

**REPUBLIC OF NAMIBIA**



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

**JUDGMENT**

**CASE NO: HC-MD-CIV-MOT-REV-2023/00426**

In the matter between:

**AFRICURE PHARMACEUTICAL NAMIBIA (PTY) LTD**

**APPLICANT**

and

**COSPHARM INVESTMENT (PTY) LTD**

**1<sup>ST</sup> RESPONDENT**

**CENTRAL PROCUREMENT BOARD OF NAMIBIA**

**2<sup>ND</sup> RESPONDENT**

**MINISTER OF HEALTH & SOCIAL SERVICES**

**3<sup>RD</sup> RESPONDENT**

**NAMPHARM**

**4<sup>TH</sup> RESPONDENT**

**ERONGOMED HEALTH DISTRIBUTORS (PTY)**

**5<sup>TH</sup> RESPONDENT**

**GENMED (PTY) LTD**

**6<sup>TH</sup> RESPONDENT**

**SUPREMO PHARMACEUTICALS (PTY) LTD**

**7<sup>TH</sup> RESPONDENT**

**MOZART MEDICAL SUPPLIERS (PTY) LTD**

**8<sup>TH</sup> RESPONDENT**

**CIRON DRUGS & PHARMACEUTICALS (PTY) LTD**

**9<sup>TH</sup> RESPONDENT**

**GEKA-PHARMA (PTY) LTD**

**10<sup>TH</sup> RESPONDENT**

**ELEMENT MEDICAL SUPPLIERS (PTY) LTD**

**11<sup>TH</sup> RESPONDENT**

**ECONO INVESTMENTS (PTY) LTD**

**12<sup>TH</sup> RESPONDENT**

**AFRIPHARM INVESTMENTS (PTY) LTD**

**13<sup>TH</sup> RESPONDENT**

WAP PHARMACARE T/A WAP MEDICAL SUPPLIERS	14 <sup>TH</sup> RESPONDENT
BROAD PHARMA (PTY) LTD	15 <sup>TH</sup> RESPONDENT
CORANCE INVESTMENTS (PTY) LTD JV TRANSPHARM	16 <sup>TH</sup> RESPONDENT
TALIINDJE INVESTMENT CC	17 <sup>TH</sup> RESPONDENT
SALUTEM MEDICALS (PTY) LTD	18 <sup>TH</sup> RESPONDENT
HOODIA PHARMA (PTY) LTD JV	
GALEN SUPPLIES CC	19 <sup>TH</sup> RESPONDENT
CAREMARQUE PHARMA CC	20 <sup>TH</sup> RESPONDENT
OSHAKATI PHARMACY CC T/A MEDEX PHARMA	21 <sup>ST</sup> RESPONDENT
SHIPANGA MEDICAL SERVICES (PTY) LTD	22 <sup>ND</sup> RESPONDENT
INNOVA HEALTHCARE DISTRIBUTORS & WAREHOUSE (PTY) LTD	23 <sup>RD</sup> RESPONDENT
LANDULAMED WHOLESALER & DISTRIBUTORS CC	24 <sup>TH</sup> RESPONDENT
PFIZER LABORTORIES (PTY) LTD	25 <sup>TH</sup> RESPONDENT
WINDHOEK MEDICAL SOLUTIONS (PTY) LTD	26 <sup>TH</sup> RESPONDENT
CHAIRPERSON OF THE REVIEW PANEL	27 <sup>TH</sup> RESPONDENT
THE REVIEW PANEL	28 <sup>TH</sup> RESPONDENT
ATTORNEY-GENERAL OF THE REPUBLIC OF NAMIBIA	29 <sup>TH</sup> RESPONDENT

**Neutral Citation:** *Africure Pharmaceutical Namibia (Pty) Ltd v Cospharm Investment (Pty) Ltd* (HC-MD-CIV-MOT-REV-2023/00426) [2024] NAHCMD 248 (24 May 2024)

**Coram:** UEITELE J

**Heard:** 15 February 2024

**Delivered:** 24 May 2024

**Flynote:** Applications — Reviews and motions — Supply of pharmaceutical products — Public Procurement Act 15 of 2015 — Procedural fairness — *Audi alteram partem* rule — Article 18 of the Namibian Constitution.

**Summary:** On 29 April 2022, the Board published a tender for the supply of pharmaceutical products, which tender closed on 08 November 2022. On 26 April 2023, the Board issued a notice of selection of procurement award to the bidders whereby the applicant was notified that it was selected to provide about N\$123 million worth of pharmaceutical goods/products. Cospharm, the first respondent, also submitted a bid but its bid was unsuccessful and was found to be unresponsive. Cospharm, aggrieved by the disqualification of its bid, filed an application in terms of s 55(4A) of the Public Procurement Act 15 of 2015 (the Act), for reconsideration of the notice of selection of procurement award of 26 April 2023.

On 03 August 2023, the Board issued a new notice of selection of procurement award in terms of which Cospharm was issued with a notice of award worth N\$1.3 billion and the applicant's award was reduced from N\$123 million to N\$45 million. Aggrieved by the notice for selection for award of 03 August 2023, the applicant, in terms of s 59 of the Act, filed a review application with the Review Panel in terms of which it challenged the 03 August 2023 award on several review grounds. Despite the applicant's review application that was pending before the Review Panel, the Board, on 16 August 2023, issued procurement contract acceptance letters to all successful bidders identified in the 03 August 2023 notice of procurement award, in which the successful bidders were requested to provide performance security worth ten percent of the contract value, within 30 days, failing which, the Board would select another bidder.

On 21 August 2023, the applicant brought an urgent application in terms of which it sought an order restraining and interdicting the Board and Cospharm from implementing or executing any procurement contract awarded by the Board in respect of Tender Number: G/OIB.CPBN01/2022 pending the outcome of the applicant's review

application lodged on 11 August 2023 with the Review Panel. This Court granted the order sought by the applicant.

