

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-MOT-REV-2017/00097

In the matter between:

BABYFACE CIVILS CC JV HENNIMMA INVESTMENTS	FIRST APPLICANT
BABYFACE CIVILS CC	SECOND APPLICANT
HENNIMMA INVESTMENTS CC	THIRD APPLICANT

and

//KARAS REGIONAL COUNCIL	FIRST RESPONDENT
CHAIRPERSON OF //KARAS REGIONAL COUNCIL	SECOND RESPONDENT
MANAGEMENT COMMITTEE OF //KARAS REGIONAL COUNCIL	THIRD RESPONDENT
CHAIRPERSON OF THE MANAGEMENT COMMITTEE OF //KARAS REGIONAL COUNCIL	FOURTH RESPONDENT
//KARAS REGIONAL TENDER BOARD	FIFTH RESPONDENT
MINISTER OF EDUCATION, ARTS & CULTURE	SIXTH RESPONDENT
MINISTER OF URBAN & RURAL DEVELOPMENT	SEVENTH RESPONDENT
KAREN MUNTING ARCHITECT	EIGHTH RESPONDENT
MINISTER OF WORKS & TRANSPORT	NINTH RESPONDENT

Neutral citation: *Babyface Civils CC JV Hennimma Investments v //Karas Regional Council* (HC-MD-CIV-MOT-REV-2017/00097) [2018] NAHCMD 29 (7 February 2018)

Coram: ANGULA DJP
Heard: 5 October 2017
Delivered: 7 February 2018
Reasons: 15 February 2018

Flynote: Review – Tender – Application to review decision of the first and/or third or fifth respondents taken on 13 February 2017 cancelling the appointment of first applicant for tender No: 11/09/2016 – Whether decision to cancel the award was taken by the wrong person who did not have the power to do so and therefore *ultra vires* and unlawful – Whether in awarding the tender it was done in compliance with the statutory requirements – Whether the tender was validly cancelled or whether the sixth respondent through its agent's was estopped from cancelling the award of the tender – Court held – Doctrine of estoppel cannot be used to give effect to what is not permitted or recognized by law – The provisions of section 17 of the State Finance Act, 1991, as well as section 37(2) of the Regional Councils Act, 1992 had not been complied with prior to awarding tender number 11/09/2016 by the fifth respondent to the first applicant – Accordingly the awarding of the tender was unlawful, null and void and is set aside.

Summary: The applicants' brought an application to review and set aside the decision of the first and/or third or fifth respondent taken on 13 February 2017 cancelling the selection of first applicant for a tender awarded to them – The applicants contend that the cancellation of the award impinge on their rights to fair and reasonable administrative actions and that the respondents acted in breach of the *audi alteram partem* rule and that failure by the applicants to submit the guarantee within the stipulated time, the sixth respondent is estopped, by virtue of its principal agent's conduct, from denying that it extended the time period for filing the guarantee and the insurance documents.

The application was opposed and the sixth respondent for the most part pointed out that the award was conditional subject to the condition that the applicants' submitted the guarantee within the required time and that failure by the applicants to submit the guarantee by 15 December 2016 meant that no rights arose from the conditional award. The sixth respondent denied that estoppel applied against it through the Principal Agent and therefore submitted that the applicants' case be dismissed. In

any event the tender was awarded without prior Treasury's approval in contravention of section 17 of State Finance Act, 1991 and section 37(a) of the Regional Council Act, 1992 and was thus unlawful, null and void.

Court Held: The applicants bear the onus to satisfy the court that the review grounds raised by them are based on facts and are of such a nature that it is entitled to the relief sought.

Court held further: The provisions of section 17 of the State Finance Act, 1991, as well as section 37(2) of the Regional Councils Act, 1992 had not been complied with prior to awarding tender number 11/09/2016 by the fifth respondent to the first applicant on 8 December 2016. For the reason that no Treasury approval had been granted prior to the tender being awarded. It follows therefore the awarding of the tender was unlawful, null and void and is liable to be set aside.

