

REPUBLIC OF NAMIBIA



**HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
JUDGMENT**

HC-MD-CIV-MOT-GEN-2019/00040

In the matter between:

SHILIMELA SECURITY & DEBT COLLECTION CC

1ST APPLICANT

OMLE SECURITY SERVICES CC

2ND APPLICANT

TRIPPLE ONE SECURITY INVESTMENTS CC

3RD APPLICANT

and

**PERMANENT SECRETARY OF THE MINISTRY OF
AGRICULTURE, WATER AND FORESTRY**

1ST RESPONDENT

CENTRAL PROCUREMENT BOARD OF NAMIBIA

2ND RESPONDENT

THE CHAIRPERSON OF THE REVIEW PANEL

3RD RESPONDENT

**THE CHAIRPERSON OF THE BID EVALUATION
COMMITTEE, MINISTRY OF AGRICULTURE**

4TH RESPONDENT

VICMAC SECURITY SERVICES CC

5TH RESPONDENT

ONGEYAMA YA IRAQ COMMERCIAL CC

6TH RESPONDENT

SPLASH INVESTMENTS CC

7TH RESPONDENT

CENTRAL SECURITY & CLEANING SERVICES CC

8TH RESPONDENT

KANGARU TRADING CC

9TH RESPONDENT

NJANGULA SECURITY SERVICES CC

10TH RESPONDENT

INDEPENDENT SECURITY SERVICES CC

11TH RESPONDENT

Neutral Citation: *Shilimela Security & Debt Collection CC v Permanent Secretary of the Ministry of Agriculture, Water and Forestry* (HC-MD-CIV-MOT-GEN-2019/00040) [2021] NAHCMD 115 (01 March 2021).

CORAM: MASUKU J

Heard: 01 October 2020

Delivered: 01 March 2021

Flynote: Legislation – Procurement Act, 2015 – the Bid Evaluation Committee, its duties and powers – whether it has power to award tender contracts - Administrative Law – powers of review of the High Court – circumstances in which court can usurp powers of a functionary discussed – whether a court can usurp functions of a body and issue an award it would not have power in law to issue - definition of administrative action discussed – test for decisions which are reviewable discussed – Civil Procedure – parties to avoid alleging fraud without proof and powers of the court to curb such tendencies.

Summary: The applicants filed bids for the award of a security tender with the Ministry of Agriculture, Water and Forestry. Their bids were found by the Bid Evaluation Committee (BEC) not to have complied with stipulated requirements and they were disqualified. Aggrieved with that decision, the applicants approached the court alleging that the BEC had acted improperly and had fraudulently deprived the applicants of an opportunity to be awarded the tender although they were eminently qualified.

Held: that the BEC does not have power to award contracts as its duties are confined to evaluation of bids and reporting its findings to the procurement committee.

Held that: because the BEC has no power in law to award tender contracts, it would be improper for the court to issue an award even if usurped the powers of the BEC.

Held further that: courts do not lightly usurp functions of functionaries in reverence to the doctrine of separation of powers, except if the functionary has exhibited bias or gross incompetence, or where the decision is a foregone conclusion.

Held: that not every decision made by a functionary, is reviewable. It is only decisions which have a 'direct and external legal effect', which can be taken on review. As such, the decision of the BEC is not of such character as it is one of the preparatory decisions in the pipeline, with the ultimate decision of awarding a contract being that of the accounting officer.

Held that: parties should desist from making serious allegations of fraud and like conduct in the absence of proof, especially where the allegations are based on a misunderstanding of the applicable law. A party who engages in such conduct may be liable to costs on a punitive scale.

The application for usurpation of the powers of the BEC, with the court awarding the tender to the applicants and the alternative prayer that the court compels the BEC to award the tender to the applicants was refused with costs.

ORDER

1. The application for the Court to usurp the bid evaluation functions of the Bid Evaluation Committee of the Ministry of Agriculture, Water and Forestry and to substitute the decision of the said Bid Evaluation Committee, with a decision of this Court by awarding tender Bid No. NCS/ONB/BGS/20-01/2017 relating to the rendering of security services to the Ministry of Agriculture, Water and Forestry, is refused.
2. The alternative application for the Court to direct the Bid Evaluation Committee of the Ministry of Agriculture, Water and Forestry to award to the Applicants tender Bid No. NCS/ONB/BGS/20-01/2017, for the rendering of security services to the Ministry of Agriculture, Water and Forestry is refused.

3. The Applicants are ordered to pay the costs of the application jointly and severally, the one paying and the other being absolved, consequent upon the employment of one instructing and one instructed counsel.

