

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO: HC-MD-CIV-MOT-REV-2018/00277

In the matter between:

**NEWPOINT ELECTRONIC SOLUTIONS (PTY) LTD** **APPLICANT**

and

**THE PERMANENT SECRETARY, OFFICE OF THE  
PRIME MINISTER** **1<sup>ST</sup> RESPONDENT**

**THE PRIME MINISTER OF THE REPUBLIC OF  
NAMIBIA** **2<sup>ND</sup> RESPONDENT**

**Neutral Citation:** *Newpoint Electronic Solutions (Pty) Ltd v Permanent Secretary, Office of the Prime Minister* (HC-MD-CIV-MOT-REV-2018/00277) [2020] NAHCMD 40 (3 February 2020)

**CORAM: MASUKU J**

Heard: 1 August 2019

Delivered: 3 February 2020

**Flynote:** Law of Contract v Administrative law – Remedy in contract and administrative law – how do you discern – breach of contract as opposed to an exercise of administrative power is not reviewable - Application of the Rule of Law paramount.

**Summary:** In 2015, a tender was advertised by the 2nd respondent through the office of the Tender Board of Namibia. The tender was 'awarded' by the Tender Board, to the applicant via a letter to the applicant dated 5 and 19 April 2016, respectively. The applicant proceeded to perform the contract at least in part, in light of the letter of award. In the meantime, the respondents engaged in consultation with their legal advisors in order to determine whether or not the awarding and execution of the tender was legal and binding in terms of the applicable law. The result of the consultations were not favourable to the applicant's cause as it reached the conclusion that the agreements purportedly entered into by the parties were unenforceable and invalid ab initio.

The applicant contends that the actions adopted by the respondents as conveyed in the letter in question, constitute administrative action, are wrongful and are accordingly reviewable by this court. The respondents on the other hand, claim that if any wrong was done on their part in the letter under scrutiny, the applicant's remedy lies in the principles of the law of contract. Applicant approached this court to set aside the cancellation of the tender.

Held: that the respondents are on the correct side of the law in the instant case.

Held further that: the mere fact that the awarding of the contract is governed by a legislative enactment does not necessarily translate to saying that if the respondents hold the view that any imperative provision of the applicable Act has been breached, the applicant is per se entitled to be heard in terms of administrative law.

Held: that the applicant's claim in this matter is sounding in contract and for that reason, it is clearly improper to then subject the respondents, as the applicant seeks to do, to the yoke of administrative law in cancelling the contract.

Held that: the applicant in casu, does have effective remedies provided in the law of contract to deal with the situation.

Held further that: for the applicant not only to blur but to actually cross the lines and seek redress from administrative law, when it is abundantly clear that the dispute arises in contract, is impermissible.

Held that: the respondent, in taking the decision it did, is not exercising public powers that are subject to and tantamount to administrative action.

Held that: Namibia, as a State, is predicated on the true, tried and tested foundations of the rule of law. For that reason, it is imperative that any steps taken by public functionaries, must have their foundation and continued existence in the rich and abiding wells of the rule of law.

Held further that: there should be no exception that justifies any departure, radical or otherwise, from the established rails of the rule of law.

Consequently, court dismissing the application for review with a costs order.

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### **ORDER**

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1. The Applicant's application for review is dismissed.
  2. The Applicant is ordered to pay the costs of the application consequent upon the employment of one instructing and one instructed Legal Practitioner.
  3. The matter is removed from the roll and is regarded as finalised.
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### **JUDGMENT**

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**MASUKU J:**

Introduction

[1] At issue in this judgment, is an application for review. The applicant approached this court seeking it to exercise its powers, to review and set aside a decision by the respondents to cancel a tender, described as Tender No. E1/2-7/2015, which was in respect of the implementation of the Oracle Payroll, Maintenance and Support of the Existing Human Capital Management Service.

[2] This application drew a negative reaction from the respondents, who, on advice, not only opposed the applicant's application, but also filed a counter-application in terms of which they sought an order declaring the agreement concluded between the parties, as described above, invalid *ab initio* and unenforceable and thus liable to be set aside.

#### The parties

[3] The applicant in this matter, is Newpoint Electronic??? Solutions (Pty) Ltd, a company duly registered and incorporated in terms of the company laws of this Republic. Its place of business is situate at No. 21 Mozart Street, Windhoek. The 1<sup>st</sup> respondent, is the Permanent Secretary of the Office of the Prime Minister, whereas the 2<sup>nd</sup> respondent, is the Prime Minister of this Republic. Both respondents, it must be stated, are represented by the Office of the Government Attorney, 2<sup>nd</sup> Floor, Sanlam Building, Independence Avenue, Windhoek.