ORDER

1. The main application is dismissed with costs.
2. The counter-application succeeds.
3. The award of the tender to the applicants made by the fifth respondent on 8 December 2016 is declared unlawful and invalid and is set aside for non-compliance with provisions of section 17 of the State Finance Act, 1991 and section 37 of the Regional Councils Act, 1992 respectively.
4. The tender is remitted to the fifth respondent for advertisement and fresh adjudication.
5. The applicants are to pay the sixth respondent's costs in relation to the counter application.

JUDGMENT (REASONS)

ANGULA DJP:

Introduction

- [1] This is a review application in which the applicants seek the following orders:
- '1.1 Reviewing, correcting and setting aside the decision of the first and/or third /or fifth respondent taken on 13 February 2017 cancelling the appointment of first applicant for tender No.: 11/09/2016 ('the tender');
 - 1.2 Declaring the first respondent and or third and /or fifth respondent's decision of 13 February 2017 as null and void ab initio; and
 - 1.3 Compelling and directing the first respondent to enter into an agreement with the first applicant within thirty (30) days of the issue of the court order so as to implement the tender.'

[2] The application is opposed by the sixth respondent represented by its Permanent Secretary who deposed to the opposing affidavit. At the same time the sixth respondent filed a counter application in which it sought an order declaring that the award of the tender to the applicants unlawful, null and void and liable to be set aside.

The parties

[3] The first applicant is Babyface Civils JV Hennimma Investments CC a Joint Venture with a business address situated at Number 44, Church Street, Windhoek, Namibia.

[4] The Second applicant is Babyface Civils CC, a Close Corporation registered and incorporated in terms of the laws of Namibia also with a business address situated at Number 44, Church Street, Windhoek, Namibia.

[5] The third respondent is Hennimma Investment CC, a Close Corporation registered and incorporated in terms of the laws of Namibia also with a business address situated at Stand Number 30, North Street, Keetmanshoop, Namibia.

[6] The first respondent is //Karas Regional Council established in terms of section 2(1) of the Regional Councils Act No 22 of 1992. No official address has been provided. The Government Attorney's address has been provided for purpose of serving process in these proceedings.

[7] The second respondent is the Chairperson of the //Karas Regional Council, appointed in terms of section 19 of the Regional Councils Act, 1992. No official address has been provided. Likewise the Government Attorney's address has been provided for purpose of serving process in these proceedings.

[8] The third respondent is the Management Committee of //Karas Regional Council, constituted in terms of section 19 of the Regional Councils Act, 1992.

[9] The fourth respondent is the Chairperson of the Management Committee of the //Karas Regional Council.

[10] The fifth respondent is the //Karas Regional Council Tender Board established in terms of section 44B(1) of the Regional Councils Act, 1992.

[11] The sixth respondent is the Minister of Education, Arts and Culture, cited in her capacity as such.

[12] The seventh respondent is the Minister of Urban and Rural Development, cited in her capacity as such.

[13] The eighth respondent is Karen Munting Architect in her capacity as appointed Principal Agent of the ninth respondent.

[14] The ninth respondent is the Minister of Works Transport, cited in these proceedings in his capacity as such.

Factual background

[15] During 2016 the first respondent advertised a tender for the construction of a primary school at Oranjemund, situated in the //Karas Region. The applicants then formed a JV (Joint Venture) which submitted the bid. They were awarded the tender. Karen Munting, the eighth respondent had been appointed by the Ministry of Works as an agent for the government projects to provide technical assistance with regard to the implementation of capital projects.

The applicants' case

[16] Most of the facts are common cause. The applicants' case is briefly as follows: On 8 December 2016 Karen Munting Architect (the agent for the ninth respondent) addressed a letter to the applicants advising that the award of the tender was subject to applicants' satisfactorily complying with certain conditions namely: submitting a bill of quantities to the respondents' quantity surveyor within seven days justifying the tendered amount; providing a performance guarantee of 10 percent of the tendered amount within seven days from the date of the letter; submit a program work within 14 days; and signing the agreement of the building contract after they had complied with the above mentioned conditions.

[17] On 15 December 2016, the first applicant notified the principal agent that it could not furnish the guarantee within seven days and that it would only submit the guarantee on 12 January 2017, which was way after the deadline stipulated had already past. The guarantee was not submitted on the date undertaken but a draft guarantee was submitted to the principal agent on 26 January 2017 for client's consideration.

