

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case No. HC-MD-CIV-MOT-REV-2017/00444

In the matter between:

NAMIBIA AIRPORTS COMPANY LTD

APPLICANT

and

**CHINA STATE ENGINEERING CONSTRUCTION
CORPORATION**

RESPONDENT

Neutral Citation: *Namibia Airports Company Ltd v China State Engineering Construction Corporation* (HC-MD-CIV-MOT-REV-2017/00444)[2019] NAHCMD 171 (07 June 2019)

CORAM: MASUKU J

Heard: 08 October 2018

Delivered: 07 June 2019

Flynote: Administrative Law – self-review of decision by Board – circumstances in which self-review is granted – unreasonable delay in launching review proceedings – considerations taken into account - Constitutional law - principle of legality and need to set aside decisions violating the said principle – concept of good constitutional citizenship addressed - Civil Procedure – joinder – parties entitled to be joined in proceedings considered.

Summary: The applicant brought an application for self-review in which the applicant's Board approached the court to set aside a decision awarding a tender to the respondent as it was allegedly tainted with illegality. The said decision had been taken by the Board's predecessor. The respondent opposed the application and claimed that the applicant took an unreasonably long time to launch the application for self-review and as such, the court should dismiss the application with costs.

Held that: applications for self-review are consistent with the principle of legality and require that decisions that are unlawful are not left to unattended but should be corrected.

Held further that: in the instant case, the application for self-review was brought within a reasonable time, given the particular facts attendant to the case.

Held that: the applicant's previous Board had been fed with serious misrepresentations by the applicant's employees such that the decision taken to award the tender to the applicant had not been properly made and on the basis of correct and true facts and it was liable to be set aside therefor.

Held further that: it was unnecessary to join the applicant's former employees who gave the wrong advice to the Board because they had no interest in the self-review and that any order made by the Board reviewing the decisions complained of, did not directly affect them or their interests.

The court ultimately granted the application as prayed.

ORDER

1. The decision and resolutions taken by the Applicant, Namibia Airports Company Ltd's previous Board of Directors on 23 June 2016, to award

a tender to the Respondent, China State Engineering Construction Corporation, is hereby reviewed and set aside.

2. It is declared that any contract that may have come into existence between the Applicant and the Respondent as a result of the said award referred to in paragraph 1 above and the communication of the award to the Respondent, is void *ab initio* and is hereby set aside.
3. The Respondent is ordered to pay the costs of this application consequent upon the employment of one instructing and three instructed Counsel.
4. The matter is removed from the roll and is regarded as finalised.

JUDGMENT

MASUKU J;

Introduction

[1] Standing toe to toe, staring each other eyeball to eyeball, conceding no inch to each other in this proverbial contest of words and legal principles, are two pugilists, namely, Namibia Airports Company Ltd on the one end, and China State Construction Corporation on the other. I shall refer to former as 'the Applicant' and to the latter as 'the Respondent' in this judgment.

[2] Essentially at the heart of these proceedings is a decision made by the applicant's previous Board of Directors on 23 June 2016, which awarded a tender to the respondent in relation to certain works at Ondangwa Airport, in the North of this Republic. The new Board, dissatisfied with the decision of its predecessor, has instituted these proceedings for 'self-review', in which it seeks the decisions of the erstwhile Board to be set aside.

[3] The applicant alleges, after some rumination, that the said decision of the erstwhile Board was marred with irregularities and should not, for that

reason, be allowed to stand, as it is unlawful. The applicant proceeds in this enterprise, from the premise that it is in duty bound, as a good 'constitutional citizen', as espoused in the landmark case of *Merafong City v Anglo Ashanti*¹ to seek an order setting aside its own decision as it were and in the process do the commendable by preserving hard earned public monies and resources. This it would appear is so even if the granting of the review sought reflects badly on the applicant and its Board.

[4] The existence and applicability of the principle of good constitutional citizenship, was accepted by this court in *Central Procurement Board and Others v Nangolo and Others*.² At the heart of this principle, it would seem, is that citizens in a constitutional State, both natural and corporate, have a duty to ensure that the Constitution and its ethos, including the principle of legality and the rule of law, are respected and applied. In this regard, good constitutional citizens avoid taking the law into their own hands nor do they turn a blind eye where some illegality has been perpetrated and regard it as water under the bridge. Rather seek appropriate orders from the court in case there may have been a breach.

[5] Where it appears there may have been a non-observance of the constitutional imperatives or departures from the paths of constitutional and legislative virtue, a good constitutional citizen has to stand up with contrition and approach the court for appropriate relief, even if to correct their own erroneous ways. Thus at times, they may need to open themselves to scrutiny for actions falling foul of constitutional imperatives. In this regard, good constitutional citizenship may require one to denude oneself and transparently own up to constitutional and legislative demeanours one may have been engaged in for the good of the constitutional and democratic State. This is what the applicant seeks to do in this case.

¹ 2017 (2) SA 211 (CC) para 59 to 60.

² 2018 (4) NR 1188 (HC) at 1191.

The parties

[6] The applicant, Namibia Airports Company Ltd, is a public company, duly registered and incorporated in terms of legislation known as the Airports Company Act³ and the Companies Act.⁴ Its place of business is situated at the Independence Avenue, Sanlam Building, 5th Floor, Windhoek. The respondent, China State Engineering Construction Corporation, on the other hand, is a company duly incorporated with limited liability in terms of the Company laws of Namibia, having its registered place of business at Axali Doeseb Street No.8, Windhoek.