[4] For ease of reference, I will refer to the applicant as such and to the respondents collectively. Where necessary, or appropriate, I will refer to each of the respondents as cited in the present proceedings.

#### Background

[5] The facts giving rise to the present proceedings are fairly common cause and are not the subject of much, if any, disputation. The common cause facts acuminate to this: During the course of 2015, a tender was advertised by the 2<sup>nd</sup> respondent through the office of the Tender Board of

Namibia. This tender was in respect of the works described in the opening paragraph of this judgment.

[6] The tender was 'awarded' by the Tender Board, to the applicant *vide* a letters to the applicant dated 5 and 19 April 2016, respectively. From the contents of the letters of award, it must be pertinently stated that according to the former letter, i.e. dated 5 April, 2016, the award was not legally binding, but was subject to the issuance of a Government Order, or the conclusion of an agreement with a Government Office, Ministry or Agency of the Government.

[7] It would appear, and this is common cause, that the applicant proceeded to perform the contract at least in part, in light of the letter of award. In the meantime, it would appear that the respondents engaged in consultation with their legal advisors in order to determine whether or not the awarding and execution of the tender was legal and binding in terms of the applicable law.

[8] The result of the consultations were not favourable to the applicant's cause. This is so because the Office of the Government Attorney, came to the conclusion that the agreements purportedly entered into by the parties were unenforceable and invalid *ab initio*. In this regard, the applicant was advised of the position adopted by the Government in this regard, by letter dated 12 June 2018. This letter was written by the Office of the Government Attorney to the applicant's legal practitioners of record.

[9] For the sake of completeness and also due to the centrality of the letter to these proceedings, it is necessary, to quote its relevant contents *in extenso*. It reads as follows:

'We write to you in respect of the above matter on the instructions of the Prime Minister.

We have considered a number of agreements purportedly concluded by our respective clients and various correspondences in relation thereto.

We have advised our client that the agreements your client is relying on are unenforceable and invalid *ab initio* on various grounds including the fact that the agreements were not concluded by the Tender Board of Namibia (as it was) on behalf of the Government as peremptorily required in terms of sections 7(1)(a) and (b) and section 16(2)(a) of the Tender Board Act of 1996.

We therefore advise you of the invalidity of the agreements. Our client on that basis will have no further engagements with your client. In any event, even assuming that the agreements were valid (which is denied) your client is not entitled to any payment due to its defective and unsatisfactory work.

Any legal action shall be vigorously opposed.'

[10] It is the above contents of the letter that have sparked the current proceedings. The applicant contends that the actions adopted by the respondents, that threw the spanner in the works, as it were, in relation to the applicant's performance of the works and as conveyed in the letter in question, constitute administrative action, are wrongful and are accordingly reviewable by this court. The applicant contends further that it was denied the right to be heard before the action to cancel was taken by the respondents.

[11] The respondents, for their part, argued and quite strenuously too, that the proceedings adopted by the applicants are inappropriate on a number of levels. First, they claim that if any wrong was done by the respondents in the letter under scrutiny, the applicant's remedy lies in the principles of the law of contract.

[12] It was also the respondents' further contention that the respondents, by writing the missive to the applicant's legal practitioners referred to above, did not make any decision at all, let alone one that is reviewable in administrative law. They adopt the position that all that the letter served to do, was to advise the applicant that in the respondents' view, the contract purportedly entered into by the parties, was unenforceable for the reasons already canvassed above.

[13] It is also important to mention, as recorded above, that the respondents did not only oppose the applicant's application. They proceeded to also file a counter-application and in terms of which they sought to obtain an order declaring the agreement concluded by and between the parties invalid *ab initio* and thus unenforceable. Chief, in the allegations by the respondents in support of the counter-application, is that the agreements did not comply with the relevant law which governs the award of Government tenders in Namibia.

[14] I propose to deal with the respective sets of applications serving before court in turn, commencing as I will, with the main application lodged by the applicant.

#### Argument on the main application

[15] As foreshadowed above, the applicant claims that the decision taken by the respondents to no longer abide by the agreement, is reviewable, a proposition that the respondents strongly disagree with. The respondents contend that the agreement, indicates that the matter is sounding in contract and for that reason, the applicant is wrong in seeking a remedy in administrative law.