4. The matter is removed from the roll and is regarded as finalised.

JUDGMENT

MASUKU J:

Introduction

[1] The procurement of goods and services by the State and its institutions is fast becoming a hotbed of litigation, which at times turns out to be acrimonious. This is chiefly because the stakes are very high. Very often, the granting of interdictory relief becomes necessary whilst the bolts and nuts of the main dispute are being carefully analysed for future determination.

[2] Presently serving before court is yet another episode in the judicial theatre involving a tender. The main actors are Shilimela Security and Debt Recovery CC, Omle Security Services CC and Triple One Security CC, who shall be referred to as 'the applicants'. The other main actor, the 'villain' as far as the applicants are concerned, is the Chairperson of the Bid Evaluation Committee of the Ministry of Agriculture, Water and Forestry. That party is cited as the 4th respondent in these proceedings. No relief is sought against the other respondents cited, according to the applicants' founding affidavit.

[3] At issue is a tender for security services which was duly advertised by the Ministry of Agriculture, Water and Forestry, ('the Ministry'). The applicant cries foul and alleges that the evaluation of the tender was marred by irregularities on the part of the 4th respondent. The applicants thus seek an order of this court, usurping the functions of the 4th respondent and the court itself awarding the tender to the applicants. In the alternative, the applicants seek an order that the court compels

the 4th respondent to issue the award of the tender to the applicants within a specified time frame.

[4] The task at hand, is to determine whether there is any merit in the applicant's case. More importantly, what stands out as a key legal issue for determination, is the propriety of this court usurping the powers and functions of statutory functionaries. Is this a proper case where the court would be at large to resort to those sparingly used powers? The jury is out, as it were.

Background

[5] As intimated above, the issue revolves around the advertisement of tender No. NCS/ONB/BGS/20-01/2017. The tender was subsequently cancelled and re-advertised by the respondents because according to them, none of the bidders qualified. This is a decision which is not submitted for determination before me. The applicant alleges that there were serious irregularities in the process, accompanied by fraud, which is the basis on which the applicants were disqualified from eventually competing for the award. The applicant's case is that the applicants were eminently qualified to be awarded the tender but were, by the sleight of hand, irregularly and fraudulently disqualified from further participation in the tender process.

[6] It is a matter of note that when one has regard to the applicant's notice of motion, there is no prayer for the court to review and set aside as irregular, the disqualification of the applicants. They, as recorded above, seek an order that this court usurps the functions of the 4th respondent, because it has nakedly exhibited bias and partiality against the applicants. In the alternative, the applicants seek an order that the court compels the 4th respondent to award the tender to the applicants without further ado.

[7] The respondents, particularly the first four respondents, oppose this application. They benevolently pour scorn on the applicants' allegations of bias, partiality, fraud and such other epithets, which appear to decorate the applicants' founding affidavit. They had intimated in their answering affidavit that application will be made for the said offensive paragraphs to be struck out as being

scandalous, vexatious or irrelevant, but they did not make such application at the appropriate time or at all.

[8] It is perhaps a matter of comment that allegations of impropriety, which allege defect of character, especially of fraud, such as made by the applicant, should not be lightly made in the absence of acceptable and admissible evidence in that regard. To shower officials with such colourful but demeaning epithets is an issue that the court does not take lightly. It normally attracts a whipping of the delinquent party by the court, in the form of an adverse costs order.¹

[9] Regardless of how dissatisfied a litigant may be with the direction such processes take, it must not be easy to lay such allegations in the absence of proof, and in circumstances where the one alleging misunderstands the law and the processes governing the issues in contention, as appears to be the case in this matter.

[10] Whilst the respondents strongly deny imputations of wrong-doing attributed to them by the applicants, they have taken the position that the application is doomed to fail because it is premised on a totally wrong understanding of the law applicable, particularly the role, power, function and place of the 4th respondent within the procurement hierarchy. They contend that the 4th respondent has no power to make any decision awarding tenders to any party. For the above reasons, the respondents contend that the only way open to the court to deal with the matter, is to dismiss the application without further ceremony and with costs.

[11] On the merits, the respondents allege that the applicants failed the technical evaluation because they failed to specify the regions in respect of which the bids were submitted, as well as the prices therefor. Furthermore, the applicants failed to supply audit reports for the past five years. It is the respondents' case that the eligibility compliance grid relied on by the applicants for relief is for testing eligibility to participate in the bid and not an indication that the bidder has met all the requirements for the entire evaluation and therefor entitled to participate in the evaluation process.

¹ *Africa New Dimensions CC v The Prosecutor-General of Namibia* (SA 22- 2016) NASC (08 March 2018).