Relief sought

[7] As intimated in the earlier paragraphs of this judgment, the applicant seeks an order for self-review, as it were in the following terms:

‘1. Reviewing and setting aside the decision and resolution taken on 23 June 2016 by the previous board of directors of the Applicant to award to the Respondent, a tender appointed as main contractor for construction of Ondangwa Airport Runway Rehabilitation Phase 2 under Contract No. MA/CS-CR/OND03-2014.

2. That any contract that may have come into existence between the Applicant and the Respondent as a result of the award including the award and as communicated to the Respondent on 24 June 2016 in such letter, be declared void ab initio, alternatively, that any such contract be declared to be invalid and be set aside.

3. To the extent necessary an order condoning any failure by the Applicant to institute proceedings within a reasonable time.

4. Ordering that if the Respondent opposes this application, to pay the costs of this application such costs to include the costs of one instructing and two instructed Counsel.’

³ Act No. 25 of 1998.

⁴ Act No. 28 of 2004.

The applicant's case

[8] The applicant's case, as can be gleaned from the papers filed of record, is advanced by Mr. Lot Haifidi, who at the time of deposing to the founding affidavit, was the acting Chief Executive Officer (CEO) of the applicant and the strategic executive: Corporate Governance of the applicant. Additionally, he is an officer of this court, duly admitted as such.

[9] The court does not intend to cover every blade of grass traversed by Mr. Haifidi in his founding affidavit. The intention is to merely identify what are the main issues covered and which appear to have a decisive or close tangential bearing on the issues for determination in this matter.

[10] Mr. Haifidi, deposed that the award in question in this matter, was preceded by two other awards, which were in respect of two prior stages. The previous awards were phase O, which was awarded to Sinohydro Corporation Ltd via a resolution of the applicant's previous Board. This award complied with the applicant's internal procedures. By resolution dated 16 September 2014, the applicant's Board at the time authorised the applicant's management to appoint and mandate Aurecon Consulting Engineers to engage contractors on a closed tender basis through obtaining three quotations from credible and seasoned contractors of reputable note.

[11] Later, a new project, termed Phase One was engaged in. It was in respect of the Ondangwa Airport. In particular, it was for the rehabilitation and upgrading of the main runway at that airport. Aurecon recommended that it be awarded to the respondent and that recommendation was followed. There is no need to entertain all the details concerned, as everything seems to have been above board. It would appear that the respondent carried out the work and completed same in July 2016.

[12] The contentious project, which is the subject of the present litigation, relates to Phase Two of the project. Central to the main scenes that see this matter before court are two figures, Mr. El Kalawi, the then CEO of the applicant and Mr. Courageous Silombela, who was the head of the applicant's department of engineering, information technology and projects. As an aside, which is not too remote for consideration, a common thread runs through both gentlemen and ties them in some bond of matrimony of sorts and it is this – they both terminated their respective relationships with the applicant shortly before they were due to face disciplinary action in connection, in part, with the issues under consideration in this matter.

[13] In respect of the last phase, Mr. Silombela apparently expressed a personal view that the second phase should not be opened for competitive bidding and that the present contractor on site should be allowed to proceed to do and complete this phase as well. It is common cause that the said contractor was the respondent.

[14] On 10 May 2016, the duet of Messrs. El Kalawi and Silombela, submitted to the Board a cost estimate of the project in the amount of N\$ 169 919 134, which was predicated on Aurecon's cost estimate. The submission made to the Board carried the signatures of the duet and it was in the following terms:

'The objectives of this submission are:

- (1) To request the Board of Directors that China Estates be re-appointed as the main contractor for the continuation of upgrading the infrastructure for Ondangwa phase 2.
- (2) To incur expenditure amounting to N\$169 919 143.00 (Incl VAT) for the Rehabilitation of Ondangwa phase 2.
- (3) That the amount of N\$ 169 919 134.00 be approved.'

[15] When one has regard to the submissions made by Mr. Silombela for this submission, first, he was of the view that phase 2 was a continuation of

phase 1 and that the contractor, i.e. the respondent, was still on site and that this fact would enure to the benefit of the applicant in that the continuation of the respondent to do phase 2 would serve to reduce project costs significantly.

[16] Mr. Silombela was not yet done. He made yet another submission that unfortunately does not bear a date. Because of its importance and possible centrality in this case, I will quote it in its entirety. In effect, this submission was concerned with the increased expenditure in relation to phase 2. It reads as follows:

‘2. To incur expenditure amounting to N\$ 200 423 355. 09 (Excl VAT) for the rehabilitation of Ondangwa Apron and Taxiway Phase 2.

3. The amount of 200, 423, 335. 09 (incl vat) be approved.’

[17] On 1 June 2016⁵, the respondent sent correspondence to Mr. Silombela in which it made another price estimate change – upward. This was a change from the original quote given. The letter stated the following, in part:

‘Reference is made to the first submission of schedule of quantity for the abovementioned project in April 2016.

We have reviewed our submission and realised that some items have been under-quoted due to incomplete quotations from subcontractors and suppliers. We have to modify prices for some items. Consequently, we sincerely request to re-submit our Schedule of Quantity to you’.

[18] The following day, Mr. Silombela ‘dutifully’ referred the contents of this letter to Aurecon, asking of the latter to ‘look into the request’ regarding the phase 2 quantities. A positive response was received from Aurecon. On 15 June 2016, Aurecon addressed an email to Mr. Silombela advising that it had done a quick assessment of the phase 2 bills of quantities. In part Aurecon stated the following in its email in question:

⁵ Founding Affidavit p12, annexure “FA9, p.106.

'The other 3 major components have increased, by different proportions to the Phase 1 rates. Considering these 3 major components have increased, by different proportions to the phase 1 rates. Considering these 3 major components against the equivalent values that might have been provided if the information had been provided from the second placed tendering for phase 1 work was used, the work will still seem to be market related – in other words, there is a good chance that these updated prices would still have been the lowest price.