[18] The quantity surveyor then pointed out that the guarantee was in respect of the second respondent only whereas the tender was awarded to the Joint Venture. The Quantity Surveyor demanded that the guarantee must be in respect of both parties. The Quantity Surveyor further demanded that the applicant must provide proof that a public liability insurance policy was in place.

[19] On 9 February 2017, the applicants submitted the guarantee. On 13 February 2017 the principal agent addressed a letter to the applicants informing them *inter alia* that due to the fact that the applicants failed to comply with the requirements set out in the appointment letter, their appointment had been cancelled; that a moratorium has been placed by the government on all new capital projects including the tender in question; and that the Ministry of Urban and Rural Development has received written allegations of corrupt practice by the //Karas Regional Council in the awarding of the tender, therefore the Ministry would not make the appointment until the allegations of corruption have been resolved. The applicants were requested to collect their guarantee and insurance documents from the office of the principal agent.

[20] As to grounds of review the applicants contended *inter alia* that the cancellation of the award infringed on their rights to fair and reasonable administrative actions; that with regard to the allegation of corrupt practice, the applicants were not afforded an opportunity to make representations and therefore the respondents acted in breach of the *audi alteram partem* rule; and that their failure to submit the guarantee within the stipulated time by virtue of the respondent's principal agent's conducts, the respondent was estopped from denying that they extended the time period for filing the guarantee and the insurance documents.

The sixth respondent's case

[21] The answering affidavit to the application has been deposed to by the Permanent Secretary ('the PS') for the Ministry of Education, Arts and Culture (the Ministry) in her capacity as the accounting officer of that Ministry.

[22] It was the PS's case that the award was conditional subject to the condition that the applicants' submitted the guarantee within the stipulated time; that failure by the applicants to submit the guarantee by 15 December 2016, meant that no rights arose from the conditional award. The sixth respondent denied that estoppel applied against it through the Principal Agent and therefore submitted that the applicants be dismissed.

[23] As to the applicants' allegation that they were not afforded an opportunity to make representations in connection with the allegation of corruption, the PS pointed out that the allegation of corruption was levelled against the //Karas Regional Council and not against the applicants. Accordingly this ground of review was misplaced.

[24] The PS furthermore contended that the moratorium was imposed before the tender was even advertised and awarded.

Evaluation of the review grounds

[25] I will consider each ground for review separately keeping in mind that the applicants bear the onus to satisfy the court that the review grounds raised by them are based on facts and are of such a nature that it is entitled to the relief sought.

Decision to cancel the award *ultra vires*

[26] There is no doubt that the applicants were entitled to fair and reasonable administrative actions in cancellation of the tender.

[27] Mr Bangamwabo, for the applicants argued that the award of the tender could only be cancelled or suspended in terms of section 37(6) of the Regional Councils Act.1992, which provides that the Minister Urban and Rural Development may at any time, after consultation with the Regional Council, withdraw or suspend any authorization granted under section 4 for expenditure of any amount that has not yet been expended.

[28] It is common cause that apart from the PS's affidavit, no other opposing affidavit was filed on behalf of any of the other respondents. It appears from the record that the tender was cancelled by Principal Agent for the sixth respondent acting on the written instructions of the acting chief regional office of the first respondent, following a decision taken by her and a director of education of the Ministry of Education.

[29] In a letter by the acting Chief Regional Officer, addressed to the Principal Agent, she informed the Principal Agent that she had had discussed with the director

of the Ministry of Education regarding the moratorium placed on capital projects, the issue of outstanding guarantee, as well as the alleged corruption practice by the //Karas Regional Council. Following those discussions, they agreed that since the tenderers failed to furnish the guarantee by due date, 15 December 2016, the tenderers disqualified themselves and finally due to the moratorium imposed by the Central Government on all capital projects, the process should be halted for direction by the line Ministry. Subsequent to receipt of that letter, the Principal Agent addressed a letter to the applicants cancelling the award.

[30] There was no indication that there had not been prior consultation with the Minister of Urban and Rural Development pursuant to the provisions of section 37(6) of the Regional Councils Act, 1992.