[16] In this regard, the respondents laid store on the case of *Government of the Republic of South Africa v Thabiso*.<sup>1</sup> At para 18, the Supreme Court of Appeal of South Africa reasoned as follows:

'What remains are the observations originating from comments by the court *a quo* which seem to support the notion that the contractual relationship between the parties may somehow be affected by the principles of administrative law. These comments have given rise to arguments on appeal, for example, as to whether the cancellation process was procedurally fair and whether Thabiso was granted a proper opportunity to address the Tender Board in accordance with the *audi alteram partem* rule prior to the cancellation. Lest I be understood to agree with these

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<sup>1</sup> 2009 (1) SA 163 (SCA)

comments by the court *a quo*, let me clarify: I do not believe that the principles of administrative law have any role to play in the outcome of the dispute. After the tender had been awarded, the relationship between the parties was governed by the principles of contract law (see e.g. *Cape Metropolitan Council v Metro Inspection Services* 2001 (3) SA 1013 (SCA) para 18; *Steenkamp N.O. v Provincial Tender Board, Eastern Cape* 2006 (3) SA 151 (SCA), paras 11 and 12. The fact that the Tender Board relied on authority derived from a statutory provision (i.e. s 4(1)(e) of the State Tender Board Act) to cancel the contract on behalf of the Government does not detract from the fact that the grounds of cancellation on which the Tender Board relied were, *inter alia*, reflected in a regulation.’ (Emphasis added).

[17] This court was further referred to a judgment of the Supreme Court in *Transworld Cargo v Air Namibia*<sup>2</sup> where the Supreme Court, citing with approval the judgment of *Permanent Secretary of Finance and Others v Ward*<sup>3</sup> in which a contract for rendering of medical services had been cancelled. At para 61, of the judgment the following excerpt appears:

‘For the above reasons, I conclude that the first appellant, when he cancelled the agreement, was not performing a public duty or implementing legislation but was acting in terms of the agreement entered into by the parties and that it could not be said that the first appellant, in doing so, was exercising a public power.’

[18] Having regard to the above cases, I am of the considered view that the respondents are on the correct side of the law in the instant case. It is clear from the facts that the applicant’s claim in this matter is sounding in contract and for that reason, it is clearly improper to then subject the respondents, as the applicant seeks to do, to the yoke of administrative law in cancelling the contract. If the respondents took the view that the contract was unenforceable for any reason, the applicant does have effective remedies provided in the law of contract to deal with that situation.

[19] For the applicant not only to blur but to actually cross the lines and seek redress from administrative law, when it is abundantly clear that the dispute arises in contract, is in my view impermissible and that is the effect of

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<sup>2</sup> 2014 (4) NR 392 SC.

<sup>3</sup> 2009 (1) NR 314 (SC) p 230.



the judgments quoted above, which resonate with my own views. I am of the view that the application should fail for that reason. The applicant, by seeking umbrage in administrative law, is clearly barking the wrong tree.

[20] The mere fact that the awarding of the contract is governed by a legislative enactment does not necessarily translate to saying that if the respondents hold the view that any imperative provision of the applicable Act has been breached, thus rendering in their view, the contract in any way void or unenforceable, then the applicant is *per se* entitled to be heard in terms of administrative law, before that decision is made, does not follow. This is so because the respondent, in taking that decision, is not exercising public powers that are subject to and tantamount to administrative action.

[21] I am of the considered view that the above argument, fully and finally disposes of the applicant's claim, rendering it liable to dismissal, as I hereby do.

#### The counter-application

[22] In the counter-application, as mentioned above, the respondents claim that the conclusion of the contract *inter partes*, was not in keeping with the relevant legislation. In this regard, the court was referred to s 16(2)(a) of the Tender Board Act<sup>4</sup>, which provides the following:

'Acceptance of tenders and entry into force of agreements

16.1 . . .

(2) Where in terms of a title of tender –

- (a) a written agreement is required to be concluded after the acceptance of a tender, the Board and the tenderer concerned shall within 30 days from the date on which the tenderer was notified accordingly in terms of subsection (1) (a) or within such extended period as the Board may determine, enter into such an agreement.'

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<sup>4</sup> Act No. 16 1996.

[23] What is clear from the wording of the legislation is that there is a difference between the acceptance of an offer to a contract by a tenderer and a conclusion of the tender contract offered in terms of the award. The first step, from what appears above, is that the tenderer must first accept the tender awarded. That is not all. A further step, which has legal consequences flowing from it, is then required to be taken within 30 days of the notification of the award of the tender. This is the conclusion of the contract between the tenderer which has accepted the tender awarded, and the Tender Board.

[24] I did not understand Mr. Boesak, in his spirited address, to quibble with or contest the fact that although the tender was awarded to the applicant and that it was duly accepted, there was no entry into the agreement by the applicant and the Tender Board within the period of 30 days from the applicant being notified of the award. Nor, may I add, within any extended period that the Board may have granted.

[25] There is in fact no indication that any such extension was ever sought, let alone granted by the Tender Board. It is also clear that no agreement after the acceptance of the award by the applicant, was ever entered into between the parties at all and which would give rise to an enforceable contract in terms of the law.

