

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA



MAIN DIVISION, WINDHOEK

RULING

PRACTICE DIRECTION 61

<b>Case Title:</b> MORGAN & QUEEN MEDICAL SUPPLIES CC // REVIEW PANEL & 13 OTHERS	<b>Case No:</b> HC-MD-CIV-MOT-REV-2022/00577
	<b>Division of Court:</b> HIGH COURT (MAIN DIVISION)
<b>Heard before:</b> HONOURABLE MR JUSTICE PARKER, ACTING	<b>Heard on:</b> 2 AUGUST 2023
	<b>Delivered on:</b> 18 OCTOBER 2023
<b>Neutral citation:</b> <i>Morgan &amp; Queen Medical Supplies CC v Review Panel</i> (HC-MD-CIV-MOT-REV-2022/00577) [2023] NAHCMD 662 (18 October 2023)	
<b>Order:</b>	
<ol style="list-style-type: none"><li>1. The decision by the first respondent dated 30 September 2022 in respect of Bid Number G/ONB/1305PO-3/2022 is reviewed and set aside and is declared null and void and of no force and effect.</li><li>2. The validity period of the bid with regard to Bid Number G/ONB/1305PO-3/2022 is extended.</li><li>3. The bid is remitted to the second respondent for the second respondent to proceed with the award of the said tender and contract negotiations.</li><li>4. The third respondent shall pay the applicant's costs of suit.</li><li>5. The matter is finalised and removed from the roll.</li></ol>	

**Reasons:**

PARKER AJ:

[1] In the instant application, the applicant challenges by judicial review the validity of a decision of an administrative body, namely, the Review Panel of the Procurement Board (the first respondent). The applicant, represented by Mr Ketjijere, seeks the relief set out in the notice of motion. Mr Ketjijere informed the court that the applicant does not persist in para 2 of the notice of motion. The third respondent, represented by Ms Shipindo, has moved to reject the application. The applicable legislation is the Public Procurement Act 15 of 1995 ('the Act').

[2] The application concerns the procurement of wheelchairs under tender Bid Number G/ONB/1305PO-3/2022. The applicant and the fourth to the fourteenth respondents were the bidders. The applicant was selected as the successful bidder.

[3] In the course of events, the Review Panel of the Procurement Board ('the RP') informed the applicant that it was disqualified and gave reasons for its decision. Aggrieved by the RP's decision, the applicant lodged a review application in terms of s 59(1) of the Act which provides an internal statutory remedy.

[4] In a letter dated 26 September 2022, the bidders, including the applicant, were informed that the third respondent had lodged a review application and informed all parties that the review hearing would take place on 30 September 2022 at 9H40, 3<sup>rd</sup> Floor Boardroom, Ministry of Finance Head Office, Moltke Street, Windhoek. The parties were also informed that they could also participate via a virtual link and that a virtual link password would be sent to the parties before the hearing.

[5] On the papers, I find that the first respondent (RP) did not keep its promise as far as the applicant was concerned. No virtual link password was sent to the applicant. The RP concedes that the link was misrouted to the wrong email address. Everybody who is familiar with virtual communication platforms knows that one cannot participate in any virtual communication without a virtual link password. The hearing of the review went ahead in the absence of the applicant. It must be highlighted and mentioned in capitalities that of all the interests of the bidders regarding the hearing, the applicant's interest was paramount,

because any adverse decision by the RP occasioned gravest prejudice to it, having been selected as the successful bidder by the employer.

[6] The applicant launched the application on two grounds: The first ground is along these lines: The applicant was not served with the review application of the third respondent that was heard before the first respondent. The link through which the virtual hearing was to be heard was never served on or shared with the applicant. Therefore, the applicant was not able to participate in the review proceedings before the first respondent. That on its own was in violation of regulation 42(3) as the applicant was not afforded the opportunity to present its case before the first respondent, thus, violating its right to *audi alteram partem* and in turn article 18 of the Namibian Constitution.

[7] The second ground is couched in the following terms: The third respondent's 'purported' review application filed before the first respondent was defective in that the third respondent only filed a letter but not a valid review application on affidavit, placing evidence before the first respondent. Thus, there was no review application filed before the first respondent in respect of which a Review Panel could be constituted. Therefore, the decision of the first respondent stands to be reviewed and set aside.

[8] I shall consider the first ground of review first because if upheld, it would be dispositive of the application. The first ground charges that the applicant was denied his common law and constitutional right to *audi alteram partem* ('*audi*' for short).

[9] As intimated previously, I find, and it is undisputed and indisputable, that the applicant's right to *audi* was violated, in the manner described above, in breach of his constitutional right under article 18 of the Namibian Constitution and his common law right to natural justice which, in any case, is protected by article 18.

[10] Mr Ketjijere submitted that on that ground alone the impugned decision stands to be reviewed and set aside. I agree. The only unsatisfactory answer vouchsafed by the third respondent's counsel, Ms Shipindo, is that the applicant should have made enquiries about the link. Why should it? The first respondent promised to send it and it sent it to a wrong email address through no fault of the applicant. In that regard it should be remembered that if, as a matter of law, the applicant was entitled to *audi*, as the applicant in the instant proceeding was, 'the reason (on the part of the respondent) for the failure to afford him one is

completely immaterial'.<sup>1</sup>

[11] Where the court finds that a basic human right guaranteed to the applicant by the Constitution has been violated, eg the right to *audi*, the court has no discretion but a duty to review and set aside the impugned decision.<sup>2</sup>

[12] Based on these reasons, I hold that the applicant has made out a case for the relief sought and is, therefore, entitled to judgment. In the result, I order as follows:

1. The decision by the first respondent dated 30 September 2022 in respect of Bid Number G/ONB/1305PO-3/2022 is reviewed and set aside and is declared null and void and of no force and effect.
2. The validity period of the bid with regard to Bid Number G/ONB/1305PO-3/2022 is extended.
3. The bid is remitted to the second respondent for the second respondent to proceed with the award of the said tender and contract negotiations.
4. The third respondent shall pay the applicant's costs of suit.
5. The matter is finalised and removed from the roll.

<b>Judge's signature:</b>	<b>Note to the parties:</b>
	Not applicable.
<b>Counsel:</b>	
<b>Applicant</b>	<b>Third Respondent</b>
H R Ketjijere Of Brockhoff & Associates Legal	R Shipindo Of Shipindo & Associates Incorporated, Windhoek

<sup>1</sup> *National Director of Public Prosecutors v Zuma* 2009 (2) SA 277 (SCA) para 23.

<sup>2</sup> *Ridge v Buldwin* [1964] A.C 40 (UKHL); *Administrator, Transvaal & Others v Zenzile & Others* 1991 (1) SA 21 (A); *Minister of Health and Social Services v Lisse* 2008 (2) NR 739 (SC).

Practitioners, Windhoek	
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