[31] On the basis the undisputed facts, counsel for the applicants correctly, in my view, submitted that the decision to cancel the award was therefore taken by the wrong person who did not have the power to do so and it was therefore *ultra vires* and unlawful.

[32] Mr Kandovazu for the sixth respondent readily conceded that on the facts the decision was *ultra vires* considering the power of those who took it. In my view, the concession was rightly made. I therefore hold that the decision to cancel the tender was *ultra vires* the power of the acting chief regional officer and the director of Education was therefore unlawful.

Alleged failure by the respondent to grant the applicant an opportunity to be heard with regard to the allegations of corruption in awarding the tender

[33] In respect of this ground of review, it is to be recalled that the letter from the Principal Agent mentioned that there will be no contract signing because the Ministry of Urban and Rural Development had received written allegations of corrupt practice by the //Karas Regional Council in awarding the tender; that investigation was under way and therefore the Ministry would not make an appointment until the matter had been resolved.

[34] In that connection the applicant complained that the respondent did not grant the applicants an opportunity to make representations regarding the allegation of corruption; and that the conduct of the respondent thereby breached the *audi alteram partem* rule.

[35] The sixth respondent's response to the complaint was that the allegation of corruption was levelled against the //Karas Regional Council and not against the applicants. The applicants would not have any representations to make. Accordingly the ground of review was under the circumstances misplaced, it was further argued.

[36] The deponent to the applicants' affidavit appeared to have accepted that ground was without merit. I say this for the reason that, in his replying affidavit he argued that if the corruption was not related to the applicants why then should they be punished for conduct unrelated to them. The fact of the matter is that the allegations of the corruption were not related to the applicants and therefore the applicants were not entitled to be heard. In my view, there was no breach of the *audi rule* and therefore the applicants failed to prove this ground and it is accordingly rejected.

The moratorium on capital projects

[37] In this regard the applicants argued first, that the moratorium is not a cancellation but rather a suspension of the award of the tender for the duration of the moratorium. Second, that the moratorium infringed on the applicants' existing right with respect to the award, therefore so the argument went, the moratorium is an arbitrary administrative action in so far it purported to cancel the applicants' right without affording them an opportunity to be heard. Mr Bangamwambo for the applicants reiterated his earlier argument that there had not been prior consultation between the Regional Council and the Minister of Urban and Rural Development in terms of section 37(6) of the Regionals Act before the award was suspended or cancelled.

[38] The PS, in response, pointed out that the letter from the Minister of Finance in which the directive to impose a moratorium dated 12 September 2016 existed long before the tender in question was advertised and awarded and therefore Regional

Tender Board members failed to apply their minds and appreciate the nature of their discretion.

[39] It would appear to me that the arguments raised in connection with this ground of review are similar to those raised in the counter application. I therefore, consider it appropriate to defer considering and resolving them when I consider the counter application. I am of the view that it might be an exercise in futility to try to resolve the issue of moratorium without knowing whether the tender had been validly awarded or not. If it were to be found that it had been validity awarded then the moratorium will amount to a temporary suspension for the duration of the award and does not amount to a cancellation.

Respondents are estopped by virtue of their conducts

[40] The applicants alleged that the sixth respondent through its principal agent is estoppel from denying that it extended the time period within which it was required to file the performance guarantee. In support of this contention the applicant relied on a string of emails exchanged between the applicants and the Principal Agent, long after the deadline for submitting the performance guarantee had passed. In this connection the applicants contended that the Principal Agent held out to the applicants that the deadline had been expressly, impliedly, tacitly extended by their conduct, silence and continued communication with the applicant about the performance guarantee.

[41] The Principal Agent did not file an affidavit to deny the imputation of having extended the deadline by conducts or to explain why they continued to communicate with the applicant regarding the guarantee, past the set deadline. The PS, in her opposing affidavit, argued that the conduct of the applicants in informing the Principal Agent of their impossibility to submit the guarantee after the deadline date was highly questionable. It is to be remembered that that the PS was not privy to the discussion about the furnishing of the guarantee. Whatever she says on this point amounts to hearsay.