On 28 August 2023, the Review Panel heard the applicant's review application and on 29 August 2023, it dismissed the applicant's review application and again confirmed the Board's decision of 03 August 2023. The applicant, aggrieved by the Review Panel's decision dismissing its review application, approached this Court on an urgent basis again on 25 September 2023. The relief sought by the applicant consisted of two components namely, part A and part B. This Court, on 25 October 2023, granted the relief sought in part A of the applicant's application.

This judgment therefore only pertains to part B of the applicant's application which concerns the question of whether or not a party, who is a participant in a tender process, is entitled to be informed about its competitor participant's application for the reconsideration under the provisions of the Act and whether it should be afforded an opportunity to make representations with respect to the reconsideration application.

*Held that:* the consequences for noncompliance with a statutory provision (whether it be classified as directory or peremptory) must ultimately depend upon the proper construction of the statutory provision in question, or, in other words, upon the intention of the lawgiver as ascertained from the language, scope, and purpose of the enactment as a whole and the statutory requirement in particular. It has thus been held that 'even where the formalities required by statute are peremptory it is not every deviation from the literal prescription that is fatal. Even in that event, the question remains whether, in spite of the defects, the object of the statutory provision had been achieved.

*Held further that:* section 55(4A) the Act does not state that the Board must take a decision with respect to a reconsideration application within seven days. The section provides that, the Board must notify a bidder who has applied for the reconsideration of its bid, within seven days of that application. The Board thus had a statutory obligation

to inform applicants for reconsideration, of its decision not later than seven days after it received a reconsideration application.

*Held that:* the fact that the right to be treated fairly was included in the Constitution, highlights the important role this right plays in a democratic society. The important role that the right to be treated fairly (which includes procedural fairness) plays in a democratic society has been discussed by our Courts on a number of occasions.

*Held further that:* the values and principles contained in our Constitution, requires of public entities such as the Board, to act in a manner that promotes accountability, responsiveness, openness and fairness when fulfilling its constitutional and statutory obligations. Compliance by public entities with their procedural fairness obligations is crucial therefore, not only for the protection of citizens' rights, but also to facilitate trust in the public administration and in our participatory democracy.

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## ORDER

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1. The decisions of the Central Procurement Board of Namibia taken on 9 May 2023 and 12 May 2023, and in particular the decisions to grant the reconsideration applications, from the following bidders namely; Cospharm Investments (Pty) Ltd (the 1<sup>st</sup> respondent), Broad Pharma (Pty) Ltd ( the 15<sup>th</sup> respondent), Econo Investments (Pty) Ltd ( the 12<sup>th</sup> respondent) and Erongo Med Health Distributors (Pty) Ltd (5<sup>th</sup> respondent) and to order the Bid Evaluation Committee to re-evaluate the bids, are reviewed and set aside.

2. The decisions of the Central Procurement Board of Namibia communicated to the bidders by Notice for Selection of Procurement Award on 03 August 2023 (and thereafter varied and communicated to the bidders on 27 September 2023) awarding

the bid to the bidders, in accordance with the re-evaluation of the bids pursuant to the reconsideration applications of the bidders referred to above in paragraph 1, is reviewed and set aside.

3. The first and second respondents must, jointly and severally, the one paying the other to be absolved, pay the applicant's costs of suit.

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

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## JUDGMENT

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### **UEITELE J:**

#### Introduction

'In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity, there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. ... The security of securities is publicity.'<sup>1</sup>

[1] This matter concerns the question of whether or not a party, who is a participant in a tender process, is entitled to be informed about another participant's (the competitor) application for the reconsideration, under the provisions of the Public Procurement Act 15 of 2015 (the Act), of its (the competitor's) bid and to be afforded an opportunity to make representations with respect to the reconsideration application.

[2] On 29 April 2022, the Central Procurement Board (the Board) by publication in the local, printed and electronic media invited bids under procurement number

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<sup>1</sup> John Bowring: The Works of Jeremy Bentham. Vol 4 (1843) at 316-317.

G/OIB/CPBN01/2022 for the supply of pharmaceutical products. The tender closed on 08 November 2022. Twenty six entities submitted bids to supply the pharmaceutical products. On 26 April 2023, the Board issued a notice of selection of procurement award to the bidders. In the 26 April 2023 notice, Africure Pharmaceutical Namibia (Pty) Ltd (who is the applicant and to whom I will in this judgment refer to as the applicant), was notified that it was selected to provide about N\$123 million worth of pharmaceutical goods/products. A company called Cospharm Investment (Pty) Ltd (who is the first respondent and I will, in this judgment, for ease of reference, refer to it as Cospharm) also submitted a bid but it was informed that its bid was found to be unresponsive and was thus disqualified.

[3] Cospharm, aggrieved by the disqualification of its bid, on 02 May 2023, filed an application in terms of s 55(4A) of the Act with the Board for a reconsideration of the notice of selection of procurement award of 26 April 2023. The following bidders also applied for reconsideration of their bids:

- (a) Landulamed Wholesaler & Distributors CC
- (b) Taliindje Investment CC;
- (c) Broad Pharma (Pty) Ltd;
- (d) Oshakati Pharmacy CC t/a Medex Pharma;
- (e) Econo Investments (Pty) Ltd;
- (f) Hoodia Pharma (Pty) Ltd JV Galen Supplies CC and
- (g) Erongomed Health Distributors (Pty) Ltd.

[4] It is common cause that the reconsideration applications were only served on the Board and not on any of the other bidders who were informed on 26 April 2023 that they were selected to provide pharmaceutical products in terms of tender G/OIB/CPBN01/2022. In fact, Cospharm made it clear in its reconsideration application that it would only serve its application for reconsideration on the Board. Cospharm's application for reconsideration is dated 02 May 2023. All the other applications for reconsideration, except the one of Taliindje Investment CC (Tallindje), are dated 08 May 2023. It furthermore appears that the Board, on 08 and 9 May 2023, considered Cospharm's and the other bidders' reconsideration applications and took a decision in respect thereof (except the one of Taliindje Investment CC (Tallindje)) on 9 May 2023 but only communicated its decision to Cospharm and the other bidders on 26 May 2023.

