

REPUBLIC OF NAMIBIA



CASE NO. A 346/2010

IN THE HIGH COURT OF NAMIBIA

In the matter between:

**UNITED AFRICA GROUP (PTY) LTD
APPLICANT**

and

THE CHAIRPERSON OF THE TENDER RESPONDENT	1ST
BOARD OF NAMIBIA THE MINISTER OF LABOUR AND SOCIAL WELFARE RESPONDENT	2ND
JOHN AND PENNY GROUP OF COMPANIES (PTY) LTD RESPONDENT	3RD
PATRIOTIC PAYMASTERS SERVICES (PTY) LTD RESPONDENT	4TH
KUJO INVESTMENTS (PTY) LTD	5TH RESPONDENT
ANTHER INVESTMENT CC	6TH RESPONDENT
EPUPA INVESTMENT TECHNOLOGY (PTY) LTD RESPONDENT	7TH

CORAM: UNENGU, AJ

Heard: 16 May 2011
Delivered: 17 June 2011

JUDGMENT

UNENGU, AJ: [1] The applicant by notice of motion brought this application of Review in terms of Rule 53 of the High Court Rules before Court and sought the following relief against the respondents.

- “1. Calling upon the Chairperson of the Tender Board of Namibia (“the board”) to show cause why:
 - 1.1 the decision taken by the board on 29 October 2010 and made known to the third respondent on 3 November 2010 to award Tender A6-1/2010: Cash Payment of Basic State Grants, Allowances to Beneficiaries to the third respondent should not be reviewed and set aside;
 - 1.2 the decision referred to in paragraph 1.1 above, should not be declared to be in conflict with Article 18 of the Constitution;
 - 1.3 Tender A6-1/2010 should not be awarded to the applicant.
2. Ordering the first respondent and such other respondents who oppose this application to pay the costs thereof.
3. Granting further and/or alternative relief to the applicant.”

Applicant is United Africa Group (Pty) Ltd, a company duly incorporated in terms of laws applicable in Namibia, with its Head Office at Suite 5001, Gutenberg Plaza, Werner Street, Windhoek.

First Respondent is the Chairperson of the Tender Board who has been cited in his official capacity with his Business address in Fiscus Building, John Meinert Street, Windhoek.

Second Respondent is the Minister of Labour and Social Welfare, also cited in his official capacity c/o the Government Attorney, Sanlam Centre, Independence Avenue, Windhoek.

Third Respondent is John and Penny Group of Companies (Pty) Ltd, a company duly incorporated and registered as such with its address at 7 Lüderitz Street, Windhoek, cited only for the interest it might have in this relief sought.

Fourth Respondent is Patriotic Paymaster Services (Pty) Ltd, a company duly incorporated and registered as such with address at 1st Floor, South Block, Maerua Mal, Centaurus Road, Windhoek, also cited only for the interest it has in the relief sought.

Fifth Respondent is Kujo Investments (Pty) Ltd, a company duly incorporated and registered as such with address at Unit 48 Hypermotor City, Maxwell Street, Southern Industrial Area, Windhoek, cited solely for the interest it has on the relief sought.

Sixth Respondent is Anther Investment CC, a close corporation duly incorporated and registered as such with address at 9 Schuster Street, Windhoek who is cited solely for the interest it has in the relief sought.

Seventh Respondent is Epupa Investments Technology (Pty) Ltd, a company duly incorporated and registered as such with address at 30 Blohm Street, Windhoek.

[2] As indicated and set out above, the application is to review and set aside the decision taken by the Tender Board on 29 October 2010 to award Tender A6-1/2010 for Cash Payment of Basic State Grants Allowances to Beneficiaries to the seventh respondent, Messrs Epupa Investments Technology (Pty) Ltd, to declare the said decision to be in conflict with Article 18 of the Constitution and to award the tender to the applicant as well as an order for costs against the respondents who oppose the application.