[42] Mr Kandovandu, for the respondent, mentioned in his heads of argument that estoppel is an equitable remedy. He then went on to argue that any person wishing

to assert estoppel must come to court with clean hands. Counsel argued further that in the instant matter the applicants came to court with unclean hands in that they were not innocent because they had failed to provide the guarantee within the prescribed deadline. I am not sure whether the concept of unclean hands and estoppel are or can be interrelated. Counsel did not refer to any authority for his proposition. I will rather consider the principle of estoppel as propounded by the other authorities.

[43] PJ Rabie, the former Chief Justice of the Republic of South Africa in his booklet; *The Law of Estoppel in South Africa* at page 108 discuss the doctrine of estoppel with reference to the judgment of *Trust Bank van Afrika Bpk v Eksteen 1964 (3) SA 402 (A)* where the court said the following:

‘The doctrine of estoppel is an equitable one, developed in the public interest, and it seems to me that whenever a representor relies on a statutory illegality it is the duty of the Court to determine whether it is in the public interest that the representee should be allowed to plead estoppel. The Court will have regard to the mischief of the statute on the one hand and of the conduct of the parties and their relationship on the other hand’.

The learned author went on to explain at page 106 that where a statute requires that certain formalities have to be complied with in order to render a transaction valid, a failure to comply with such formalities cannot be remedied by estoppel.

[44] Baxter¹ states that public authorities could never acquire lawful power through the operation of estoppel because to allow this would undermine the principle of legality; that to allow a public authority to hold out incorrectly that it is empowered to act in a certain manner would permit it to arrogate to itself power which it did not possess.

[45] In my view, it makes sense and there is force in the above statement of the law. In the instant matter there is no evidence that the Principal Agent was authorised to grant an extension for filing the guarantee. This fact in my view is borne out by the fact that the Principal Agent did not cancel the award until she was instructed by the acting chief regional office of the first respondent. Both the director

¹ L Baxter: *Administrative Law*. Juta & Co. Cape Town: South Africa, p. 401.

of Education and the acting chief regional office did not have the power to extend the time to provide the guarantee. Counsel for the applicants did not refer to any source of authority for such power. As Baxter points out, to hold out that the director of education and the acting chief regional officer and or the principal agent are estopped from denying that they have the power to extend the deadline would arrogate to those officials the power they did not possess.

[46] The doctrine of estoppel cannot be used to give effect to what is not permitted or recognized by law. As will become clear later in this judgement when dealing with the counter-application, the finding will be that, the tender was granted without Treasury authorization. By awarding the tender and thereby incurring expenditures for which there had been no appropriation or authorization the fifth respondent acted against the peremptory provisions of the relevant statutes. For all these reasons, this ground of review stands to be dismissed.

Counter-application

[47] As mentioned earlier, simultaneously with the filing of the answering affidavit in opposition to the main application, the sixth respondent filed a counter-application in which it sought an order declaring that the award of the tender awarded to the applicants is unlawful, null and void and liable to be set aside.

[48] The founding affidavit has likewise been deposed by the Permanent Secretary of the sixth respondent. The deponent stated that the project in question was one of the capital projects that fell under the mandate and funding of the Ministry of Education. The project was one of the projects that were decentralized and delegated to the Regional Councils, which took place on 26 July 2016.

[49] It is common cause that on 12 September 2016 the Minister of Finance issued a moratorium in terms of which all new capital projects were frozen. The first respondent was informed about the directive. However, on 20 September 2016, it advertised the tender which forms the subject of this application; that thereafter the acting permanent secretary of the Ministry of Works and Transport issued a circular reiterating the directive from the Minister of Finance. Thereafter on 7 December

2016, the first respondent deliberated and awarded the tender to the applicants despite the existence of the moratorium.

[50] As regard to the grounds for review, the deponent contended that the first respondent acted *ultra vires* its power in awarding the tender in that it acted outside its delegated power. Furthermore, it is a procedural requirement that before a tender is awarded there must be a certificate available confirming the availability of funds; and that when the tender in this matter was awarded the first respondent did not have such a certificate. The certificate further ensures that there is compliance with section 17 of the State Finance Act. And that by awarding the tender without Treasury authorization the first respondent acted contrary to the provisions of the State Finance Act, 1991.