[5] I interpose here and note that s 55(4A) of the Act requires the Board to, within seven days from the date of receipt of an application for reconsideration, notify a bidder, who has applied for a reconsideration of its bid, of its decision. As indicated in the preceding paragraph, the Board failed to notify Cospharm and the other bidders of its decision within the seven days stipulated in s 55(4A). As a result of the Board's failure, Cospharm, on 24 May 2023, lodged a review application as contemplated under s 59 of the Act with the Review Panel. As I indicated in the preceding paragraph, the Board notified Cospharm and the other bidders of its decision with respect to their application for reconsideration on 26 May 2023. In addition to notifying the bidders of its decision, the Board directed the Bid Evaluation Committee to re-evaluate Cospharm's bid.

[6] After learning that its reconsideration application was favourably reconsidered, Cospharm, on 06 June 2023, withdrew its application for review from the Review Panel. The applicant on 06 June 2023, after becoming aware that Cospharm has withdrawn its review application, addressed a letter to the chairperson of the Board. The essence of the applicant's letter was to convey to the Board that the period within which the Board was empowered to reconsider an award had, in terms s 55 (4A) of the Act, lapsed. In the letter, the applicant further made the allegations that the Board's decision to direct the Bid Evaluation Committee to re-evaluate Cospharm's bid was *ultra vires* the Act. On



8 June 2023, Cospharm's legal representatives responded to the applicant's letter of 6 June 2023, which was addressed to the Board. In its letter, Cospharm contended that, there was no prohibition in law or bar against the Board from taking a decision after the seven day prescribed period has lapsed.

[7] The Board itself only replied to the applicant's letter on 12 June 2023, wherein the Board stated that it had already adjudicated upon Cospharm's reconsideration application on 09 May 2023 and a resolution was taken on that day. The Board in its letter further pointed out that, it was not correct that it had considered the reconsideration applications beyond the seven day standstill period that ended on 11 May 2023 but admitted that due to some oversight, it only communicated its decision to Cospharm and the other bidders on 26 May 2023. The applicant and the Board continued to exchange correspondence with respect to the propriety or validity of communicating the Board's decision outside the seven days stipulated in s 55(4A) of the Act.

[8] It appears that Taliindje Investment CC's (the 17<sup>th</sup> respondent) application for the reconsideration of its bid was lodged sometime during June 2023. It further appears that Taliindje's reconsideration application was unsuccessful and thereafter Taliindje applied for the review of the Board's decision to the Review Panel in terms of which it challenged the Board's decision to award the bids as communicated to the bidders on 26 April 2023. The Review Panel heard Taliindje's review application on 06 July 2023 and on 17 July 2023, where after it dismissed the application. The Review Panel furthermore confirmed the validity of the awards as communicated by the Board on 26 April 2023.

[9] On 03 August 2023, the Board issued a new notice of selection for procurement award in terms of which Cospharm was issued with a notice of award worth approximately N\$1.3 billion and the applicant's award was reduced from N\$123 million to N\$45 million. Aggrieved by the notice of selection for award of 30 August 2023, the applicant in terms of s 59 of the Act, on 11 August 2023, filed a review application with

the Review Panel in terms of which it challenged the 03 August 2023 award on several review grounds. Despite the applicant's review application which was pending before the Review Panel, the Board, on 16 August 2023, issued procurement contract acceptance letters to all successful bidders identified in the 03 August 2023 notice of procurement award, in which the successful bidders were requested to provide performance security worth ten percent of the contract value, within 30 days, failing which, the Board would select another bidder. The Board's letter of 16 August 2023 further states that 'pending the signature of the contract agreement, this letter of acceptance, employer's requirement and your submitted bid offer, shall constitute the establishment of the contract'.

[10] On 21 August 2023, the applicant launched an urgent application in terms of which it sought an order restraining and interdicting the Board and any bidder identified in the bid award of 03 August 2023, from implementing or executing any procurement contract awarded by the Board in respect of Tender Number: G/OIB.CPBN01/2022 pending the outcome of the applicant's review application lodged on 11 August 2023 with the Review Panel. This Court granted the order sought by the applicant.<sup>2</sup>

[11] On 28 August 2023, the Review Panel heard the applicant's review application and, on 29 August 2023, dismissed the applicant's review application and again confirmed the Board's decision of 03 August 2023. The applicant aggrieved by the Review Panel's decision, commenced proceedings, on 25 September 2023, on an urgent basis against Cospharm as the first respondent, the Board as the second respondent, the Minister of Health and Social Services as the third respondent, the other 24 bidders as the fourth to the twenty sixth respondents, the Chairperson of the Review Panel and the Review Panel as the twenty seventh and twenty eighth respondents and the Attorney-General as the twenty ninth respondents. The applicant's application of 25 September 2023 consists of two components namely, part A and part B. From the 29 respondents, only Cospharm, the Board and the Attorney General

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<sup>2</sup> See *Africure Pharmaceutical Namibia (Pty) Ltd v Cospharm Investment (Pty) Ltd* (HC-MD-CIV-MOT-GEN-2023/00374) [2023] NAHCMD 578 (19 September 2023).

opposed the applicant's application. The Chairperson of the Review Panel and the Review Panel did not oppose the application but they filed affidavits to place certain facts before the Court.