Taking the availability of resources on site into account and the required time frames, it seems beneficial if the NAC Board would consider approval for the phase 2 work to continue.'

[19] On 22 June 2016 the duet prepared a submission of even date, for the attention of the Board. It was to be discussed at a meeting to be held the following day, namely 23 June 2016. The matter indeed served before the Board and the extract of the meetings reflects that the Board dealt with the matter as follows:

(a) That the submission is requesting for the approval from the Board of Directors for China State Construction Engineering to be re-appointed as the main contractor for the continuation of the upgrading of the infrastructure of the Ondangwa Runway Rehabilitation phase 2.

(b) That China State Construction Engineering team is still on site.

(c) That this submission has not been submitted to the Tender and Technical Committee.

(d) That the request being sought from the Board of Directors is for phase 2 of the project not to go on public tender as it is a continuation of phase 1 which was successfully and timeously completed as per specifications provided.

(e) That the phase 2 of the Ondangwa Runway Rehabilitation project is for Rehabilitation of the Ondangwa airport Apron and Taxiway.

(f) That in future the projects that are to be completed in phases be placed on tender and that they be timeously submitted to the Board of Directors.'

[20] It is a matter of record that the Board indeed approved the reappointment of the respondent to do phase 2 of the project and this was for

an amount of N\$ 211 616 793. 30, (Vat inclusive). Striking while the iron was still hot, and right on the heels of the reappointment by the Board, Mr. El Kalawi, the very next day, wrote a letter to the respondent advising it of the award to it by the applicant of the tender in relation to phase 2 of the project. This letter conveyed that the agreed price for the services to be rendered would be N\$ 211 616. 30.⁶ The respondent acknowledged receipt of the letter and undertook to deliver 'the project in the manner of good quality and time efficiency'.⁷

[21] The applicant, in view of the events recounted above, claims that there was a radical departure from the original estimates and that the figures kept increasing without any proper explanation therefor being proffered. Although the price was N\$ 169 919 143. 00 around 10 May 2016, by 26 May, 2016, it had increased to the whopping N\$ 200 423 355. 00. In this regard, further charged the applicant, there was no indication that the price charged was market related.

[22] Another curious and disconcerting feature, the applicant further claims, is that Mr. Silombela had without any promptings determined that phase 2 tender must proceed without tender and resultantly, that the respondent, who was allegedly on site would have to be awarded the tender. In this regard, the project relating to phase 2 was to be treated as a continuation of the previous phase 1 of the project.

[23] The applicant further expressed discomfort that the project was being dealt on alleged urgent basis without any grounds therefor, and in the process, running roughshod over the clear and unambiguous procurement procedures and policies of the applicant. This, the applicant claims is the reason why this court should intervene in the matter and grant the prayer for self-review, considering particularly that the applicant is funded through public funds which must be properly accounted for. Its stewardship over the funds must not be a cause for concern.

⁶ Founding Affidavit 'FA 18' p 172, record p. 619.

⁷ Founding Affidavit 'FA 19, p.621

[24] In a nutshell, the applicant contends that the decision to award the project to the respondent was unlawful and improper in that the applicant's employees, the duet, in particular, acted improperly and caused the previous Board of the applicant to act in an unlawful manner by not complying with the applicant's procurement policy. It contends further that the Board did not seek exemptions in terms of its procurement policy and that it did not properly apply its mind to the submissions and misrepresentations by Mr. Silombela to the Board.

[25] The applicant further submits that there was no budget set aside for the upgrading of the Ondangwa Airport when the Board awarded the tender. In that regard, legality and good governance require that funding should already be in place before any tender is awarded. If allowed to proceed, the award will place an onerous financial burden on the applicant, which will serve to dissipate funds allocated to the applicant in a manner that will detrimentally affect other projects the applicant is to undertake.

[26] The applicant further states that the decision to award the tender to the respondent is marred by material maladministration and it also failed to comply with the requirements of the State Finance Act.⁸ Last, but by no means least, the applicant contends that the decision of the erstwhile Board did not comply with the provisions of Art. 18 of the Constitution of Namibia and must for that reason be set aside.

The respondent's case

[27] I will attempt to crystallise the position of the respondent in as few a paragraphs as possible but without doing violence to the main thrust of its case. It is fair to say that the defences the respondent presents, for the most part, are not factual, i.e. it is not contesting most of the events that took place, as recounted by the applicant. It, however, places a certain emphasis on the legal implications of the events that the respondent deals with in its papers.

⁸ Act No. 31 of 1991.

Even if one may be regarded as guilty of terminological inexactitude, one can best describe the respondent's defences as being technical and legal in nature for the most part.

[28] The respondent, for its part, has vehemently opposed the application for self-review on a number of grounds. Principally, the respondent takes the view that the decision sought to be set aside, was taken by the proper statutory body, which was fully possessed of the power and authority to take it. For that reason, it further contends, there is no basis to set aside the decision for the reason that there are now allegations of irregularities on the basis of which the applicant seeks to avoid the consequences of its own decision.

[29] It was the respondent's further strong contention that the court should refuse to lend its processes in the applicant's favour for the reason that the applicant unreasonably delayed in bringing the application in question. In this regard, the applicant points out that the delay in this case is a staggering 17 months and there is no proper explanation for the delay.

[30] The respondent further takes issue with what it refers to as the inordinate delay in launching these proceedings. It claims that the inordinate delay will occasion serious prejudice to it. It is also the respondent's further contention that the applicant has not stated how it will, at the least, ameliorate the serious prejudice the respondent stands to suffer if the decision is set aside. The respondent accordingly prays that the court should hold that the delay in this matter is of the kind that should entitle the court to dismiss the application out of hand, without the need to even consider the merits of the application for review.