Determination

[12] I am of the considered view that when one has proper regard to the respondents' response, the matter is capable of determination on the legal issues that are raised by the respondents, without a need to decide the factual premise. This is because the respondents argue that the application flies in the face of the provisions of the Act, an argument, whose sustainability will be tested below. I accordingly proceed to deal with the legal issue that arise.

Usurpation of BEC powers by the court

[13] In order to determine whether this court may properly usurp the powers of the 4th respondent and 'award' the tender, as prayed for, it is important first to have regard to the nature and powers of the 4th respondent. Section 26 of the Public Procurement Act² provides for the creation of a Bid Evaluation Committee, ('BEC'). In s 26(1), it calls for the Procurement Board or accounting officer, to establish *an ad hoc* bid evaluation committee for 'the evaluation of bids required to be undertaken in accordance with this Act'.

[14] It would stand to reason that the BEC is not necessarily a standing committee or body of set individuals. It is one whose lifespan is normally short and is decided based on the peculiar nature and scope of the tender advertised. It will normally involve persons with specialised 'skills, knowledge and experience relevant to the particular procurement requirements.'³ Their skills, experience or knowledge may include technical skills, procurement and contracting skills, financial management and analytical skills and legal knowledge and expertise.

[15] Subsection (4) provides as follows:

'A bid evaluation committee established under subsection (1) is responsible for –
(a) the evaluation of pre-qualification, bids, proposals or quotations; and

² Act No. 15 of 2015,

³ Section 26 (6) of the Act.

(b) the preparation of evaluation reports for submission to the procurement committee as provided under this Act.

[16] It is accordingly clear, from the provisions of the law that the BEC has specified functions. It is an *ad hoc* body that is appointed for the purpose of evaluating pre-qualification bids, proposals or quotations and to prepare evaluation reports for submission to the procurement committee. That is all it is empowered to do in terms of the law.

[17] What is accordingly plain from a careful reading of the Act, is that the BEC does not award tenders. It simply does not have the power to do so, if proper regard is had to the enabling legislation as quoted above. That being the case, it becomes as clear as noonday that if it is proper for the court to usurp powers of a body, and that is another enquiry altogether, that body must possess the power that the court is being moved, on application, to usurp. In other words, the usurpation of the powers must be confined to the four corners of the powers conferred on the body alleged to be biased, incompetent or where the contemplated hearing is nothing but an unrehearsed charade.

[18] Because the BEC has no power to award any tenders, it follows, as night follows day, that the court cannot properly usurp the powers of the 4th respondent in this case and issue an award to the applicants. This is chiefly because the 4th respondent simply does not have that power. It would therefore be absurd for this court to purport to exercise power by awarding a tender but which the body, whose powers it has usurped, does not have. The Latin *maxim nemo dat quod non habet* (No one gives that which he has not), may accordingly find application in the instant case in so far as the court, the usurper, may be called to exercise powers that the body whose powers are usurped, had no power to exercise.

[19] In fact, if the court gave in to the applicants' entreaties, it would in effect usurp the functions of the accounting officer, which have not on the evidence before court, yet been exercised. The court is thus being invited to get ahead of itself and engage in prophetic and divination escapades, which would suggest well in advance that the accounting officer will be biased or incompetent before the matter comes before him for determination. This would be grossly irregular conduct

on the part of the court. It would serve to throw the procurement train off the legislative rails into complete disarray and chaos, dismembering many persons in the train, in the process, drivers and passengers alike.

[20] I agree with the argument advanced by Mr. Chibwana, for the respondents, to the effect that if the court were to grant the relief sought by the applicants, because the matter is at the level of the BEC, where an order would be made for the award of the tender to the applicants, the effect would be that the court's decision would then be subject to review or appeal to the procurement committee, and possibly the controlling officer. This, he submitted would turn the court to a farce that would never have been intended by the legislature.

[21] Mr. Shakumu cited very good authority dealing with the situations where a usurpation of functions of a functionary by a court may be permissible. This includes the case of *Gauteng Gambling Construction Board v Silverstar Development Ltd and Others*⁴ and *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another*.⁵

[22] The question of usurpation of the functionary's power, has previously come for decision before our courts. In *Minister of Health and Social Services v Lisse*, the Supreme Court, quoted with approval the sentiments expressed in *Erf One Six Seven Orchard CC v Greater Johannesburg Metropolitan Council (Johannesburg Administration and Another)*⁶, where it is stated as follows:

'The matter will not be sent back to the decision-maker unless there are special circumstances giving reason for not doing so. Thus, for example, a matter would not be referred back where the tribunal or functionary has exhibited bias or gross incompetence or where the outcome appears to be a foregone.'