[51] Firstly the funding of the project constituted a procurement of goods and services for the government and therefore the requirements of the Finance Act, No. 31 of 1991 and section of the Regional Councils Act 1992, had to be complied with. In this connection the sixth respondent pointed out that on the applicants' own version, the tender was awarded to them by the first respondent, the //Karas Regional Council and/or by the Management Committee or //Karas Regional Council, the third respondent. The sixth respondent pointed out in this respect that the relevant authority vested with the power to award government tenders is the Tender Board in terms of section 16(1) of the Tender Board Act, 1996. The sixth respondent further pleaded that the fifth respondent, the //Karas Regional Tender Board has the power to award tenders but the applicants did not allege that it had delegated its power to the first and or third respondent to award the tender.

[52] If the allegations by the applicants are correct that the tender was awarded by the first and/or the third respondent then it meant that such respondents acted *ultra vires* their powers as they have no power to award tenders.

[53] In any event, according to the PS, which is not denied by the applicants, the source of funding of the said project was the government and not the //Karas Regional Council. There had been no Treasury authorization of the expenditure in respect of the said project as required by section 17 of the State Finance Act, 1991.

Non-compliance with the provisions of section 17 would render the purported award a nullity.

Opposition of the counter application by the applicants

[54] The applicants took issue with the standing of the Permanent Secretary to bring the counter application; and that the Ministry of Education had no role to play in awarding and implementation of the tender. They contended that the power to award the tender vested in the //Karas Regional Council.

[55] As to the moratorium issued by the Minister of Finance concerning the freezing of new capital tenders the applicants contended that such directive only applied to the Tender Board of Namibia and not to the Regional Councils.

[56] The rest of the applicants' opposing affidavit consisted of bare denials and arguments.

Issues for consideration

[57] The issues for consideration in this matter are: whether when the tender was awarded it was done in compliance with the statutory requirements. In the event it is found that the tender was awarded in compliance with the statutory requirements the next question will be; whether the tender was validly cancelled or whether the sixth respondent is through its agent's conduct was estopped from cancelling the award of the tender. In the event it is found that the cancellation of the tender was invalid, the next question will be what remedy, if any, should be afforded to the applicants.

[58] I think it would be prudent to start with the issue of whether the tender was validly awarded or not because if the answer to that question is in the affirmative it will eliminate the need to deal with the other question, except the question of what remedy, if any, should be to afforded to the applicants. Counsel for the sixth respondent put it a bit differently: He stated that the question is whether or not the award was in compliance with the statutory requirements.

[59] Mr Kandovazu, referred to the definition of the 'delegation' as contained in the *Decentralization Act No of 2000* wherein the term is defined as the transfer by a Minister of a function from a Line Ministry to a Regional Council or to a local authority in order to empower and enable the Regional Council or Local Authority to perform the function as agent on behalf and in the name of the Line Ministry. Based on that definition, counsel then argued that the funding of the project in the instant matter came from the State Revenue Fund and was done by the sixth respondent as the Line Ministry. Therefore, so the argument ran, that argument that sixth respondent has no interest in the project was misplaced.

[60] Counsel further referred to section 17 of the State Finance Act, 31 of 1991 which prohibits the incurring of expenditure or making payments without Treasury authorisation. He then submitted that the awarding of a tender even at regional level amounts to incurring an expenditure. Mr Kandovazu further referred to Section 37(2) of the Regional Councils Act No. 22 of 1992 which prohibits a Regional Council from incurring any expenditure in respect of which an amount which has been appropriated and which relates to revenue derived from the Government unless it has obtained the prior authorisation of the Minister of Finance. Counsel submitted further that awarding a tender amounts to incurring expenditure therefore approval by Treasury is required. To buttress his argument, counsel referred the court to the pronouncement by the Supreme Court in the matter of *President of the Republic of Namibia & Two Others v Anhui Foreign Economic Construction Group Corporation Ltd & Another SA 59/2016* where the court said the following with regard effect of awarding of a tender without Treasury approval:

'The court found that it was thus established that an award had been made in the letter of 3 December 2015. It was common cause that the Tender Board Act, 1996 had not been followed which was required for valid procurement in capital projects involving the Government. Nor had Treasury approval been granted under the State Finance Act. The failure to follow the procedures in the Tender Board Act meant that the award was invalid and had to be set aside'.