[12] In part A, the applicant sought, apart from the prayer for costs, an order condoning its non-compliance with the rules of this Court and to have the matter heard on an urgent basis as envisaged under rule 73 (4) of the High Court Rules and an interim order interdicting and restraining the Board and all the successful bidders in terms of the notice of selection for award dated 3 August 2023 from implementing or executing any procurement contract awarded by the Central Procurement Board, in respect of *Tender Number: G/OIB/CPBN01/2022* pending the review in part B of the notice of motion. On 25 October 2023 this Court granted the interim interdict as claimed in part A of the applicants notice of motion.<sup>3</sup>

[13] After this Court granted the relief sought in part A of the applicant's application, the Board and the Review Panel filed their records of proceedings sought to be reviewed. Subsequent to receiving the records of the proceedings sought to be reviewed, the applicant filed an amended notice of motion, in terms of which it now in part B of the application, sought the following orders:

- (a) an order declaring the Board's decisions taken on 9 May 2023 and 12 May 2023, and in particular, the decisions to grant the 3 reconsideration applications from the following bidders, namely Cospharm, Broad Pharma (Pty) Ltd (the 15<sup>th</sup> respondent), Econo Investments (Pty) Ltd (the 12<sup>th</sup> respondent) and Erongo Med Health Distributors (Pty) Ltd (the 5<sup>th</sup> respondent ) and any other bidders not mentioned in the application and to order the Bid Evaluation Committee to re-evaluate the bids, invalid;
- (b) an order declaring the Board's decision communicated to the bidders by Notice for Selection of Procurement Award on 3 August 2023 (and thereafter varied and communicated to the bidders on 27 September 2023) awarding the bids to the

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<sup>3</sup> *Africure Pharmaceutical Namibia (Pty) Ltd v Cospharm Investment (Pty) Ltd* (HC-MD-CIV-MOT-REV-2023/00426) [2023] NAHCMD 679 (25 October 2023).

bidders, in accordance with the re-evaluation of the bids pursuant to the reconsideration applications of the bidders referred to in the preceding subparagraph, invalid, alternatively reviewed and set aside;

- (c) an order declaring invalid and reviewing and setting aside the decision and order by the Review Panel dated 29 August 2023 (but served on the applicant on 15 September 2023) dismissing the review application lodged by the applicant;
- (d) an order directing the board to act in terms of s 55(5) of the Public Procurement Act, 15 of 2015 and award contracts to the successful bidders in terms of the first Notice for Selection of Procurement Award dated 26 April 2023; and
- (e) In the event that the Court finds that s 55(4A) of the Public Procurement Act, Act 15 of 2015 denies a selected bidder an opportunity to make representations to a Public Entity or the Board in respect of a reconsideration application of another bidder, an order declaring s 55 (4A) of the Public Procurement Act, No. 15 of 2015 unconstitutional to the extent that the provision seeks to deny a selected bidder an opportunity to make representations, to the Public Entity or the Board, in relation to a reconsideration application lodged by another bidder for being in violation of Article 18 of the Namibian Constitution.

The basis on which the applicant relies for the relief it seeks and the Board's opposition of the relief sought

[14] The applicant seeks an order either declaring the Board and the Review Panel's decisions invalid or reviewing and setting aside those decisions on three bases. The first basis is the applicant's contention that the decisions taken on 09 May 2023 and 12 May 2023 and communicated on 26 May 2023 by the Board, which is outside the prescribed 'standstill period' of 7 days, are a nullity. The applicant contends that although the Board considered the applications within the 7 days 'standstill period' the

Board failed to communicate its decision in respect of the reconsideration applications to the bidders within the 'standstill period' provided for in s 55(4A) of the Act.

[15] The applicant thus contends that, the failure of the Board to communicate its decision within the period provided for in s 55(4A), resulted in the process of reconsidering the applications coming to an end and the Board could no longer communicate any valid decision in respect of the reconsideration applications as it was no longer seized with the reconsideration applications when the 7 day period expired. As a result thereof, the Board no longer had jurisdiction to deal with the reconsideration applications – it was *functus officio*. By failing to communicate its decision within the prescribed period, the Board is considered to not have made any valid decision in respect of the reconsideration applications, the reasoning continued.

[16] The second basis is the applicant's contention that the Board failed to observe the *audi alteram partem* rule and thus failed to ensure that the applicant was treated procedurally fair as required under Art 18 of the Constitution. The applicant argued that the reconsideration applications were not served on the applicant or any of the other selected bidders who were interested parties. The reconsideration applications were considered in secret, in contravention of the provisions of the Act, which requires the Board to act transparently. The applicant further contends that the Board did not afford it and other selected bidders an opportunity to be heard in respect of the reconsideration applications thus infringing the applicant's right to fair and reasonable administrative action guaranteed by Art 18 of the Constitution.

[17] The third basis is the applicant's contention that the Review Panel ignored its own order made in respect of the review application that was filed by Taliindje Investment CC and that the Review Panel's decision of 11 June 2023 was never disturbed and that decision still stands.

[18] The Board opposes the application on the basis that s 55(4A) only prescribes the period within which an application for reconsideration must be determined. The Board continued and contended that there is nothing in the Act which prescribes the period

within which the decision, once taken, must be communicated. It thus reasoned that, the fact that the decision to grant the reconsideration applications was communicated outside the 7 day period as stated in s 55(4A) of the Act is of no moment and does not render a decision taken within the prescribed time frame invalid.

[19] As regards the applicant's contention that it was not informed of the reconsideration applications and that it was denied *audi*, the Board reasoned that s 55(4A) of the Act imposes no obligation on it to serve a request or an application for reconsideration on other bidders. The board contended that s 55(4A) simply creates a right for 'a bidder' to apply to the Board for it to reconsider the bidders bid. The Board further reasoned that s 55(4B) of the Act confers on a bidder the right to have a reconsideration application reviewed by the Review Panel. The right to have a decision of the Board in relation to a reconsideration application reviewed by the Review Panel is the build in *audi* that is granted to a bidder, the Board contended.

#### The issues to be decided

[20] In view of the parties' contentions, I am of the view that three questions arise for determination in this application. Firstly, whether the failure to communicate the Board's decision within the 7 days, as contemplated under a 54(4A) of the Act, is fatal. Secondly, whether the Board is obliged to inform bidders about a reconsideration application and to afford them an opportunity to comment on the reconsideration application. Thirdly, whether the Review Panels decision of 11 June 2023 is still valid.

[21] I find it appropriate to, briefly set out the legislative framework which governs the bidding process, before I embark on answering the questions that I have identified.