[3] Briefly the facts of the matter are as follows:

In 2010, approximately in the middle of the year, the Tender Board invited tenders under Tender A6-1/2010 for the rendering of services to the Government to effect cash payment of basic grants, allowances to beneficiaries for the period 1st December 2010 to 30 November 2015. The closing date of the tender being Tuesday, 21 September 2010 at 14h30. Six tenderers, namely the applicant and third to seventh respondents tendered and submitted their tender bids. After the assessment of the bid documents, only two out of the six tenderers

were found to meet all the specifications and conditions of the tender. These were Messrs United Africa Group (Pty) Ltd (the applicant), the second lowest and Messrs Epupa Investment Technology (the seventh respondent), the lowest tenderer.

[4] In their letter dated 18 October 2010, to the Secretary of the Tender Board on pages 2 and 3, the Ministerial Tender Committee indicate as follows in respect of the applicant and the seventh respondent.

“Messrs United Africa Group

The Ministry undertook site visits and was convinced that the site that the company wants to use is conducive for the execution of the tender. In terms of capacity to execute the work, the Ministry was quite satisfied. As far as further compliance to the technical and operation specifications is concerned, the proposal submitted by Messrs United Africa Namibia as well their presentation conforms to the tender specifications and conditions as spelled out in the tender document. The Ministry also verified their submission of guarantee and received confirmation from their Bank as attached. (Emphasis added)

Messrs Epupa Investment Technology

The Ministry undertook site visits and was convinced that the site that the company wants to use is conducive for the execution of the tender. In terms of capacity to execute the work, the Ministry was quite satisfied. As far as further compliance to the technical and operational specification is concerned, the proposal submitted by Messrs Epupa Investments as well as their presentation, conform to the tender specifications and conditions as spelled out in the tender document.

The Ministry also verified their submission of guarantee and did not receive confirmation from their Bank.” (Emphasis added)

I have quoted the aforesaid verbatim from the letter because the applicant relied heavily on the difference of the guarantees submitted by the applicant and the seventh respondent, to fight the decision of the Tender Board by awarding the tender to the seventh respondent.

[5] The Ministerial Tender Committee then recommended to the Tender Board that the tender be awarded to the applicant because, according to them, their bid submission met all the specifications and conditions of the tender; that they were the second lowest and their prices were fair and reasonable.

[6] However, the Tender Board did not agree with the recommendation of the Ministerial Tender Committee to award the tender to the applicant. Instead, it awarded the tender to the seventh respondent. The Tender Board also requested reasons from the Ministerial Tender Committee why they did not recommend the lowest qualifying tenderer - in this case the seventh respondent. The Minister Tender Committee replied that the seventh respondent did not provide a letter of confirmation as the applicant did. The Tender Board disagreed and was of the view that the letter of intent, the seventh respondent provided, was good or sufficient proof that the bank will

issue the written guarantee once the tender has been awarded to them. Further, the Tender Board was also of the view that the issue regarding the confirmation of the guarantee was not a pre-requisite a tenderer must comply with for a tenderer to qualify, and that it was never stated anywhere in the tender documents that tenderers should provide a letter of confirmation from a bank in addition to the letter of intent. As a result hereof, the applicant wrote a letter to the Secretary of the Tender Board and threatened to take its decision to the High Court on an urgent basis in search of an appropriate relief. The Tender Board replied and indicated that it had approached the Attorney-General's office for advice regarding the issue.

[7] While still waiting for the advice from the Office of the Attorney-General, various correspondence were exchanged between the applicant and the Secretariat of the Tender Board whereby the applicant attempted to persuade the Tender Board to withdraw its decision. The Tender Board did not agree and the applicant approached the High Court on an urgent basis in terms of Rule 6(12) for amongst others, to interdict the Tender Board from implementing its decision of awarding the tender to the seventh respondent and to be granted other relief. The High Court refused the application for lack of urgency and as such the applicant was forced to proceed on the ordinary basis. This is now the application which served before me.