[31] Last, the respondent takes the position that the application for condonation for the late filing of the application should fail. It points out that there is an element of prevarication on the part of the applicant as to whether it admits that there is an undue delay or not. It accordingly takes the position that this prevarication by the applicant is indicative of a lack of good faith on

the part of the applicant and that the court should not, in the circumstances, exercise its discretion in the applicant's favour.

Self-review

[32] Before turning to deal with the meaty issues raised by the respondent, it is imperative that the court deals albeit briefly with the doctrine of self-reviews. The starting position is that every administrative act taken, even if unlawful, stands until it has been properly set aside by a competent body.⁹ It is for that reason that where a public body or organ of State realises that its decisions are tainted with illegality, or serve to violate the rule of law, it should not bury its head in the proverbial sand but is in duty bound to investigate the illegality and take appropriate measures to have the situation remedied by an appropriate authority.

[33] This is because the principle of legality peremptorily requires that unlawful conduct must be corrected. In *Pepcor Retirement Fund and Another v Financial Services Board and Another*,¹⁰ the Supreme Court of Appeal stated that, 'a public functionary may be entitled and even obliged to seek the review of its own decision.'

[34] Similar sentiments were expressed by the Constitutional Court of South Africa in *State Information Technology Agency SOC Limit v Gijima Holdings (Pty) Ltd*.¹¹ There, the court expressed itself thus:

'The principle of legality may thus be a vehicle for its review . . . Indeed, we have previously held that the principle of legality would be a means by which an organ of State may seek to review its own decision.'

[35] In that connection, it becomes clear that the route taken by the applicant in this application, is not unknown at law. It is a noble, responsible

⁹ *Oudekraal Estates (Pty) Ltd v The City of Cape Town and Others* 2004 (6) SA 222 (SCA) and *President of the Republic of Namibia v Anhui Foreign Economic Construction Group Corporation Ltd and Another* 2017 (2) NR 340, para 68.

¹⁰ 2003 (6) SA 38 (SCA).

¹¹ 2018 (2) SA 23, paras 40-41.

admission of possible guilt, particularly geared to setting wrongs right by asking the court to make an appropriate declarator and to have the offending actions or decisions, set aside. This action serves to open doors to remove the stench of illegal actions and decisions and concomitantly allows the fresh air of legality and constitutionality to reign and permeate the space. This allows the public body to be restored in walking on the rails of legality and constitutionalism.

[36] To this extent, I am of the view that the route taken by the applicant is consistent with good constitutional citizenship. Whether the applicant will actually succeed in its quest to set aside its decision, is an entirely different enquiry and this will be examined as the judgment unfolds.

[37] I presently turn to deal with the points of law that were raised by the respondent in its papers. I will first deal with the points taken that the applicant has unreasonably delayed in launching these proceedings; the alleged prejudice to the respondent; that interested parties were not joined in the proceedings and lack of merit on the grounds of review alleged.

Non-joinder

[38] The respondent raised the question that certain necessary parties were not joined to the proceedings. These were the duet of Messrs. El Kalawi and Silombela of the one part, and Aurecon of the other. It was accordingly submitted that the proceedings should be stayed until the joinder of these parties is effected.

[39] I must mention that from my notes, this is not an argument that Mr. Maleka pursued in oral argument. I will deal with it nonetheless, albeit very briefly. As correctly stated by Mr. Bhana, this is an issue that should properly have been raised during case management and subjected to the preemptory provisions of rule 32(9) and (10). It appears to me opportunistic for the respondent to raise this point for the first time in its heads of argument. It may

have been fodder for *Mukata v Appolos*¹², namely, a striking off for non-compliance with rule 32 (9) and (10) aforesaid.

[40] In his heads of argument, Mr. Maleka relied on the judgment of Miller A.J. in *Ondonga Traditional Authority v Okwanyama Traditional Authority*,¹³ where the learned Judge said:

‘It is trite law that when a person has an interest of such a nature that he or she is likely to be prejudicially affected by any judgment given in the action, it is essential that such a person be joined as an applicant or respondent. The objection of non-joinder may be raised where the point is taken that a party who should be before court has not been joined or given notice of the proceedings. The test is whether the party that is alleged to be a necessary party for purposes of the joinder has a legal interest in the matter of the litigation, which may be affected prejudicially by the judgment of the court in the proceedings concerned. This test was applied in *Kleinhans v The Chairperson of the Council for the Municipality of Walvis Bay and Others*,¹⁴ where Damaseb JP at 447 para 32 said:

“The leading case on joinder in our jurisprudence is *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A). It establishes that it is necessary to join a party to litigation any person who has a direct and substantial interest in any order, which the court might make in the litigation with which it is seized. If the order which might be made would not be capable of being sustained or carried into effect without prejudicing a party, that party was a necessary party and should be joined except where it consents to its exclusion. Clearly, the *ratio* in *Amalgamated Engineering Union* is that a party with a legal interest in the subject matter of the litigation and whose rights might be prejudicially affected by the judgment of the court, has a direct and substantial interest in the matter and should be joined as a party.’ (Emphasis added).

[41] The question is whether the duet, together with Aurecon are parties that may, in the words quoted above, be regarded as having a direct and substantial interest in the case. I will start with the duet. It is in evidence that

¹² (I 3396/2014) [2015] NAHCMD 54 (12 March 2015).

¹³ 2017 (3) NR 709 (HC)

¹⁴ 2011 (2) NR 437.

both gentlemen left the applicant's employ shortly before they were due to face disciplinary proceedings. It is clear as noontide that the disciplinary action instituted against them largely stems from allegations that they conducted themselves with lack of probity in the very decisions that were taken that the applicant seeks to set aside on review in this application.

