



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-MOT-REV-2016/00234

In the matter between:

TULIVE REINSURANCE BROKERS (PTY) LTD

APPLICANT

and

**THE CHAIRPERSON OF THE TENDER
BOARD OF NAMIBIA**

FIRST RESPONDENT

**PERMANENT SECRETARY – MINISTRY OF
WORKS AND TRANSPORT**

SECOND RESPONDENT

AON NAMIBIA (PTY) LTD

THIRD RESPONDENT

WELWITSCHIA INSURANCE BROKERS

FOURTH RESPONDENT

ENYANDI INVESTMENT BROKER LTD

FIFTH RESPONDENT

Neutral citation: *Tulive Reinsurance Brokers (Pty) Ltd v The Chairperson of the Tender Board of Namibia* (HC-MD-CIV-MOT-REV-2016/00234) [2017] NAHCMD 79 (16 March 2017)

Coram: PARKER AJ

Heard: 24 – 25 January 2017

Delivered: 16 March 2017

Flynote: Administrative law – Judicial review – Review of award of tender – One reason for applicant's bid failing was that applicant failed to submit all relevant tender

documents – Applicant contended it submitted all pages of the tender documents in question – Respondent denied applicant did – Court found that on the papers respondents' denial raised genuine and material dispute of fact which was not referred to evidence – In that regard court was bound to accept the version of the respondent and facts admitted by the respondent, contained in applicant's affidavits – Having so decided court concluded that there were missing pages in applicant's bid documents – Consequently, respondents were entitled to disqualify applicant and entitled not to award tender to applicant – Principle in *Mostert v The Minister of Justice* 2003 NR 11 (SC) applied.

Summary: Administrative law – Judicial review – Review of award of tender – Applicant's tender rejected because there was missing pages in applicant's submitted bid documents – Applicant's bid disqualified on that basis – Nevertheless respondents went ahead to consider applicant's bid – Applicant's bid failed because of the missing pages from submitted applicant's bid documents and also because applicant provided a Securities' Financial Strength documents that stated a Ration as of November 2016 – Court found that respondent acted wrongly when they considered applicant's bid which was disqualified due to incomplete bid documents – And respondents did not act wrongly when they rejected applicant's award – If court set aside the award upon the application of the applicant would be tantamount to the court perpetuating an illegality committed by respondents – Accordingly, court dismissed the application.

ORDER

The application is dismissed with costs, which costs must be paid to first and second respondents.

JUDGMENT

PARKER AJ:

[1] In this matter the court is presented with a neat question: Are the reasons that first respondent's Board ('the Tender Board') gave for rejecting applicant's tender based on reasonable considerations? The applicant, represented by Mr Phatela, says that they are not based on reasonable considerations, and has approached the court to review the decision. First and second respondents ('the respondents'), represented by Mr Boonzaier, have moved to reject the application.

[2] In April 2016 the Ministry of Works and Transport advertised a tender: Tender No. A10/2-26/2016. This tender is the subject matter of the instant proceeding. The applicant's case is that its representative obtained an original of the tender documents and applicant submitted a bid on those original documents. Applicant says that it duly completed a bid document TB1288 and supplied information on pages 1, 2, 3, 4, 5, 6 and 7. Applicant initialled on every page and signed on the last page, and also filled in the date part: 10.05.2016.

[3] Applicant says further that it completed a bid document TB556 and supplied information on pages 8, 9, 10 and 11. Applicant initialled on every page and signed on the last page, and also filled in the date part: 10.05.2016. Furthermore, applicant says it duly completed a bid document TB339 which contained two sheets, reflecting pages 12, 13 and 14. As with the previous documents, applicant says that it supplied information on pages 12, 13, 14 and 15, and initialled on all the pages and signed on the last page and filed in the date part: 10.05.2016.

[4] Applicant avers further that it duly completed a bid document TB489 which contained pages 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29 and 30. These pages received the same treatment as the pages of the other bid documents.

[5] In due course the Tender Board informed applicant (through its legal representatives) that applicant's bid was unsuccessful and gave the following reasons for not awarding the tender to applicant:

- '- Messrs Tulive Reinsurance Broker (Pty) Ltd omitted pages 3, 5, 7, 9, 11, 13, 15, 17, 19, 21 and 23 on the TB 1288, TB/556, TB339 and TB489.

- Messrs Tulive Reinsurance Broker (Pty) Ltd provides a Securities' Financial Strength documents that states a Ration as of November 2016.'

[6] Applicant stated -

'15. The applicant's contention is that its tender document was tampered with and pages 3, 5, 7, 9, 11, 13, 15, 17, 19, 21 and 23 were removed. The effect of the tampering was that the first respondent disqualified the applicant's tender.

'16. At the outset we submit that even if it is concluded that the applicant's tender document was not tampered with, the omission of those pages by functionaries of the first respondent amounted to a material mistake of fact and the tender award would still be liable to be set aside by this honourable court.'

[7] The first respondent ('the respondents') contend contrariwise that the applicant might have re-copied its bid documents and in the process might have omitted pages in question. In this regard it is important to note that the missing pages bear odd numbers which creates the likelihood that since the bid documents were printed on both sides, that is, back and back, the respondents' contention cannot be so outrageous that it cannot be tenable. Respondents reject applicant's allegation that respondents and their officials tampered with applicant's tender bids. In sum, respondents contend that the tender documents which they received from applicant did not have the aforementioned pages and therefore its bid stood to be disqualified: the respondents put forth a denial. In my view they raised a genuine and material dispute of fact. In such situation Strydom ACJ stated in *Mostert v The Minister of Justice* 2003 NR 11 at 21G-I thus:

'In my opinion a genuine dispute of fact was raised by the denial of the Permanent Secretary and, as the dispute was not referred to evidence, the principles, applied in cases such as *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) at 235E-G and *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A), must be followed. It follows therefore that once a genuine dispute of fact was raised, which was not referred to evidence, the Court is bound to accept the version of the respondent and facts admitted by the respondent, contained in the appellant's affidavit.

Bearing in mind these principles I am not able to find that the Permanent Secretary was politically motivated or acted with an ulterior motive when she transferred the appellant.'

[9] Keeping the foregoing principles in my mind's eye, I am unable to find that the applicant submitted the missing pages of the tender documents to the Tender Board. It follows that the respondents were entitled to disqualify the applicant's bid and were, thus, entitled not to award the tender to the applicant. Indeed, as a matter of law, there was no tender submitted by applicant which the respondents could consider. The fact that the Tender Board went ahead anyway to consider the applicant's bid despite the fact that applicant's bid did not qualify to be considered along with the other bids turns on nothing. The applicant's bid, as I say, stood to be disqualified and the respondents acted wrongly to have considered the bid in the first place. To grant the relief applicant seeks and set aside the award would be tantamount to the court perpetuating the illegality committed by the Tender Board when they considered the applicant's bid in the first place.

[10] This conclusion, in my view, is dispositive of the application; for, having so concluded, it is absolutely unnecessary to consider the Tender Board's second reason for not awarding the tender to the applicant. It follows inevitably and reasonably that the application fails.

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

The application is dismissed with costs, which costs must be paid to first and second respondents.

C Parker
Acting Judge

APPEARANCES

APPLICANT: T C Phatela
Instructed by Dr Weder, Kauta & Hoveka Inc., Windhoek

FIRST AND SECOND
RESPONDENTS: M G Boonzaier
Of Government Attorney, Windhoek

THIRD, FOURTH AND
FIFTH RESPONDENTS: No appearance