

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 320/2014

In the matter between:

TULIPAMWE CONSULTING ENGINEERS

APPLICANT

And

**ROADS AUTHORITY
ROADS FUND
THE CHAIRPERSON OF THE TENDER COMMITTEE
OF THE FIRST RESPONDENT
LITHON-GIBB (PTY) LTD**

**FIRST RESPONDENT
SECOND RESPONDENT
THIRD RESPONDENT
FOURTH RESPONDENT**

Neutral citation: *Tulipamwe Consulting Engineers v Roads Authority (A320/2014)*
[2015] NAHCMD 103 (9 April 2015)

Coram: MILLER AJ

Heard: 9 April 2015

Delivered: 9 April 2015 (ex tempore)

Judg: made available: 29 April 2015

ORDER

1. The first respondent is ordered to make the record of the proceedings available to the applicant within 10 days from the date of this order and to advise the Registrar of this Court that it has done so.
2. The first respondent shall pay the applicant's cost which shall include the cost of one instructing and two instructed counsel.
3. The matter is postponed to 30 April 2015 at 15:30 for a status hearing.

JUDGMENT

MILLER AJ:

[1] Presently pending before me is an application in terms of Rule 76 of the Rules of the Court to review the decision by the first respondent in terms thereof of the applicant's tender was either not considered or disallowed. Rule 76 reads as follows and I quote: 'All proceedings to bring under review the decision or proceedings of an inferior Court, Tribunal and an Administrative body or Administrative Official are, unless a law otherwise provides by way of application directed and delivered by the party seeking to certain review such decision or proceedings to the Magistrate or Presiding Officer of the Court, the Chairperson of the Tribunal, the Chairperson of the administrative body or administrative official and to all other parties affected.

[2] An application referred to in sub rule (1) must call on the person referred to in the sub rule to, (a) show cause why such decision or proceeding should not be reviewed and corrected or set aside, b) Within 15 days after receipt of the

application to serve on the Applicant a copy of the complete record and file with the registrar of the original record of such proceedings so to be corrected and set aside together with reasons for the decisions and to notify the Applicant that he or she has done so'.

[3] Rule 76 finds resonance with the Constitutional principles enshrined in Article 18 of the Namibian Constitution which obliges Administrative bodies and Tribunals to act fairly. It is common cause that the applicant has called on the first respondent to comply with sub rule (2) of Rule 76 which I have quoted above. It is further common cause that the first respondent has not complied with the rule in as much as the record has not been made available to the applicant.

[4] The purpose of the rule is set out in Judgment of Kriegler AJA as he then was, in *Jockey Club of South Africa v Forbes* 1993 (1) SA 649 (A). It is apparent that an application in terms of Rule 76 affords the Applicant the right to have access to the record of the proceedings under review and to amplify or vary or amend the notice of motion and the founding affidavit. The reason for it in my view is that the decision is taken in the absence of the applicant and in order to make out its case the rule provides that the record should be provided.

[5] The respondent represented by Mr Frank assisted by Ms Sauls adopt the stance that the applicant did not make out a *prima facie* case in the founding affidavit. Henceforth so it is argued the provisions of the sub rule (2) of the Rule 76 do not find application. The principle is that in considering whether a *prima facie* case has been made out or not the court will accept that the facts stated in the founding affidavit are correct.

[6] I also bear in mind that in order to make out a *prima facie* case requires a fairly low threshold and it is sufficient if the facts set out in the founding affidavit is sufficient to conclude that a reasonable court may or could find in favor of the

applicant. It is apparent from the founding Affidavit that the tender was either not considered at all or that it was disqualified on the basis that it was tainted by corrupt acts on the part of the applicant and its employees. It would appear if the tender was disqualified or was not considered at all because so it is alleged, the applicant's tender did not comply with the tender requirements in as much as an alternative tender was submitted.

[7] This allegation is denied by the applicant in the founding affidavit. It also denies the further allegation that there was any corrupt practice which could have led to the disqualification of the tender. If either of these allegations are correct, it would follow that the first Respondent did not act reasonably in considering the tender application of the Applicant. I am satisfied that on a *prima facie* basis a case has been established on the founding papers for the review of the first Respondent's decision.

[8] In the circumstances the following orders are made:

1. The first respondent is ordered to make the record of the proceedings available to the applicant within 10 days from the date of this order and to advise the Registrar of this Court that it has done so.
2. The first respondent shall pay the applicant's cost which shall include the cost of one instructing and two instructed counsel.
3. The matter is postponed to 30 April 2015 at 15:30 for a status hearing.

PJ MILLER
Acting Judge

APPEARANCES

APPLICANT: Mr Heathcote, assisted by Ms Van Der Westhuizen
Instructed by Van der Merwe-Greef Andima Inc.
Windhoek

RESPONDENT: Mr Frank, assisted by Ms Sauls
Instructed by Sauls & Co Law Chambers,
Windhoek

Instructed by Ellis Shilengudwa Inc, Windhoek