[42] It is a fact that allegations of impropriety and misrepresentation are levelled against them in this application and which it is further alleged, prompted the applicant's previous Board to make the decisions that it did. The million-dollar question, however, is whether that qualifies them to be regarded as persons with a direct and substantial interest in this matter.

[43] I am of the considered view that the duet does not fall within the strict confines of the direct and substantial interest that the court qualified in the *Amalgamated Engineering* case. The court stated that for a party to qualify as such, it must be so that the order sought cannot be capable of being sustained or carried into effect without prejudicing the said parties. Does the duet fit hand in glove with that classification? I think not.

[44] I am of the considered opinion that although some damning allegations are made against the duet in the application, it is for purposes of making a compelling case for the order the applicant seeks, namely, that of self-review. The duet is not so placed that the order sought, and not necessarily the basis therefor, cannot be carried out without prejudicing them. They are not parties to the agreement sought to be set aside and if anything, as correctly submitted by Mr. Bhana, they are, at best, witnesses, who do not deserve to be joined to the proceedings. They were simply employees of the applicant.

[45] It is accordingly my view that the order of self-review, if granted, can be carried out without affecting the said gentlemen's interests in the manner envisaged in *Amalgamated Engineering*. It does not require them or their participation for the order to be carried out nor can it be said that their participation would serve to sustain its life or enforcement. Their rights are

tangentially affected in the reasons leading to the review but not in the carrying out of the decision itself.

[46] I am of the view that the fact that the duet left the applicant's employ in similarly hasty fashion and they had an opportunity to cleanse their respective names but chose to leave in deliberate haste. An adverse inference is the only one that can be drawn from such a scenario, in my respectful view. They decided, for reasons not given, in the face of damning allegations of impropriety against them, to take their leave, leaving the allegations unanswered and their actions unexplained.

[47] In this regard, it would, in my view, be unreasonable to expect the applicant to carry the extra expense of joining the duet to the litigation in view of the fact that they denied themselves a forum where they could defend themselves and their actions, which the applicant claims were prejudicial to it and led its Board to make decisions that are now regarded as not only unwise but also illegal and unsustainable. They may be affected in so far as the basis for the decisions sought to be impugned without rendering them necessary parties within the meaning ascribed in the *Amalgamated Engineering* case.

[48] I am of the considered view that Aurecon also falls in the same category as the duet, expressly barring the issue of disciplinary proceedings otherwise lodged and successfully evaded by the duet through the stratagem of leaving the applicant in haste. For all other intents and purposes, I am of the considered view that Aurecon is not peculiarly placed in a situation where it can be said that the order sought by the applicant cannot be carried out without affecting its interests. It is not a party to the agreement sought to be set aside on review and does not assert any rights in relation to the agreement in question.

[49] In the premises, I am of the view that the point of non-joinder is not properly raised considering the facts of the instant case. It cannot be said that the order sought is incapable of being carried into effect without affecting their interests. The order prayed for cannot detrimentally affect their rights or

interests. To this extent, it may be said that their joinder, although may be one of convenience, is certainly not one of necessity. They have no direct interest in the order for review of the decisions sought to be set aside in this application.

[50] In closing, it is fitting to quote a short excerpt from the *Amalgamated Engineering* case, where the court expressed the need to apply the standard of parties to be joined strictly. It said the following:

‘It is now our settled legal position that a direct and substantial interest is an interest in the right which is the subject matter by the litigant and not merely a pecuniary interest . . . These courts have adopted a paradigm shift towards the strict application of this principle to an extent that where the need for joinder arises they will ensure that interested parties are afforded an opportunity to be heard.’

[51] I accordingly dismiss this point and find that the interest that the stated parties have, does not meet the high threshold. There is no order sought making any adverse or any declaration for that matter, on their personal or professional conduct.

Unreasonable delay

[52] The pith and marrow of the respondent’s case in this regard is that the applicant took an unreasonably long period before launching this application. In its calculation, the respondent alleges that the delay amounts to a staggering period of 17 months. In this regard, continues the respondent, the delay is egregious and that the applicant’s attempts to explain the delay are not convincing. It is argued that for that reason, the application should be dismissed on this basis alone, rendering it unnecessary to consider the merits of the application, as required by the Supreme Court judgment in *South African Poultry Association and Another v Minister of Trade and Industry and Others*.¹⁵

[53] In amplifying its argument, the respondent states that the decision sought to be impugned was that of the applicant, an organ of State. In this

¹⁵ 2018 (1) NR 1 (SC).

connection, it is submitted by the applicant that it becomes immaterial that those who took the decision were the former members of the applicant's Board. The long and short of it, so submits the respondent, the decision taken was that of the applicant and it knew what decision it took and that if it was wrong or illegal, it should have sought the application for review a long time ago. The lengthy delay should therefore serve to disentitle the applicant the relief it seeks.