[61] On the basis of what was stated in the *Anhui* matter, counsel submitted that the award of the tender in the instant matter is liable to be set aside due to non-compliance with the statutory provisions.

[62] Counsel for the applicants argued, with much conviction, I should say, that the provisions of State Finance Act and the Regional Councils Act were not applicable to the facts of this matter; that the Regional Act empowers the Minister to establish a Regional Council Tender Board; and that in the instant matter the tender was correctly adjudicated by the //Karas Regional Tender Board. Counsel finally disagreed that in awarding the tender, the Regional Tender Board acted *ultra vires* the power of the Tender Board.

[63] Before dealing with the issues identified for determination the issues of standing of the Permanent Secretary which has been placed in issue by the applicants. In my view, a non-issue which has been elevated to an issue. It is common cause that the Permanent Secretary is the accounting officer of the Ministry of Education. It was the PS' case that the construction of the Primary School at Oranjemund was one of the capital projects that fell under the mandate and funding of the Ministry of Education. Furthermore that the project was amongst those projects which were decentralized during the delegation phase to the Regional Council for implementation. The PS gave the date when the delegation was made namely 26 July 2016. Counsel for the sixth respondent referred the court to the provisions of the Decentralization Act, 2000, which defines delegation of functions by a line Ministry to a Regional Council whereby such Council acts as an agent of the Line Ministry.

[64] It would appear therefore that the //Karas Regional Council was acting as the agent of the Ministry of Education with regard to this project. It follows therefore in my considered view that the PS of the Ministry of Education, in her capacity as the accounting officer has the standing and indeed intimate knowledge about the project and is therefore fully qualified and has standing to oppose these proceedings on behalf on of the Ministry of Education. The denial and allegations by the deponent to the applicants' affidavit to the counter application that the Ministry of Education has no role to play in the project is without basis and are accordingly rejected. I now proceed to consider the first issue for determination identified earlier herein.

Was the tender done in compliance with the applicable statutory provisions?

[65] It was the PS's case that the tender was not done in compliance with the provisions of the State Finance Act and in contravention of the moratorium imposed by the Minister of Finance. Counsel for the sixth respondent, in his helpful heads of argument pointed out, correctly in my view, that the awarding of a tender even at the Regional Council level amount to incurring an expenditure by virtue of the provisions of section 37(2) of the Regional Councils Act, 1992. No affidavit has been filed on behalf of the Regional Council to contradict the PS's version. Furthermore as the PS pointed out, the record of the proceedings of the Regional Tender Board, which was produced in terms of the rules of this court, did not have the financial certificate from the Minister confirming the availability of funds.

[66] It was argued on behalf of the applicants that the tender in question fell under the power of the //Karas Regional Council. Reliance for this argument was placed on the contents of the letter from the PS of the Ministry of Works dated 12 July 2016, addressed to the Principal Architect, the eighth respondent, advising that the project which is the subject of this matter, together with thirteen other capital projects had been decentralized by the Ministry of Education to the Regions and therefore hence on the administrative functions previously undertaken by the Ministry of Education which included payments of professional fees accounts monthly interim payment certificates to contractors and tender adjudications will be done at regional level.

[67] There appears to be no dispute between the parties regarding the delegation of the functions in respect of the project to the Regional Council. I did earlier in this judgment deal with the effect of 'delegation' as opposed to a 'devolution' of a function by a Line Minister to a Regional Council in terms of the Decentralization Act, 2000; To the extent that I might not have made myself clearer, the Act provides that in respect of delegation of a function the Regional Council is acting as agent for and on behalf of the Line Ministry whereas in respect of devolution of a function the Regional Council is performing the function for its own profit and loss. It follows therefore from this differentiation between delegation and devolution that the Regional Council was acting as an agent for the Ministry of Education. As an agent for the Ministry, it was bound to follow and abide by the instructions of its principal.