[23] In *Holme Namibia Investments (Pty) Ltd v Minister of Urban and Rural Development*⁷ the court cited with approval the remarks of O'Regan J in *Bato Star*

⁴ *Gambling Construction Board v Silverstar Development Ltd and Others* 2005 (4) SA 67 (SCA)

⁵ *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another* 2015 (5) SA 245 (CC).

⁶ *Erf One Six Seven Orchards CC v Greater Johannesburg Metropolitan Council: Johannesburg Administration and Another* (174/96) [1998] ZASCA 91

*v Minister of Environmental Affairs*⁸ where the learned judge remarked as follows on this matter:

'In treating the decisions of administrative agencies with the appropriate respect, a Court is recognising the proper role of the Executive within the Constitution. In doing so, a court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A Court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a Court should give weight to these considerations will depend upon the character of the decision itself, as well as on the identity of the decision-maker. A decision that requires an equilibrium to be struck between a ranger of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the Courts. Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances, a Court should pay due respect to the route selected by the decision-maker. This does not mean, however, that where a decision is one, which will reasonably result in the achievement of the goal, or which is not reasonably supported on the facts or not reasonable in the light of the reasons given for it, a Court may not review that decision. A Court should not rubber-stamp an unreasonable decision simply because of the complexity of the decision or the identity of the decision-maker.' See also *Hashagen v Public Accountants and Auditors Board*.⁹

[24] It would appear, from the foregoing, that the court should not lightly venture into the usurpation mode in reverence to the doctrine of separation of powers. This is because many of these decisions are specialist in nature and may be complicated and not easy to comprehend, let alone decided on by the courts in solitude and in the absence of expert advice and opinion, which the court is often bound to do, in application proceedings.

Is there an administrative decision made by the BEC?

[25] What is important to note, and this moves me to another dimension of the argument, it is plain, from the authorities cited above, that there must have been a

⁷ *Holme Namibia Investments (Pty) Ltd v Minister of Urban and Rural Development* (HC-MD-CIV-MOT-REV-2017.00314) [2019] NAHCMD 171 (29 May 2019).

⁸ *Star v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) para 48.

⁹ *Hashagen v Public Accountants and Auditors Board* HC-MD-CIV-MOT-REV-2017/00210) [2019] NAHCMD 336 (10 September 2019).

decision that has been made. Mr. Chibwana argued forcefully that in the instant case, the 4th respondent never made any decision and does not have the power to make any decision that this court would, if it had power to intervene, to set aside on review.

[26] In terms of the Act, the power to award tenders is resident in the accounting officer, acting on the recommendation of the Procurement Committee, created in terms of regulation 6(1) and (2) made under the Act. This body oversees the procurement process and recommends to the accounting officer the bidding process of a public entity; reviews the evaluation of the pre-qualification or bid for procurement made and submitted by the BEC; attends to clarification of issues appertaining to bidding during the bidding stage and lastly, recommends to the accounting officer the approval for the award of a procurement contract.

[27] It is clear, from the foregoing, that the decision to award a tender, is made by the accounting officer concerned, in this case, the 1st respondent, acting on the recommendation of the Procurement Committee. Part of the duties of the procurement committee, as stated above, is to review the evaluation of the pre-qualification or bid for procurement submitted by the 4th respondent.

[28] This makes it very clear that the 4th respondent does not make any decision, including awarding any tender, which is subject to review by this court. The decision that may be assailed on review, is made by the accounting officer in terms of regulation 6(3). That officer may act on the recommendation of the procurement committee or request a re-evaluation by the 4th respondent or the re-submission of bids to the procurement committee for reconsideration. I would, for that reason, agree with Mr. Chibwana that the applicants are barking the wrong tree as it is plain that the 4th respondent did not make any decision that is capable of being taken on review to this court.

[29] It must be borne in mind that it is not every decision made by a public official that qualifies for being taken on review before this court. There are certain characteristics that a decision should have in order for it to be able to attract an application for review. In this regard, Mr. Chibwana helpfully referred the court to a

judgment of the courts in Australia in the matter *Australian Broadcasting Tribunal Board v Bond and Others*.¹⁰

[30] In the said judgment, the court reasoned the issue in the following terms:

[35] On a similar process of reasoning in the present case, the determination of maximum gas prices was made by way of a staged process which only became binding on its completion when NERSA gave its decision on Sasol Gas's application. The fact that there were various steps in the process does not ender each of these steps individually, an administrative action which adversely affected the rights of any person. For as Nugent JA stressed in *Grey's Marine Hout Bay (Pty) Ltd & Others v Minister of Public Works & Others*; 2005 (6) SA 313 para 24, administrative action in general terms involves the conduct of the bureaucracy having 'direct and immediate consequences for individuals or groups of individuals.' NERSA's determination of the methodology to be used did not have consequences of that nature. It could only have had such an impact once it determined what Sasol Gas's maximum prices should be. Until then, it did not bind any party and, in my view, did not constitute administrative action'.