#### The legislative framework

[22] The starting point is the purpose of the Act. The long title of the Act, amongst other matters, provides that the Act is enacted to regulate the procurement of goods,

works and services, the letting or hiring of anything or the acquisition or granting of rights for or on behalf of, and the disposal of assets of public entities.<sup>4</sup> Section 2 of the Act identifies three core objects of the Act, the first core object identified by the Act is to promote integrity, accountability, transparency, competitive supply, effectiveness, efficiency, fair-dealing, value for money, responsiveness, informed decision making, consistency, legality and integration in the procurement, the letting and hiring of anything, the acquisition or granting of rights and the disposal of assets. (Underlined for emphasis)

[23] The next relevant provisions are contained in Part 6 of the Act. Section 40 of the Act obliges the Board to prepare an invitation to bid, inviting bidders to submit priced offers for, amongst other services, the supply of goods. As a general rule, a bid is submitted in writing, duly signed and in a sealed envelope, at the address specified in the bidding documents.<sup>5</sup> The Board must set a deadline for the submission of bids, applications for pre-qualification and expressions of interest, so as to allow sufficient time for the preparation and submission, with a view to maximizing competition, which may not be less than the prescribed minimum period.<sup>6</sup> Where the Board receives a bid in its sealed envelope after the deadline for submission of bids, it must return the unopened sealed envelope to the bidder.<sup>7</sup> A bid remains valid for the period as indicated in the bidding documents which may not be more than 180 days.<sup>8</sup> The validity period of a bid may be extended only with the agreement of the bidder concerned.<sup>9</sup>

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<sup>4</sup> Section 1 of the Act defines public entity as follows:

“public entity” means any office, ministry or agency of the Government, and includes –

- (a) a local authority council;
- (b) a regional council;
- (c) a public enterprise as referred to in the Public Enterprises Governance Act, 2019 (Act No. 1 of 2019);
- (d) an entity or trust that is owned or controlled by the Government, when engaged in any procurement individually or in consortium;
- (e) an entity declared as public entity in terms of section 5; and
- (f) a subsidiary of a public enterprise referred to in paragraph (c);

<sup>5</sup> Section 46 (1).

<sup>6</sup> Section 47 (1).

<sup>7</sup> Section 47(2).

<sup>8</sup> Section 48 (1).

<sup>9</sup> Section 48 (2).

[24] A bid envelope is opened at the time and place indicated in the bidding documents.<sup>10</sup> The time of bid opening coincides with the deadline for the submission of bids, or follows immediately thereafter, if this is necessary for logistic reasons.<sup>11</sup> A bidder or his or her representative is authorised to attend the bid opening.<sup>12</sup> At a bid opening session, the name of the bidder, the total amount of each bid, any discount or alternative offered, the presence or absence of any bid security, if required, and the documents referred to in s 50(2), are read out and recorded, and a copy of the record is made available to any bidder on request.<sup>13</sup>

[25] The Board or a public entity in order to evaluate bids must, except where the request for sealed quotations method is used and where price is the determining factor, set up a bid evaluation committee.<sup>14</sup> The bid evaluation committee must prepare an evaluation report, detailing the examination and evaluation of bids and identifying the lowest evaluated bid that meets the qualification criteria.<sup>15</sup>

[26] Section 55 of the Act provides that the Board must award a procurement contract to the bidder having submitted the lowest evaluated substantially responsive bid which meets the qualification criteria specified in the pre-qualification or bidding documents, but only after the Board has complied with the steps outlined in sections (3), (4), (4A), (4B), (4C), (4D) and (5).<sup>16</sup>

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<sup>10</sup> Section 51(1).

<sup>11</sup> Section 51 (2).

<sup>12</sup> Section 51(3).

<sup>13</sup> Section 51 (4).

<sup>14</sup> Section 52 (2).

<sup>15</sup> Section 52(3).

<sup>16</sup>“public entity” means any office, ministry or agency of the Government, and includes –

- (a) a local authority council;
- (b) a regional council;
- (c) a public enterprise as referred to in the Public Enterprises Governance Act, 2019 (Act No. 1 of 2019);
- (d) an entity or trust that is owned or controlled by the Government, when engaged in any procurement individually or in consortium;
- (e) an entity declared as public entity in terms of section 5; and [The word “a” appears to have been omitted before the phrase “public entity”.]
- (f) a subsidiary of a public enterprise referred to in paragraph (c).”



[27] Section 55(4) furthermore provides that the chairperson of the Board must, in the prescribed manner and form, notify-

- (a) the successful bidder of the selection of its bid for award; and
- (b) the other bidders, specifying the name and address of the successful bidder and the price of the contract, accompanied by the executive summary of the bid evaluation report.<sup>17</sup>

[28] The section proceeds and provides that an unsuccessful bidder may, within seven days from the date of receipt of the notice referred to in subsection 4, apply to the Board to reconsider its selection of a bid for award and the Board must, within seven days from the date of receipt of the application, notify the bidder of its decision.<sup>18</sup> If the unsuccessful bidder does not, receive a response (to its application for reconsideration) from or is not satisfied with a decision of the Board, the unsuccessful bidder may within the seven days apply to the Review Panel for review of the decision or action as contemplated in s 59(1) of the Act. The section furthermore provides that a bidder who is aggrieved by a decision or action of the Board must first exhaust the remedies under s 55 of the Act, before applying for review under s 59(1) of the Act.<sup>19</sup>

#### The approach to the interpretation of legal documents

[29] In *Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors CC*,<sup>20</sup> the Supreme Court set out the proper approach to the interpretation of documents, generally. The Supreme Court, in a nutshell stated that, interpretation is 'essentially one unitary exercise' in which both text and context are relevant to construing a legal document. The Court further stated that one must assess the meaning, grammar and syntax of the words used; and the words used must be construed within their immediate

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<sup>17</sup> Section 55(4).

<sup>18</sup> Section 55(4A).

<sup>19</sup> Section 55(4D).

<sup>20</sup> *Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors CC* 2015 (3) NR 733 (SC).

textual context, as well as against the broader purpose and character of the document itself.

[30] The Court furthermore reasoned that consideration must be given to the language used in the document in light of the ordinary rules of grammar and syntax, the context in which the provision appears, the apparent purpose to which it is directed, and the material known to those responsible for its production. Where more than one meaning is possible, each possibility must be weighted in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results, or one that undermines the apparent purpose of the document. The Court must avoid the temptation to substitute what it regards as reasonable, sensible or unbusinesslike, for the words actually used.