[8] As previously indicated it is an application brought to Court by the applicant in terms of Rule 53 of the High Court Rules, requesting the Court to grant them the aforesaid relief. The grounds for the review are as follows:

“31.1 The requirement for a guarantee could not be dispensed with by the Board. The Board thus acted outside the scope of their powers and did not understand the legal basis of the exercise of their discretion.

31.2 The Board took irrelevant matters into consideration while ignoring relevant considerations.

31.3 Whereas the price of tender is relevant, the **“best interest of equal wealth distribution”** has no foundation in fact or law and is irrelevant to the discretion that had to be exercised.

31.4 The reference to **“best interest of equal wealth distribution”** is indicative of improper purpose or ulterior motive.

31.5 The Board had no apprehension for the relevant decisional referents.

31.6 That the decision is distorted by an error as to the Board’s statutory powers in condoning Epupa’s non-compliance.

31.7 Dispensing with the requirement relating to the unconditional written guarantee the Board contravened sec.15(2)(a) and 15(3)(a) of the Tender Board of Namibia Act, No 16 of 1996.”

[9] The fourth respondent also joined the applicant to have the decision of the Tender Board reviewed but withdrew their opposition and counterclaim on the eleventh hour before the hearing of the review. Mr Frank, SC assisted by Mr Dicks represented the applicant and Mr Coleman acted on behalf of the seventh respondent. No

appearance for first respondent, although the review in the matter was directed against the decision of the Tender Board of which first respondent is the Chairperson. It is also strange that no attempt was made, either by way of an affidavit or otherwise, by first respondent on behalf of the Tender Board to defend or explain why the latter decided to grant the tender to the seventh respondent and not to the applicant who was recommended by the Ministerial Tender Committee.

[10] Be that as it may. When the hearing started, Mr Coleman, counsel for the seventh respondent applied for condonation for the late filing of the heads of argument and tendered payment of costs of such application. In view of the fact that other parties were given notice in advance and that the cause for the delay of the late filing thereof was explained in an affidavit by Ms Angula, the legal practitioner for the seventh respondent, and also that nobody objected or opposed the application, I granted the application as prayed for and condoned the late filing of the heads of argument.

[11] I must also mention that both Counsel for the applicant and for the seventh respondent prepared written heads of argument which they amplified with oral submissions during the hearing. Submissions from both side were extensive and to the point. Both counsel indicated that they will not go through their heads paragraph by paragraph but

rather would highlight and summarise the core issues in the written heads of argument. This was done to curtail the duration of the proceedings. That despite, counsel were still allowed the time to argue the cases of their clients as they pleased.

[12] In conclusion of their submissions, Mr Frank, counsel for the applicant requested the court to find in favour of his client. In the alternative, he argued that should the court not find in favour of his client and award the tender to the applicant the court should set aside the decision of the Tender Board and refer the tender back to the Tender Board for reconsideration. Mr Frank also prayed for costs of the application. On his side, Mr Coleman, counsel for the seventh respondent, argued in conclusion, that the Tender Board did not act *mala fide* - that the authority referred to by the applicant were irrelevant and therefore the application should be dismissed with costs. According to him the decision taken by the Tender Board was not reviewable.

[13] Rule of court 53 is the rule that prescribes the procedures for bringing certain matters on review. The relevant part of it provides as follows:

“53. (1) Save where any law otherwise provides, all proceedings to bring under review the decision or proceeding of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative

functions shall be by way of notice of motion directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairman of the court, tribunal or board or to the officer, as the case may be, and to all other parties affected-

- (a) calling upon such persons to show cause why such decision or proceedings should not be reviewed and corrected or set aside; and
- (b) calling upon the magistrate, presiding officer, chairman or officer, as the case may be, to dispatch, within 15 days after receipt of the notice of motion, to the registrar the record of such proceedings sought to be corrected or set aside, together with such reasons as he or she is by law required or desires to give or make, and to notify the applicant that he or she has done so.

