order allowing a party to an appeal to execute pending such appeal and, thus reversing the normal position that an appeal suspends the order *a quo*, any party to that appeal will be allowed to simply make that fact known to this court (for example in the heads of argument or at the hearing).

To avoid any disputes it would be advisable to furnish the court with a copy of such order. When the existence of such order is disputed an application will have to be brought to establish this fact. However as disputes on this aspect should indeed be a very rare event there is no need to bring an application to adduce new evidence to place the fact that there is such an order in existence before this court.

[59] Once it is accepted that an order to execute pending an appeal has been given certain inference will normally flow from this fact, namely that the party in whose favour such order was given has or is in the process of enforcing the order *a quo*. Thus in the present matter it follows that PIS has, since shortly after that order, been rendering security services to NUST and has been paid for such services in terms of its approved bid. In other words, PIS has been performing the services contained in its bid and NUST adhered to the terms and conditions contained in the bid requirements. Simply put, they have adhered to the terms and conditions of the contract between them.

[60] In this matter, the evidence sought to be placed before the court was generally evidence to support the inference that in any event follows from the order to execute. To this was added some details such as the exact amount paid by NUST to PIS up to the time of the application to adduce further evidence and some other minor details.

[61] On the facts of this case there was no need for an application to adduce further evidence that would in any event necessarily follow from the order to execute pending the appeal and hence the application stands to be dismissed with costs.

Conclusion

[62] This is an appeal in which the costs should follow the result. There was no suggestion by counsel to the contrary and such order shall thus be granted.

[63] As far as the application to adduce further evidence is concerned which stands to be dismissed, it was submitted on behalf of NPS that a costs order be granted allowing the costs of two instructed counsel to oppose this application. In view of the time spent on it, the nature of the evidence sought to be adduced and the issues raised in opposition thereto, I do not think that it warranted the employment of two instructed counsel and will grant an order that will include one instructed counsel only.

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

1. The application to adduce further evidence is dismissed with costs inclusive of the costs of one instructing and one instructed counsel.
2. The appeal is dismissed with costs inclusive of the costs of one instructing and one instructed counsel.

FRANK AJA

SMUTS JA

ANGULA AJA

APPEARANCES

APPELLANT: M Fitzgerald, SC (with him G Dicks)
Instructed by Koep & Partners

FIRST RESPONDENT: T Chibwana
Instructed by Appolos Shimakeleni
Lawyers

SECOND AND THIRD RESPONDENTS: J Ncube
Of Government Attorney

FIFTH RESPONDENT: T Luvindao
Of Dr. Weder, Kauta & Hoveka Inc.