[54] Meeting this argument pound for pound, Mr. Bhana, for the applicant submitted that properly considered in its context, this case admits of no delay at all. In the alternative, he submits that if there was a delay at all, it was not unreasonable in all the circumstances of the case. In explaining the events, the applicant sets out the following time line:

- (a) the impugned decision was taken on 23 June 2016;
- (b) on 1 September 2016, the previous Board was removed from office and the new Board assumed office and reviewed the tender awards made during the office of the previous Board;
- (c) Mr. Lot Haifidi, the applicant's legal advisor, was mandated by the new Board to investigate and obtain a legal opinion on the tender awards made the by the erstwhile Board. This was a painstaking exercise as voluminous documents had to be essayed; the previous Board resisted giving him relevant information;
- (d) between 1 September 2016 and 28 November 2016, external legal counsel was engaged to assist and advise accordingly;
- (e) in December 2016, external legal counsel advised they needed further documentation in anticipation and the outcome of a forensic audit in anticipation of taking legal action in the matter;
- (f) the respondent persistently made requests to commence with the works and demanded the conclusion of a written agreement, resulting in a meeting of the new Board in March 2017, when a decision to approach the court was made by the Board and to seek to have the award of the tender to the respondent set aside;

- (g) in April 2017, Deloitte was engaged to do a forensic audit and this was submitted to the Board in October 2017. The report was voluminous and demanded careful attention and consideration;
- (h) it became necessary from the report to institute disciplinary proceedings against the duet. They were suspended and Mr. Silombela resigned in November before the hearing. Mr. El Kalawi reached a settlement with the Board in December 2017. It being evident that the disciplinary processes would not see the light of day, when they were expected to unearth a lot of information that could be used in court to justify the route eventually taken, it became difficult to proceed further but to approach the court on 12 December 2017.

[55] Before considering the above factors and how they influenced the delay and whether they constitute an acceptable explanation, it is I think, necessary to refer to case law regarding the approach to such matters. It is heartening to say both sets of protagonists referred to the landmark judgment in *Keya v Chief of the Defence Force and Others*.¹⁶

[56] In that case, the Supreme Court expressed itself in the following terms:

[21] This court has held that the question of whether a litigant has delayed unreasonably in instituting proceedings involves two enquiries: the first is whether the time it took the litigant to institute proceedings was unreasonable, then the question arises whether the court should, in exercise of its discretion, grant condonation for the unreasonable delay. In considering whether there has been unreasonable delay, the High Court held that each case must be judged on its own facts and circumstances so what may be reasonable in one case may not be so in another. Moreover, the enquiry as to whether a delay is unreasonable or not does not involve the exercise of the court's discretion.

[22] The reason for requiring applicants not to delay unreasonably in judicial review can be succinctly stated. It is in the public interest that both citizens and government may act on the basis that administrative decisions are lawful and final in effect. It undermines that public interest if a litigant is permitted to delay and other

¹⁶ 2013 (3) NR 770 (SC), paras 21 and 22.

citizens may have acted. If a litigant delays unreasonably in challenging administrative action, that delay will often cause prejudice to the administrative official or agency concerned, and also to other members of the public. But it is not necessary to establish prejudice for a court to find the delay to be unreasonable, although of course the existence of prejudice will be material if established. There may, of course be circumstances when the public interest in finality and certainty should give weight to other countervailing considerations. That is why once a court has determined that there has been an unreasonable delay, it will decide whether the delay should nevertheless be condoned. In deciding to condone an unreasonable delay, the court will consider whether the public interest in the finality of administrative decisions is outweighed in a particular case by other considerations.'

[57] It is also important in this regard, to refer to the High Court judgment in *Keya*¹⁷ where the learned Judge President Damaseb, set out the proper approach to this enquiry in devastatingly clear language and which the Supreme Court did not interfere with. He said:

'It is now judicially accepted that an applicant for review need not rush to court upon his cause of action arising as he is entitled to first ascertain the terms and effect of the offending decision; to ascertain the reasons for the decision if they are not self-evident; to seek legal counsel and expert advice where necessary; to endeavour to find an amicable solution if that is possible; to obtain relevant documents if he has a good reason to think they exist and they are necessary to support the relief result desired; consult with persons who may depose to affidavits in support of the review; and then to consult with counsel, prepare and lodge the launching papers. The list of possible preparatory steps and measures is not exhaustive; but in each case where they are undertaken they should be shown to have been necessary and reasonable.'

[58] I do not wish to burden this judgment with further authority on this matter. I am of the view that in the first place, it is not fair or proper to reckon the period of the delay alleged, to run from the making of the decision by the previous Board. What cannot be denied is that the impugned decision was taken on 23 June 2016 and the new Board came into office in September 2016. It would therefore be unfair to count the period from the making of the

¹⁷ (A 29/2007) [2009] NAHCMD 10 (20 February 2009).

decision as part of the delay that should work against the applicant herein. From the 17 months that Mr. Maleka urged the court to find staggering, must be subtracted a period of about 3 months, leaving the period to one of 14 months, rounded off.

[59] I am of the considered view that this was a complex matter that landed on the lap of the new Board and it was 'hot' as well. It was therefore necessary for the Board to acquaint itself with the issues and as happened, seek internal legal assistance to investigate the issues and provide advice on the legality of the decision in question.

[60] Furthermore, there was need to engage the services of experts to conduct a forensic audit. This process was to be allowed to run its full course before the Board could, on advice, find it necessary to refer the matter to court. In this regard, bodies in the shoes of the applicant should not be rushed into making hasty decisions in the absence of a full conspectus of the issues involved because it becomes embarrassing to be told by the court that you have brought a half-baked matter, denying yourself and the court all the necessary investigations and witnesses necessary to enable you take an informed decision in that regard.

[61] There was also the issue of disciplinary proceedings of the duet that needed to be dealt with as it had an effect on the outcome and what may eventually have needed to be done before the court was approached. When these gentlemen parted ways with the applicant in not too comfortable circumstances, generally speaking, it became clear that the route would be to approach this court for appropriate relief, if a decision to approach this court was seen as called for. The duet left the applicant in or around early November 2017, for Mr. Silombela and early December 2017 for Mr. El Kalawi.

[62] Mr. Haifidi alleged that he had difficulty getting co-operation in relation to some of the documents he required to complete the exercise and to engage and get legal assistance from external counsel. In this regard, some

of the persons who were involved in the making of the impugned decision, including the duet, were before they parted ways with the applicant, in possession of most of the necessary documents pertaining to the award of the tender.