[31] It is against the background of the legislative framework and the principles governing the interpretation of written documents that I now discuss and answer the question that I am required to resolve in this matter.

Is the Board's failure to inform a bidder within 7 days of its decision, regarding a reconsideration application, fatal?

[32] I will not rehearse the detail submissions made by the respective counsels at the hearing of this matter, I will simply summarise the crux of their submissions. Counsel who represented the applicant, in summary argued that, s 55(4A) of the Act provides that the Board must notify the bidder of its decision in respect of a reconsideration application within seven days from date of receipt of the application. She further argued that the use of the word "must" is generally regarded as implying that the provision is peremptory. Referring to authorities from the Supreme Court<sup>21</sup> and this Court<sup>22</sup> she recognises that the enquiry does not stop there in deciding whether non-compliance with the prescribed time period would result in a nullity. She submitted that the context

<sup>21</sup> *Torbitt v International University of Management and Namibia* 2017 (2) NR 233 (SC); *Financial Exchange (Pty) Ltd v Chief Executive Officer of the Namibia Financial Institution Supervisory Authority and Registrar of Stock Exchanges and Another* 2019 (3) NR 859 (SC).

<sup>22</sup> *Engels v Allied Chemical Manufacturers (Pty) Ltd and Another* 1992 NR 372 (HC) at 380C-I.

of the particular legislation is particularly crucial in determining whether nullity should follow on non-compliance.

[33] Counsel who represented the applicant further argued that it is apparent from the Act, read as a whole, that there is a general sensitivity to time. She argued that:

'... [it] is clear from the objects of the Act as set out in section 2 that the legislature wanted to create a procurement system which is effective and efficient, not only in respect of the processes that must be adopted, but to also ensure economic efficiency. Time, in this regard, plays a significant role. The import of time in the context of public procurement again becomes apparent in section 49 which deals with the bid validity period. A bid validity period must not be more than 180 days and although this period may be extended, it can only be extended in agreement with the bidders. This generally imposes a period of six months within which the Board must consider, evaluate and award bids. If the bid validity period expires prior to a bid being awarded, any award outside that bid validity period will constitute a nullity. The reason for this is the fact that once the bid validity period expires, without there being an award, the bidding process is concluded, albeit unsuccessfully.'

[34] Counsel continued and argued that an application for review brought outside the seven day period, constitutes a nullity. Even if the failure to bring the review application within the seven day period is on account of reasons outside the control of the bidder, condonation cannot be granted. She further argued that is clear from sections 55(4A) and 55(4B) that the legislature intended to create a process which would prevent an inordinate delay in the challenging of bid awards. She concluded by submitting that the decisions of the Board communicated to the bidders after the seven day period constitute a nullity.

[35] Counsel for Cospharm relying on *Torbitt*<sup>23</sup> contended that, where a statutory duty is imposed on a public entity or public officers and the statute requires that such a duty must be performed in a certain manner or in a certain time or under specified conditions, such prescription may well be regarded as intended to be directory only in

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<sup>23</sup> Supra footnote 10

cases when injustice or inconvenience to others, who have no control over those exercising the duty would result, if such requirement were essential or imperative. Counsel thus concluded that the communication of the decision outside the time prescribed under s 55(4A) can therefore not render the decision a nullity.

[36] Counsel who represented the Board argued that section 55(4A) does not, at least on the part of the Board, prescribe the requisites for its implementation of that decision. The section also does not prescribe that the decision can only be implemented or acted upon after the bidder is notified. In fact, the section is completely silent as to whether the Board can immediately implement that decision prior to the notifying of the bidder. The requirement is that there must be a decision taken by the Board. Counsel thus argued that, the effect of that decision and its validity must not be linked to a requirement for notifying the bidder of its existence. Counsel continued and argued that, once there is a decision it must be valid and it must have valid consequences. The requirement to notify the bidder is separate from the act of taking the decision. The delay in the notification must not invalidate a decision, if that decision by the Board was taken within the seven days as prescribed by s 55(4A), the argument went.

[37] Counsel furthermore argued that the provision of the Act, (that is s 55(4A)) is silent on the consequences that must be visited upon a decision if the Board takes the decision within 7 days but for one reason or another fails to notify the bidder of that decision within 7 days. He continued and argued that within the scheme of the Act, the procurement process must be completed within a timeline of 180 days. Time is of the essence and therefore, if the bidder does not receive the decision or is dissatisfied with a decision under s 55(4A), such bidder can resort to s 55(4B) and take that decision/inaction on review to the Review Panel in terms of s 59 of the Act.

[38] He further argued that rendering a decision of the Board validly taken within the prescribed period simply because the decision so taken was not communicated to a bidder within seven days set out in the section would lead to absurd consequences. Such an adverse consequence will do injustice to the provisions of s 55(4A), particularly

where it does not appear from the words used in the section that the legislature intended that the failure to notify a bidder of the decision taken would result in a nullity.

[39] The debate as to what consequences must follow where a Statute does not prescribe the consequences of non-compliance with a statutory provision has engaged Courts for a considerable period. The Courts have generally accepted that the use of peremptory words such as 'shall/must' as opposed to 'may' is indicative of the legislature's intention to make the provision peremptory. The use of the word 'may' as opposed to 'shall' is construed as indicative of the legislature's intention to make a provision directory. In some instances the legislature explicitly provides that failure to comply with a statutory provision is fatal. In other instances, the legislature specifically provides that failure to comply is not fatal.<sup>24</sup> In both of the above instances no difficulty arises. The difficulty usually arises where the legislature has made no specific indication as to whether failure to comply is fatal or not.