(2) The notice of motion shall set out the decision or proceedings sought to be reviewed and shall be supported by affidavit setting out the grounds and the facts and circumstances upon which applicant relies to have the decision or proceedings set aside or corrected.” (See also *Federal Convention Namibia v National Assembly, Namibia* 1991 NR 69 at 71 J).

[14] Apart from prescribing the procedures to be followed, the Rule also provides that the applicant in the review proceedings should also provide grounds and facts as well as circumstances upon which being relied on to have the decision or proceedings set aside or corrected, set out in an affidavit. That has been complied with by the applicant in this application. Several grounds for the review were set out in the affidavit of Mr Rubinstein who deposed to the founding affidavit of the applicant. However, it would appear from the affidavit, written heads

of argument and oral submissions that the bone of contention is the tender requirement under the heading "FINANCIAL VIABILITY" relating to the furnishing of a letter from a bank indicating financial viability of a tenderer to execute the tender if successful.

[15] The applicant is arguing that the seventh respondent did not meet this requirement, therefore, the Tender Board made a mistake by awarding the tender to them. They (the applicant) argued that although both the applicant and the seventh respondent provided letter of good standing from the First National Bank, that of the seventh respondent was conditional. The Tender Board considered the letter of intent provided to the seventh respondent by the bank and found it to be sufficient proof that the Bank will provide the guarantee once the tender has been awarded to them.

[16] There is nothing wrong or untoward in this consideration by the Tender Board, in my view. In any event, the Ministerial Tender Committee did not disqualify the seventh respondent for failure to provide a letter of confirmation from a bank. The Ministerial Tender Committee, also held the view that the so-called letter of confirmation was not a requirement of the tender, therefore, could not be held against the seventh respondent. Although the applicant was recommended to be awarded the tender, the seventh respondent also

qualified. This is what the Ministerial Tender Committee said in their letter dated 19 October 2010 to the Tender Board regarding the seventh respondent. The Tender Committee said the following regarding the seventh respondent:

“Messrs Epupa Investment Technology

The Ministry undertook site visits and was convinced that the site that the company wants to use is conducive for the execution of the tender. In terms of capacity to execute the work, the Ministry was quite satisfied. As far as further compliance to the technical and operational specification is concerned, the proposal submitted by Messrs Epupa Investments as well as their presentation, conform to the tender specifications and conditions as spelled out in the tender document.

The Ministry also verified their submission of guarantee and did not receive confirmation from their Bank.” (Emphasis added). It is thus clear from the above that the seventh respondent met all the requirements of the tender.

[17] Clause 28 of the Terms and Conditions on which the applicant rely heavily as the core ground for the review, does not make provision for a confirmation letter to be provided by the tenderers. To the contrary this is what clause 28 provided:

“28. Financial Viability

A letter of good standing from the Bank indicating financial viability of the Contractor to deliver services as well as a written guarantee, the value of which shall be 10% of the monthly aggregate (N\$55,000,000.00) of Basic State grant and allowances handed into the contractors custody, from the financial institution will be required.”

It follows therefore, that the allegation of the applicant that the seventh respondent did not meet the requirements of the tender, is baseless, does not hold water and is rejected.

[18] It must also be mentioned that when the tender was awarded to them (seventh respondent) they managed to procure the bank guarantee from Bank Windhoek. In the meantime, a contract has been entered into between them and the Ministry of Labour and Social Welfare to implement the tender. It was also submitted on behalf of the seventh respondent that they have already commenced on the 1st December 2010 to execute the tender.

[19] It is also the contention of the applicant that to award the tender to the seventh respondent and not the applicant, because it would not be in the “best interest of equal wealth distribution” shows a failure on the side of the Board to appreciate the extent of its discretion. The criteria used by the Board were not sanctioned by the Tender Board Act or any law therefore not a legally permissible factor when taking their decision – the applicant further argued.