[68] Reverting to the last leg of the applicants' argument outlined above, namely that the Regional Council, through its Tender Board was entitled to adjudicate the tender that fact equally appears not to be in dispute. As pointed out in the preceding paragraph, the first respondent, through its Tender Board, in carrying out the function as agent for the Ministry was bound to comply with the Ministry's instructions as well as the statutory provisions to which the Ministry was subject.

[69] I mentioned earlier that the applicants' opposing affidavit to the counter application is replete with denial of facts which are by virtue of her office as an accounting officer, are expected to be within the PS's knowledge but which are certainly not within the knowledge of the deponent to the applicants' affidavit. I will refer to some of the instances: The PS deposed that the project which is the subject matter of this case was one of the capital projects which fell under the mandate and funding of the Ministry of Education. In response thereto the deponent to the applicants' affidavit denied the allegation and asserted that the correct position was that the mandate and funding and awarding of the project fell under the first respondent's jurisdiction and competence. No positive evidence has been given to support the denial and the assertion. In my view no real dispute of fact has arisen. The court is satisfied about the inherent credibility of the PS's factual averment.

[70] In respect of the moratorium issued by the Minister of Finance, the PS alleged that the directive applied to all capital projects nationwide and to all stakeholders including Central Government as well as Regional Governments. Against this allegation, the deponent asserted that the directive was directed to the chairperson of the Tender Board of Namibia and applied to the Tender Board of Namibia only. It is to be noted that again no positive evidence has been tendered to support the assertion. The deponent is a mere tenderer who is denying the facts deposed to by the accounting officer of the Ministry. In my view no real dispute has been raised and the applicants' bare denial stands to be rejected.

[71] In the light of the facts, statutory provisions as case law as well as counsel's submissions considered in this matter, I have arrived at the conclusion that the provisions of the section 17 of the State Finance Act, 1991, as well as section 37(2) of the Regional Councils Act, 1992 had not been complied with prior to awarding tender number 11/09/2016 by the fifth respondent to the first applicant on 8

December 2016. This is so because no Treasury approval had been granted prior to the tender being awarded. It follows therefore the awarding of the tender was unlawful, null and void and is liable to be set aside.

[72] Having concluded that the award of the tender was unlawful, it becomes unnecessary to consider the remainder of the issues identified for determination earlier in this judgment, namely whether the tender was validly cancelled or whether the sixth respondent, through its agent's conduct is estopped from cancelling the tender. The only remaining question is what remedy should be afforded to the parties. I deal with this issue below.

Remedy

[73] The Supreme Court in *Chico/Octagon Joint Venture v Road Authority & Others*² expressed itself in the following words with regard to the appropriate remedy where an administrative act has been declared invalid. It held at par 42 that once it is concluded that a ground or grounds for review have been established, the default remedy is to set aside the challenged act and to remit the matter to the decision-maker for a fresh decision

[74] Counsel for the parties were in agreement, based on the above principle of law, that in the event the award of the tender by the fifth respondent to the applicants is held to be invalid, the matter must be remitted to the fifth respondent. The court intends to act accordingly in line with the above principle and with the concurrence of the parties.

Conclusion and order

[75] In my view, the sixth respondent has been successful with its ground of review and is accordingly entitled to the orders sought in the counter-application. On the other hand the applicant failed in their grounds for review. The main application stands to be dismissed. I cannot see the reason why the normal rule relating to costs, namely costs follow the result, should not apply in this matter.

² SA/2016 [2017] NASC 34 (21 August 2017)

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

1. The main application is dismissed with costs.
2. The counter-application succeeds.
3. The award of the tender to the applicants made by the fifth respondent on 8 December 2016 is declared unlawful and invalid and is set aside for non-compliance with provisions of section 17 of the State Finance Act, 1991 and section 37 of the Regional Councils Act, 1992 respectively.
4. The tender is remitted to the fifth respondent for advertisement and fresh adjudication.
5. The applicants are to pay the sixth respondent's costs in relation to the counter application.

H Angula
Deputy-Judge President

APPEARANCES

APPLICANTS:

F X BANGAMWABO

Of Clement Daniels Attorneys, Windhoek

RESPONDENTS:

N KANDOVAZU

Of Government Attorney, Windhoek