[63] The application was then launched on 12 December 2017, not long after the duet had taken their leave of the applicant's employ. I am of the considered view that in the peculiar circumstances of this case, considering that the decision to be impugned was that of the self same applicant, albeit under different stewardship, it does take longer to assemble all the pertinent facts before approaching the court.

[64] In a normal review, where a public body has taken a decision, it would not take as long to get the record and other documents necessary for making a decision to launch an application for review. In a self review, however, it appears, as in this case, that the instinct of self-preservation on the part of those likely to be implicated kicks in and holds sway. Getting necessary and crucial information may become an uphill battle as those implicated become gatekeepers, keeping the crucial facts and information interned in the deep vaults and recesses of their hearts. In this connection, crucial documents and other information may even be destroyed or eternally placed beyond reach of their perceived persecutors.

[65] I am accordingly of the considered view that the delay occasioned in this matter, cannot properly be regarded as egregious. I say so considering the complex state of facts and the magnitude of the issues and the personalities involved. I come to the conclusion that the delay in this matter is fully explained and is not such as to lead this court to refuse the application therefor. The preparatory steps and measures taken by the applicant, were, to borrow from the language of the Judge President in *Keya*, necessary and reasonable.

[66] If it can be found that the delay is for any reason unreasonable, I am of the considered opinion that this would be a proper case for the court

exercising its discretion in the applicant's favour. In this connection, as I have mentioned above, the delay, it is found to be, is explained by reference to timelines supplied. Furthermore, in the *Keya* case, the Supreme Court stated with absolute clarity that the court may have, in an appropriate case, consider whether public interest in the finality of administrative decisions is outweighed by other considerations.

[67] In this case, as will have been evident, the applicant's procurement policies were thrown in the dustbin, as it were and the amount of the tender grew exponentially without any proper or reasonable explanation. In this regard, it would be appropriate to quote, by way of example, some of the clauses in the applicant's procurement policies. It reads as follows:

'The purpose of this policy document is to define the parameters within which the procurement requirements of NAC must be met. This document is the Company's Procurement Policy and regulates all purchases of equipment, goods and services irrespective of amounts. All procurement activities should be conducted in accordance with applicable regulatory requirements and leading practice that is fair, transparent and competitive.' (Emphasis added).

[68] It must be recalled in this connection that the tender was not advertised as peremptorily required above. It was simply given to the applicant on a golden platter and unlawfully caused to 'merge' with a previous phase of the works needed to be done at the Ondangwa Airport.

[69] The tender grew in leaps and bounds in amount from N\$ 169 million to N\$ 211 million, a whopping N\$ 43 million difference, which translates to about 26% increment. This astronomic increase, remarkably, took place over period of 9 weeks. There is no indication that the applicant would have received optimal value in that connection. Furthermore, as mentioned above, the applicant's officials merged unlawfully, what were disparate phases of the project into one, avoiding in the process, placing phase 2 to tender at enormous expense, not only to the applicant, but also to potentially to the fiscus. I deal with this issue in more detail later.

[70] Mr. Maleka is crying foul. He alleges that the guilty parties, being the duet not only left but seem to have received some golden handshake of sorts when the respondent is left to lick its wounds as it were. He strongly argued that the prejudice suffered by his client is manifest. I do agree that the applicant let the duet off very lightly especially in the light of what was seen as their egregious prejudicial conduct. Why there was a settlement with Mr. El Kalawi simply beats me.

[71] That notwithstanding, I do not agree that the respondent is entirely correct in its submissions in regard to the prejudice it alleges it suffered and continues to suffer. I say so for the reason that it generally knew what the terms of the award of the applicant were and the preparatory steps that needed to be taken.

[72] The respondent was not a stranger to the dealings with the applicant as it had been engaged in an earlier phase. More importantly, the respondent knew that the contract had not been signed and could only mobilise the site once the contract had been signed and sealed by the parties. It could not legitimately start incurring huge expenses with the contract not yet in black and white and in the bank as it were. If it did so, I am of the considered view that it has itself to blame in that regard. If the respondent is of the view that it suffered any loss as a result of the applicant's stance, it has a remedy, which does not impinge on this court not granting the relief sought in the circumstances.

[73] Furthermore, Mr. Haifidi states that the access permits previously issued to the respondent and Aurecon were revoked and returned in July 2016. This is not gainsaid. In the premises, I am of the view that the prejudice allegedly suffered by the respondent is not credible because it knew that the phases were different and once informed of the difficulties that arose, it had a duty to mitigate its losses. It is telling that there does not appear to be any application by the respondent to enforce the award in question. The real

prejudice, it seems to me is to be suffered by the taxpayer if a decision such as this is allowed to stand.

[74] I am of the opinion that from the allegations made by the applicant and viewed in the context of the undeniable facts, which include (a) that the procurement processes were shelved deliberately and unlawfully; (b) that the Board was duped into believing that phase 2 was a continuation of the previous phase, which was clearly not the case, it becomes apparent that the Board did not properly apply their minds to the correct facts.

[75] It is also seriously disconcerting that the award was made during the Board's last meeting, where they seem intent of leaving a 'legacy' behind them, which does not, in retrospect, appear to leave them covered in glory. The fact that the tender increased astronomically by N\$ 43 million, with the Board being hoodwinked by Mr. Silombela into believing that the increase was a mere 1.5% escalation, when it was actually 26%, is a hall mark of illegal conduct on the part of the applicant's employees and a failure by the Board to play its oversight role properly and conscientiously. Like his name, Courageous, Mr. Silombela was indeed courageous to make that patently wrong and misleading submission to the Board, it not being an isolated one, it must be remarked.