[40] Francis Bennion<sup>25</sup> suggests that the Courts have to determine the intention of the legislature using certain principles of interpretation as guidelines. He said:

'Where a duty arises under a statute, the court, charged with the task of enforcing the statute, needs to decide what consequence Parliament intended should follow from breach of the duty. This is an area where legislative drafting has been markedly deficient. Draftsmen find it easy to use the language of command. They say that a thing "shall" be done. Too often they fail to consider the consequence when it is not done. What is not thought of by the draftsman is not expressed in the statute. Yet the courts are forced to reach a decision.

It would be draconian to hold that in every case failure to comply with the relevant duty invalidates the thing done. So the courts' answer has been to devise a distinction between mandatory and directory duties. Terms used instead of "mandatory" include "absolute", "obligatory", "imperative" and "strict". In place of "directory", the term "permissive" is sometimes

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<sup>24</sup> *Messenger of the Magistrate's Court, Durban v Pillay* 1952(3) SA 678 to 683 (A) quoted with approval in *Old Mutual Life Assurance Company (Namibia) Ltd v Deputy Sheriff of Windhoek* (HC-MD-CIV-MOT-REV-2018/00454) [2021] NAHCMD 88 (26 February 2021).

<sup>25</sup> Francis Bennion *Statutory Interpretation*, Butterworths, London 1984, p 21-22.

used. Use of the term "directory" in the sense of permissive has been justly criticised. {See Craies *Statute Law* (7<sup>th</sup> edn, 1971) p 61 n 74.} However it is now firmly rooted.

Where the relevant duty is mandatory, failure to comply with it invalidates the thing done. Where it is merely directory the thing done will be unaffected (though there may be some sanction for disobedience imposed on the person bound)...

[41] Thereafter the learned author sets out some guiding principles for the determination of whether failure to comply with a statutory provision is fatal or a mere irregularity. He said:

‘One of these guiding principles is the possible consequences of a particular interpretation. If interpreting non-compliance with a statutory provision leads to consequences totally disproportionate to the mischief intended to be remedied, the presumption is that Parliament did not intend such a consequence and therefore the provision is directory.’

[42] In *Volschenk v Volschenk*<sup>26</sup>, the Court stated the following:

‘I am not aware of any decision laying down a general rule that all provisions with respect to time are necessarily obligatory, and that failure to comply strictly therewith results in nullifying all acts done pursuant thereto. The real intention of the legislature should in all cases be inquired into and the reasons ascertained why the legislature should have wished to create a nullity.’

[43] In *Standard Bank Namibia Limited v Nambale N.O*<sup>27</sup> this Court reasoned that:

[14] Statutory requirements are often categorized as "*peremptory*" or "*directory*". These are well-known, concise, and convenient labels to use for the purpose of differentiating between the two categories. But the earlier clear-cut distinction between them (the former requiring exact compliance and the latter merely substantial compliance) now seems to have become somewhat blurred. Care must therefore be exercised not to infer merely from the use of

<sup>26</sup> *Volsclenk v Volsclenk* 1947 TPD 486 at p 490..

<sup>27</sup> *Standard Bank Namibia Limited v Nambale N.O* (HC-MD-CIV-ACT-CON-2020/03082) NAHCMD 484 (8 August 2023).

such labels what degree of compliance is necessary and what the consequences are of none or defective compliance.

[15] The consequences for noncompliance with a statutory provision (whether it be classified as directory or peremptory) must ultimately depend upon the proper construction of the statutory provision in question, or, in other words, upon the intention of the lawgiver as ascertained from the language, scope, and purpose of the enactment as a whole and the statutory requirement in particular. It has thus been held that 'even where the formalities required by statute are peremptory it is not every deviation from the literal prescription that is fatal. Even in that event, the question remains whether, in spite of the defects, the object of the statutory provision had been achieved.'

[44] The proposition by counsel who represented the Board, that s 55(4A) of the Act does not, at least on the part of the Board, prescribe the requisites for its implementation of the decision with respect to a reconsideration application and that the section (that is, s 55(4A) also does not prescribe that the decision can only be implemented or acted upon after the bidder is notified, is, under the circumstances of this case, demonstrably flawed: I say the reasoning is flawed because s 55(4A) of the Act does not state that the Board must take a decision with respect to a reconsideration application within seven days. The section provides that the Board must notify a bidder, who has applied for the reconsideration of its bid, of its decision within seven days of that application. The Board thus has a statutory obligation to inform an applicant for reconsideration of its decision, not later than seven days after it received a reconsideration application.

[45] Esther N Kuugongelwa<sup>28</sup> argues that:

'In public procurement, review bodies have generally been prohibited from interfering with concluded contracts. This is particularly so as time is of the essence in the procurement process and any disruptions delay the implementation of government contracts. Delays are

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<sup>28</sup> Ester Ndapepwa Kuugongelwa. *A Critical Analysis of Namibia's Public Procurement Supplier Remedies Regulatory Framework: Introducing the Standstill Period*. (2015) 2 Africa Public Procurement Law Journal. (APPLJ) 59 at p 60.

undesirable as they lead to the inflation of costs, which at the end of the day government has to incur. The procuring process involves the high expenditure of public funds and requires it to be used in a manner that ensures that public money is not wasted. The disruption that comes with supplier remedies therefore has to be regulated to ensure it remains minimal while affording suppliers with the right to justice. It is for this reason that the standstill period was created in the European Union (EU) to set a time limit within which unsuccessful suppliers who feel that the correct procedures were not followed can lodge their complaints before the contract is concluded. Once the time period has lapsed, contracts awarded can then be concluded between the government and the successful supplier. Challenges to the concluded contract are prohibited after this. The implementation of the contract awarded is, in other words, allowed to run smoothly with no interruptions.'

[46] I have no doubt in my mind that the standstill period of seven days introduced by s 55(4C) of the Act was similarly introduced in the procurement process to minimize the disruptions that come with supplier remedies while affording them the right to justice. Once the time period (the standstill period) has lapsed, contracts awarded can then be concluded between the government and the successful supplier. Challenges to the concluded contract are prohibited after the standstill period.