[20] The applicant might be correct in stating so, the Tender Board of Namibia Act, 1996 (Act 16 of 1996) (the Act) does not provide for such a consideration. However, the applicant must not forget that the

Tender Board did not only consider the so-called “in the best interest of the equal wealth distribution” but also that the lowest qualifying tenderer, namely the seventh respondent must have been recommended by the Ministerial Tender Committee. The Board was not convinced without a motivation from the Committee why the seventh respondent was not recommended in the first place.

[21] I think the Tender Board was aware of the provisions of section 15(6) of the Act which provides that “if the Board does not accept the lowest tender or tenders from the among all the tenders submitted to it, the reasons for not accepting the lowest tender or tenders shall be kept on record by the Board.” These reasons, the Tender Board did not have and would have been a misdirection on the part of the Tender Board to ignore this statutory obligation which is couched in peremptory terms. In *Cash Paymaster Services (Pty) Ltd v Eastern Cape Province* 1999(1) SA 324 at 357 F Ebrahim, AJ made the following conclusion in situations where the Tender Board does not accept the lowest tender:

“It is trite that one of the crucial factors in the awarding of a tender is the question of costs. While the Tender Board is not necessarily obliged to accept the lowest tender, it is required where it rejects such a tenderer to provide adequate and cogent reasons for its decision based on the relevant facts before it.” (Emphasis added)

[22] In *casu*, the facts before the Tender Board were that both the applicant and the seventh respondent met the requirements of the tender, and that the seventh respondent were the lowest tenderer of the two. Therefore, if the Tender Board agreed with the recommendation of the Ministerial Tender Committee, it would have failed to save the government costs and would not have been in a position to provide adequate and cogent reasons to justify its decision. Ebrahim, AJ continued at 359 I - 360 A and said:

“Those in public office, at every level must constantly be aware of their responsibilities in this regard. Public funds cannot be spent as if they are in endless supply. Nor can the attitude be adopted that to misspend millions of rands is of little or no consequence. Tender Boards, more than any other government tribunals, have a particular responsibility in this regard. The value of annual contracts nationally probably run into trillions of rands if tender boards do not recognise that their primary task is the procurement of the services of tenderers at the least possible costs to the State... the ability to of the government to balance its budget is greatly undermined.”

I agree with the arguments of Ebrahim, AJ in his concurring judgment with Pickard, JP, in the matter of Cash Paymaster Services (Pty) Ltd *supra*

[23] That being the case, I am in agreement with seventh respondent’s submission that the role of the Tender Board is to ensure that the government gets the best price and value for what it pays for. By doing what the Tender Board did, it cannot be said that it had

overstepped its powers provided in the Act. There is also nothing wrong in the procedure followed by it in awarding the tender to the seventh respondent. The fact that mention was made about “the best interest of equal wealth distribution” by the Tender Board, it was never considered to be the overriding factor of its decision. The main reason for its decision to award the tender to the seventh respondent, in my view, was the fact that the seventh respondent, as one of the two tenderers who met all the requirements of the tender and the lowest of the two, should get the tender. By so doing, it will save costs to the government and will not need to scratch their heads for reasons to justify the decision for not awarding it to the lowest qualifying tenderer. Consequently, in view of the aforementioned, I find that the applicant failed to prove the relief sought in the notice of motion, that the procedure followed was fair and reasonable and is not in conflict with Article 18 of the Constitution of Namibia and that the application should fail.

[24] In the result, therefore, I make the following order:

1. The application is dismissed with costs such costs to include costs of one instructing and one instructed counsel.

2. Further, the fourth respondent is ordered to pay costs in favour of the seventh respondent from date of the application until the 16th May 2011 excluding the costs of the hearing of the application, such costs also to include the costs of the instructing and instructed counsel.

UNENGU, AJ

Appearance for the parties:

For the applicant:

Mr T Frank

Instructed by: Theunissen, Louw & Partners

For the seventh respondent:

Mr G

Coleman

Instructed by: LorentzAngula Inc