[76] Although the duet eventually left with their disciplinary processes hanging, it is a fact that the charges against them were serious as they involved fraud and misrepresentations, which led the Board down to what appeared to be down the garden path, yet it was a road to damnation. This, in my view, shows the gravity of the illegal and reckless conduct and advice that preceded the Board making the decision to award the tender in the most questionable and financially imprudent episodes. To allow such a decision to stand would be a serious desecration of the foundational pillars of the rule of law and the principle of legality.

[77] The Supreme Court spoke once and one would have expected the people concerned to hear twice in *President of the Republic of Namibia v*

Anhui,¹⁸ where the court spoke resoundingly about the need to deal scrupulously with procurement matters. The court said:

‘ . . . the primacy of the public interest in procurement, by means of public funds particularly on the scale envisaged in the upgrade of the airport, requires that statutory provisions should be scrupulously and transparently complied with and where there have been breaches, those blemishes must be corrected.’

[78] It is clear that the procurement procedures and policies, as adverted to earlier, were placed on retirement or worse, placed in a comatose state, as the award to the respondent progressed unaffected by the applicable laws, regulations and policies. This allowed this catastrophe to occur.

[79] Mr. Maleka has perforated the allegations of illegality with argument to the effect that no good case has been made out. I respectfully disagree. I particularly do so in view of the case of *Viking Pony v Hydro-Tech Systems*¹⁹ In that case, the Constitutional Court of South Africa expressed itself in the following compelling terms:

[31] In other words, it is not the existence of conclusive evidence of a fraudulent misrepresentation that should trigger responsive action from an organ of State. It is the awareness of information, which, if verified through proper investigation, could potentially expose a fraudulent scheme.

[80] I agree. The situation, in this matter is far better than that referred to above. The very fact and circumstances of the departure of the duet and the other glaring irregularities referred to above, make this case a compelling one.

[81] Mr. Maleka additionally punched holes in the conduct of two officers of this court, namely Mr. Rodgers Kauta and Mr. Haifidi. He requested the court to return particularly scathing findings on their conduct as officers of this court, but who, it is alleged, were involved in untoward conduct. I refrain from doing so for two reasons. The first is that I do not have, at my disposal any facts,

¹⁸ 2017 (2) NR 340, para 68.

¹⁹ 2011 (1) SA 327 (CC) paras 28 and 31.

which justify such far-reaching conclusions. The issues raised by Mr. Maleka are highly contested territory.

[82] More importantly, Mr. Maleka's earlier argument comes back to haunt him. He requires this court to make detrimental findings against the two gentlemen but they have not been cited and asked or afforded an opportunity to deal with these allegations and the particular relief the respondent seeks, which may be detrimental to their professional standing. It would be ill of this court to precipitately act on such an unfair procedure, assailing the repute and dignity of the gentlemen on clearly contested allegations. The respondent can, if it has the evidence, do what it deems necessary to move the matter forward in the manner it was requesting this court to do.

Motions to strike out

[83] The parties traded notices of motions to strike out certain paragraphs on the basis that same were either vexatious, scandalous or irrelevant and in other cases, it was alleged that same contained hearsay evidence. It does seem that by the time the hearing of oral argument came, both parties appeared to have lost steam on these applications and they were not pursued in argument. I will accordingly not address them in this judgment.

Conclusion

[84] In view of the conclusions I have reached above, I am of the considered view that firstly, there is no egregious delay on the part of the applicant in launching these proceedings. Should this conclusion be erroneous, it is my view that the delay is properly explained. I also hold that as demonstrated above, the applicant has made a very strong case on the merits to justify the court exercising its discretion in allowing the application to proceed.

[85] The latter conclusion is premised on the illegalities mentioned, which include the side-lining of the procurement policies of the applicant without any

lawful or other basis. There was also an exponential increase in the amount quoted for the tender in a matter of weeks by 26%. The collapsing of two phases into one is also telling to benefit the respondent, is also telling. These and other factors mentioned in the judgment persuade me to reach the conclusion that the applicant is entitled to the order it seeks.

Costs

[86] The ordinary rule applicable is that costs follow the event. In this matter, the respondent unsuccessfully opposed the matter and it should accordingly pay the costs on the ordinary scale. An issue occurred to my mind after the argument was concluded and whilst I was preparing judgement. It is that a party in the shoes of the applicant, i.e. seeking self-review, appears to be similarly circumstanced as a party who is in the wrong and who applies for condonation.

[87] I say so for the reason that in self-review, that party will have made a wrong decision that it seeks the court to have set aside. The question is whether this party should not ordinarily pay the costs as he or she seeks an indulgence from the court, unless the opposition by the respondent is frivolous or for some reason, completely insupportable. This, however, is a matter for another day.

Order

[88] I accordingly grant the following order:

1. The decision and resolutions taken by the Applicant, Namibia Airports Company Ltd.'s previous Board of Directors on 23 June 2016, to award a tender to the Respondent, China State Engineering Construction Corporation, is hereby reviewed and set aside.
2. It is declared that any contract that may have come into existence between the Applicant and the Respondent as a result of the said

award referred to in paragraph 1 above and the communication of the award to the Respondent, is void *ab initio* and is hereby set aside.

3. The Respondent is ordered to pay the costs of this application consequent upon the employment of one instructing and three instructed Counsel.
4. The matter is removed from the roll and is regarded as finalised.

T.S Masuku
Judge

APPEARANCES:

APPLICANT: R. Bhana, SC, (with him A. W. T. Rowan and U. A. Hengari)

Instructed by Kangueehi & Kavendjii Inc.

RESPONDENT: V. Maleka, SC, (with him S. Akweenda and E. Nekwaya)

Instructed by ENS Africa Namibia, Windhoek.