



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 52/2014

In the matter between:

**FREE NAMIBIA CATERERS**

**APPLICANT**

And

**THE CHAIRMAN OF THE TENDER BOARD  
OF NAMIBIA**

**FIRST RESPONDENT**

**THE MINISTER OF EDUCATION**

**SECOND RESPONDENT**

**PERMANENT SECRETARY, MINISTRY OF  
EDUCATION**

**THIRD RESPONDENT**

**DIRECTOR (PQA) MINISTRY OF EDUCATION**

**FOURTH RESPONDENT**

**CHAIRPERSON MOE TENDER COMMITTEE**

**FIFTH RESPONDENT**

**Neutral citation:** *Free Namibia Caterers v The Chairman of the Tender Board of Namibia* (A 52-2014) [2015] NAHCMD 196 (21 August 2015)

**Coram:** MILLER, AJ

**Heard:** 26 November 2014

**Delivered:** 21 August 2015

**Flynote: Review** – Decision of tender board to award tender for catering services to government schools – Review to set aside and re-award the tender to the applicant – Supreme court confirming the setting aside and ordering for re-awarding of the

original tender to other tenderers, including the applicant – Tender awarded to the applicant - Specific tender period omitted from the award – Application to extend the period dismissed since the supreme court ordered that the original tender should be the one to be re-awarded.

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### ORDER

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1. The application is dismissed with costs, including costs of one instructing counsel and one instructed counsel in favour of the respondents.
2. The interim order issued on 27 March 2014 is hereby discharged.

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### JUDGMENT

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MILLER AJ:

- [1] This is an application brought on notice of motion.
- [2] The applicant seeks the following relief:
  - (a) That the decision of the Ministry of Education (MOE) Tender Committee made on 4 November 2013 recommending that the Tender Board award Tender A9-11/2009 for the Ohangwena/Oshikoto hostel catering region to Free Namibia Caterers Cc for the period 1 October to 31 March 2014 be reviewed and corrected and recommend the award of the tender for the period 10 January 2014 to 10 January 2019.
  - (b) That the decision of the Tender Board taken on 7 November 2013 in respect of the tender be corrected that “The Board resolved to award the tender to Messrs Free Namibia Caterers for the man-day price of N\$30.05 for the period 10 January 2014 to 10 January 2019”.

- (c) That the decision of the Tender Board made in February/March 2014 to invite tenders for the Ohangwena and Oshikoto regions as part of the tender number M9-11/2014 be reviewed and corrected or set aside.
- (d) That the decision of the second, third or fourth respondent in February/March 2014 to include catering services for the Ohangwena and Oshikoto regions as part of the new tender be reviewed and corrected or set aside.
- (e) Declaring that the tender awarded to the applicant on 7 November 2013 for catering services in respect of the Ohangwena and Oshikoto regions endures for a five year period from 10 January 2014 to until 10 January 2019.
- (f) Directing third and fourth respondents to comply within 10 days of the date of this order with paragraph 4 of the third respondent's letter dated 11 December 2013 by inviting Ms Christina Mentz of the applicant to sign the agreement referred to in the letter and also directing that the agreement contain the term 10 January 2014 to 10 January 2019.
- (g) That the respondents pay the costs of this application.

[3] Applicant is Free Namibia Caterers CC, a close corporation duly incorporated in terms of laws applicable in Namibia, with its principal place of business at farm Mannheim 100/22 district of Tsumeb, Oshikoto Region.

[4] The respondents are cited in their official capacities. The first respondent is the Chairperson of the Tender Board of Namibia. The second respondent is the Minister of Education. The third respondent is the Permanent Secretary, Ministry of Education. The fourth respondent is the Director (PQA), Ministry of Education. The fifth respondent is the Chairperson, Ministry of Education Tender Committee. I shall refer to them collectively as 'the respondents' except where the context otherwise requires.

[5] The background to the application is that on or about 2009 the Chairman of the Tender Board of Namibia cited as first respondent put up tender Number A9-11/2009 for the rendering of catering services to government hostels countrywide.

[6] In reaction to the call for tenders, applicant together with other companies submitted their tenders for Caprivi-Kavango, Ohangwena-Oshikoto and Otjozondjupa regions.

[7] On 18 May 2009, the applicant received a letter from first respondent that its bid for Ohangwena-Oshikoto was unsuccessful. The relevant tender was awarded to an entity named Conger Investments (Pty) t/a Atlantic Food Services, not a party to the present application.

[8] Being dissatisfied with the decision of the first respondent not to award the relevant tender to it, the applicant initiated review proceedings by way of application to review and set aside said decision of the first respondent. The applicant also sought for an order that the tender for this region be awarded to it.

[9] The High Court set aside the decision awarding the tender but did not order that it be awarded to the applicant. Respondents dissatisfied with the setting aside of the tender, appealed to the Supreme Court. On 15 July 2013 the Supreme Court dismissed the appeal and cross-appeal, which accordingly meant that the award of the tender remained set aside as per the High Court order.

[10] In so far as the issue of correcting the award, the Supreme Court directed that the tender be referred back to the Tender Board for reconsideration and that the only tenders to be re-considered are those of the respondent (applicant in the instant application) and two other companies that submitted tenders for the region, excluding Conger Investments (Pty) t/a Atlantic Food Services.