[31] In considering the above judgment, it becomes plain that the involvement of the 4th respondent in the consideration and evaluation of the bids in this matter did not have any immediate detrimental effect on the applicants. The BEC was one of the bodies which would evaluate and make its findings in a progressive process involving other bodies and offices which eventually leads to the final decision on the tender. As it is, it would appear that the decision to award a tender in this matter has not been made because the tender was cancelled. It is that decision, if made, that would have a direct and external legal effect on the applicants. The evaluations, findings and the recommendations, if any, that the 4th respondent would have made at this stage are thus not an administrative action properly so-called.

[32] This court has, in dealing with decisions that constitute administrative action, adopted the words of Professor Hoexter, namely, that the decision, to qualify as administrative action, must have a 'direct and external legal effect' on the

¹⁰ *Australian Broadcasting Tribunal Board v Bond and Others* Australian Law Reports, 11 (HCA) (1990) 170 CLR 321 at 32 and 43 (26 July 1990).

applicants.¹¹ It is very plain, due regard being had to what has been discussed above that the 4th respondent's decision is not one that would ever ripen, on its own, to constitute administrative action and thus capable of being reviewed by this court.

[33] It would appear that the evaluation and reports of the BEC are forwarded to the procurement committee, which, if satisfied, would then make a recommendation to the accounting officer. It is that final and momentous decision of the accounting officer to award the tender and to notify the unsuccessful bidders that constitutes an administrative action capable of causing a direct and external legal effect on bidders' rights. It is that decision that may be brought to this court on review, in my considered view.

Conclusion

[34] In view of the various issues discussed above, it would appear to me that the applicants' application is ill-conceived and is based on a misreading or misunderstanding of the provisions of the Act. In particular, it would appear that the applicants do not appreciate the function and role of the 4th respondent in scheme of finally awarding a contract to a successful bidder. The 4th respondent does not award contracts and did not purport to do so at any stage. As such, the court could not usurp its powers to award it simply does not have.

[35] Furthermore, it is also plain that the circumstances that would allow this court to intervene and usurp the powers of a functionary, are non-existent, especially as the 4th respondent has no power, in any event, to award contracts as stated. Lastly, properly considered, the 4th respondent's role is confined to being a part in the process of reaching the final decision to award a contract, which it does not make. For that reason, its decision does not have direct external legal effect that would attract an application for review before this court. It is thus actions are thus not an administrative action subject to the court's powers of review.

Costs

¹¹ *Luxury Investments No. 6 (Pty) Ltd v Minister of Works and Transport* (HC-MD-CIV-MOT-REV-2017/00136 [2020] NAHCMD 153 (7 May 2020)).

[36] It has now been accepted that the ordinary rule that applies in that costs follow the event. There is no reason why the applicants should not be ordered to pay the respondents' costs in this matter. It is clear that the applicants were unsuccessful in their application and they are thus ordered to pay the costs of those respondents who opposed the application.

Order

[37] In the circumstances, I am of the considered view that this is an application that is entirely without merit. It has to be dismissed accordingly. The order that presents itself as condign therefor is the following:

1. The application for the Court to usurp the bid evaluation functions of the Bid Evaluation Committee of the Ministry of Agriculture, Water and Forestry and to substitute the decision of the said Bid Evaluation Committee, with a decision of this Court by awarding tender Bid No. NCS/ONB/BGS/20-01/2017 relating to the rendering of security services to the Ministry of Agriculture, Water and Forestry, is refused.
2. The alternative application for the Court to direct the Bid Evaluation Committee of the Ministry of Agriculture, Water and Forestry to award to the Applicants tender Bid No. NCS/ONB/BGS/20-01/2017, for the rendering of security services to the Ministry of Agriculture, Water and Forestry is refused.
3. The Applicants are ordered to pay the costs of the application jointly and severally, the one paying and the other being absolved, consequent upon the employment of one instructing and one instructed counsel.
4. The matter is removed from the roll and is regarded as finalised.

T.S. Masuku
Judge

APPEARANCES:

APPLICANTS:

S. Kishi-Shakumu
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RESPONDENTS:

T. Chibwana
Instructed by Government Attorney