[26] Namibia, as a State, is predicated on the true, tried and tested foundations of the rule of law. For that reason, it is imperative that any steps taken by public functionaries, must have their foundation and continued existence in the rich and abiding wells of the rule of law. Where any action is taken contrary to or not in conformity with the rule of law, as stipulated in the Constitution or ordinary legislation, including primary legislation, then the courts would be doing a great and offensive disservice to the aspirations of the founders of this country in countenancing such action. There should, in this regard, be no exception that justifies any departure, radical or otherwise, from the established rails of the rule of law.

[27] Mr. Namandje, in his able address, referred the court to the notorious case of *Rally for Democracy*,<sup>5</sup> where the Supreme Court in very clear and unambiguous terms, unreservedly endorsed the rule of law as a foundational pillar of this country. The court expressed itself thus:

‘The rule of law is one of the foundational principles of our State. One of the incidents that follows logically and naturally from this principle is the doctrine of legality. In our country, under a Constitution as its “Supreme Law”, it demands that the exercise of public power should be authorised by law – either by the Constitution itself or by any other law recognised by or made under the Constitution. “The exercise of public power is only legitimate where lawful”. If public functionaries are to exercise powers or perform functions outside the parameters of their legal authority, they, in fact, usurp powers of the State constitutionally entrusted to legislative authorities and other public functionaries. The doctrine, as a means to determine the legality of administrative conduct, is therefore fundamental in controlling – and where necessary, in constraining – the exercise of public powers and functions in our constitutional democracy.’

[28] It is accordingly not in dispute that the tender awarded in the instant case, was not concluded in terms of the applicable legislative enactment. For that reason, it was invalid from inception as it did not comply with what are clearly mandatory provisions of the law. It would therefore be against the tenets of the rule of law gloss over and allow such a contract, which is not even limping, but still-born, to be performed.

[29] To place the matter beyond doubt or contestation, in *Anhui v President of the Republic of Namibia*<sup>6</sup> Smuts JA made the following cardinal conclusion:

‘It is common cause that the provisions of the Tender Board Act had not been followed and would need to be followed for valid procurement in capital construction projects involving the Government. It is also clear from the affidavit by the Minister of Finance that Treasury approval had also not been granted under s 17 of the State Finance Act. The failure to follow the procedures set out in the Tender Board Act is fatal to the validity of an award made by the Ministry’ or its Permanent Secretary. For

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<sup>5</sup> 2010 (2) NR 487 at para

<sup>6</sup> 2017 (2) NR 340 (SC) p 349 para 41.

this reason alone, the award set out in the Permanent Secretary's letter of 3 December 2015, viewed in context with his letter of the same date to the NAC, is unlawful and invalid and should be set aside.' (Emphasis added).

[30] In view of the above judgments of the Supreme Court, which it must be stated, are binding on this court, the only reasonable conclusion one can come to, is that the applicant clearly has no leg to stand on, given the emphatic inevitability of the consequences of not following the peremptory legal provisions mentioned above by the parties.

[31] I should, in this regard, commend the respondents for the responsible and proper action, as good constitutional citizens, not to act as prosecutors and executioners in their cause. Once advised that the conduct in question may be invalid, they then sought an order from the court to declare the purported contract invalid and thus sought an imprimatur from the court regarding the validity of the contract they had purportedly entered into with the applicant.

[32] Mr. Namandje had other arguments in his briefcase that he eloquently detonated, so to speak during the hearing. In view of the conclusion reached on this particular issue, I am of the considered view that it is unnecessary to address the further points, if anything, to avoid carpet-bombing, as it were.

### Conclusion

[33] In the premises, it becomes clear that the applicant's application, for the reasons advanced above, is doomed to fail. For reasons also advanced in the judgment, I hold the view that the counter-application by the respondents for the declaration of the award of the tender to the applicant invalid, is clearly sustainable for the reasons adverted to above.

### Order

[34] Having regard to what has been stated above, the following order, in the circumstances, accordingly appears to be condign:

1. The Applicant's application for the review, correcting and setting aside of the Respondents' decision to cancel Tender No. E1/2-7/2015 for the implementation of the Oracle Payroll, Maintenance and Support of the existing Human Capital Management Service, is dismissed.
2. The Respondents counter-application to declare the service level agreement entered into between the Applicant and the First Respondent invalid *ab initio* and thus unenforceable, is hereby granted.
3. The Applicant is ordered to pay the costs of the application consequent upon the employment of one instructing and one instructed legal practitioner.
4. The matter is removed from the roll and is regarded as finalised.

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T.S Masuku  
Judge

## APPEARANCES:

APPLICANT: W. Boesak  
Instructed by: ENS|Africa. Windhoek

RESPONDENTS: S.Namandje,  
Instructed by: Office of the Government Attorney. Windhoek.