[11] Giving effect to the Supreme Court order, the Tender Board re-evaluated the said tenders and awarded the tender to the applicant for the remainder of the original tender period, that is, until end March 2014. It is this decision which the applicant now seeks to attack.

[12] The case of the applicant is simply that the notification by the first respondent

did not stipulate a period for the tender but only stated that: 'The period will be indicated in the contract'.

[13] It was submitted on behalf of the applicant that the issue of the term of the contract was at least on five occasions raised with the respondents, to which they failed to react. In this regard counsel for the applicant referred me to a series of the letters addressed to the respondents, attached as annexures to the amended notice of motion. Counsel submitted that as a result of the respondents' failure to stipulate the period of the tender and subsequent failure to react to the applicant's letters on the issue, the applicant assumed that the tender awarded to it was for the original five years. These allegations are ostensibly included in order to show a foundation for the claim that the applicant had a legitimate assumption that the tender was for the full term until 10 January 2019.

[14] The respondents' counsel in resisting this ground contended that there are no indications from the Supreme Court decision, as to which of the facts and allegations therein made, are relied upon by the applicant in support of its contentions.

[15] Counsel for the respondents submitted that it is clear from the order of the Supreme Court that what the Tender Board had to do was to award the existing tender and not a tender for a different term. Counsel further submitted that this is emphasized by the fact that the Tender Board had to re-adjudicate the tender between the then existing tenderers (save for Atlantic Food Services) who all tendered for the original tender.

[16] As regards the extension of the tender, he argued that if the applicant had wished for the term of the tender to have been extended, it (applicant) should have made out a case for such extension which it did not. Had this been done the respondents could have dealt with this issue with reference to the fact that it is a countrywide tender although divided into regions. Accordingly, the respondents never had an opportunity to address this issue at all as it was not raised until this review was launched.

[17] Counsel claims that the Tender Board in awarding the tender to the applicant had followed all the recommendations of the Supreme Court and there were no irregularities on its part. There was no duty on the Tender Board to go out of its way and determine a new term. The respondents claim that if the applicant wanted to extend the original term, it should have approached the first respondent and enquired about the extension of the original term. This did not happen.

[18] Relying on the stated facts, the respondents contend that the attempt in this application by the applicant in a roundabout manner to review the decision of the Supreme Court should not be countenanced. The Supreme Court directed that the Tender Board re-consider the original tender - and not one for a longer term- and that is exactly what the Tender Board did. In this respect the applicant cannot, because it failed to persuade the Supreme Court to correct the decision by extending the term of the tender, now attempt to rectify that failure and get the High Court to make the 'correction' that should have been sought and obtained in the original review application. In this premises, the respondents claim that the relief sought by the applicant is untenable.

[19] In respect of the claim for damages, the applicant's claim is based on equity and fairness. The applicant seeks to draw support for its submission from a principle better known in the law of delict. It argues that it lost a certain period of the duration of the tender, due to the incorrect award made initially. Consequently it is entitled to be put in the same position it would have been in had the initial wrong not been committed.

[20] On that score, the argument cannot prevail if the judgment of the Supreme Court confines the award of the tender to the then existing tender. Otherwise it would tantamount to reviewing the decision of the Supreme Court.

#### Issue

[21] The issue that confronts me is whether the applicant is entitled to have the tender for the full period to 10 January 2019.

[22] The applicant's contention is that the notification of awarding the tender by

the first respondent did not stipulate a period and as a result of the respondents' failure to stipulate the period of the tender and subsequent failure to react to the applicant's letters on the issue, the applicant assumed that the tender awarded to it was for the original five years. It is in such premises that the applicant contends that the tender should have been awarded to the applicant for the period until 10 January 2019.

[23] The respondents, on the other hand, urged me to dismiss the application on the ground that the Supreme Court did not extend the original tender. The nub of the contention is that the Supreme Court directed that the Tender Board reconsider the original tender –and not one for a longer term- and that is exactly what the Tender Board did. Therefore the re-consideration and subsequent re-awarding of the tender by the Tender Board merely reaffirmed the self-evident directives of the Supreme Court. In conclusion, the respondents submit that the applicant is barred from seeking rectification of its failure in persuading the Supreme Court to correct the decision by extending the term of the tender.

[24] I agree with the respondents. It is evident that from order 4 of the Supreme Court decision that the Tender Board was directed to re-consider the original tender and not one for a longer term- and that is exactly what the Tender Board did. Moreover, it is also clear from the said order that the term of the contract was never extended by the Supreme Court. In my view, in these circumstances, the applicant's contention that it is entitled to have the tender for the period to 10 January 2019, therefore fails.

#### Order

[25] In the premises I make the following order:

1. The application is dismissed with costs, including costs of one instructing counsel and one instructed counsel in favour of the respondents.
2. The interim order issued on 27 March 2014 is hereby discharged.

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Miller, AJ  
Acting

APPEARANCES

APPLICANT : G Coleman (assisted by E Angula)  
Instructed by AngulaColeman, Windhoek

RESPONDENTS: T J Frank SC  
Instructed by Government Attorney, Windhoek