[47] If one has regard to the legislative framework there is one thread that runs through it and the thread is that time is of the essence. For example, a bidder who submits his, her or its bid outside the time set, is automatically disqualified, a bid is valid for a period of 180 days only. No bid can be awarded during the standstill period a bid awarded during that period is invalid, a dissatisfied bidder cannot challenge the validity of bid after the standstill period. I therefore conclude that the objects of the statutory provision (that is s 55(4A)) would not be achieved if the applicants are not notified of the Board's decision within the prescribed period. The Board's failure to notify the applicants for reconsideration of its decision within the prescribed period undermines the objects of s 55(4A) and is thus fatal and results in a nullity of the Board's decision.



Is the applicant entitled to be informed and heard as regards an application for reconsideration?

[48] Counsel for the applicant argued that the Board is required to be transparent in its decision-making. She continued and argued that as an affected party, the applicant ought to have been informed that reconsideration applications were filed and it should have been granted an opportunity to be heard in respect of those applications. She, with reference to the matter of *Matador Enterprises (Pty) Ltd v Minister of Trade and Industry and Others*<sup>29</sup> 2015 (2) NR 477 (HC), argued that:

‘The right to be heard and fairness demand that persons adversely affected by a decision be afforded the opportunity to be heard with a view to producing a favourable result and require that they are apprised of factors which they need to address. As was stressed by this Court —

“Art 18 of the Constitution of Namibia pertaining to administrative justice requires not only reasonable and fair decisions based on reasonable grounds, but inherent in that requirement is fair procedures which are transparent”.’

[49] Counsel for the Board, on the other hand, argued that there was no breach of the *audi alterm partem* rule. His point of departure was that, unlike s 55(4) of the Act which obliges the chairperson of the Board to notify a successful bidder of the selection of its bid for the award and the other bidders, s 55(4A) of the Act is silent about notifying other bidders of the reconsideration application.

[50] Counsel furthermore argued that *audi* is not a one-size-fits-all but a flexible principle, where context is important. The context of fairness is not static but must be tailored to the circumstances of each case. The all-or-nothing approach to fairness has been said to be a thing of the past. Counsel proceeded and argued that the ‘one-size-

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<sup>29</sup> *Matador Enterprises (Pty) Ltd v Minister of Trade and Industry and Others* 2015 (2) NR 477 (HC) at para 105.

fits-all' approach tended to produce results that were either overly burdensome for the administration or entirely unhelpful to the complainant.

[51] He continued and argued that, although *audi* may be a statutory requirement, the case's particular circumstances may oust *audi* or significantly attenuate its operation. He submitted that reconsideration applications are such a case. He continued and argued that s 55(4A) simply confers a right on aggrieved bidder to apply for the reconsideration of its bid, which application must be decided within seven days. The Act also creates a right to review the decision of the Board under s 59. It thus means that an aggrieved bidder must apply to the Review Panel if it is aggrieved by a reconsideration decision. This is the built-in *audi* mechanism created by the Act itself, the argument went.

[52] In *Pamo Trading Enterprises CC and Another v Chairperson of the Tender Board of Namibia and Others*,<sup>30</sup> the Supreme Court observed that organs of state, such as the Board, are performing public functions and utilises public funds. There can be no doubt that decisions relating to procurement of services ordinarily qualify as administrative action under the Constitution and, specifically, in terms of Art 18 of the Constitution.<sup>31</sup> Procurement steps taken by public officials and agencies, like the Board, must therefore be lawful and procedurally fair.<sup>32</sup>

[53] Article 18 of the Namibian Constitution provides that 'Administrative bodies and administrative officials must act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal.'

[54] The fact that the right to be treated fairly was included in the Constitution highlights the important role this right plays in a democratic society. The important role that the right to be treated fairly (which includes procedural fairness) plays in a

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<sup>30</sup> *Pamo Trading Enterprises CC and Another v Chairperson of the Tender Board of Namibia and Others* 2019 (3) NR 834 (SC)

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*

democratic society has been discussed by our Courts on a number of occasions. Professor Hoexter<sup>33</sup> describes the importance of procedural fairness as follows:

'Procedural fairness . . . is concerned with giving people an opportunity to participate in the decisions that will affect them, and - crucially - a chance of influencing the outcome of those decisions. Such participation is a safeguard that not only signals respect for the dignity and worth of the participants, but is also likely to improve the quality and rationality of administrative decision-making and to enhance its legitimacy.'

[55] In *De Lange v Smuts NO*,<sup>34</sup> Mokgoro J reasoned that:

'...everyone has the right to state his or her own case, not because his or her version is right, and must be accepted, but because in evaluating the cogency of any argument, the arbiter, still a fallible human being, must be informed about the points of view of both parties in order to stand any real chance of coming up with an objectively justifiable conclusion that is anything more than chance.'

[56] In addition to the reasons referred to in the preceding paragraphs, procedural fairness also plays an important role in our democracy because it promotes some of the values that underlie the Constitution, including accountability, responsiveness and openness. In addition, it also promotes the value of public participation. Since our Constitution is the Supreme Law of our Country, I repeat the reasoning of the Supreme Court when it stated that procurement steps taken by public officials and agencies like the Board must therefore be lawful and procedurally fair. It follows that the applicant is, in the circumstances of this matter, entitled to be informed of an application for the reconsideration of any bidder and is also entitled to be heard with respect to that reconsideration application.

[57] The values and principles contained in our Constitution require of public entities, such as the Board, to act in a manner that promotes accountability, responsiveness, openness and fairness when fulfilling its constitutional and statutory obligations.

<sup>33</sup> Cora Hoexter *Administrative Law in South Africa* (Juta, Cape Town 2007) at 326 – 7.

<sup>34</sup> *De Lange v Smuts NO* 1998 (3) SA 785 (CC) at para 131,

Compliance by public entities with their procedural fairness obligations is therefore crucial, not only for the protection of citizens' rights, but also to facilitate trust in the public administration and in our participatory democracy. I hold that when the Board received the applications for reconsiderations, it did so in fulfilment of the statutory duties to acquire goods for the public's wellbeing. The Board thus had an obligation and duty to treat every bidder and to afford such a bidder an opportunity to be heard before any decision affecting its rights (this includes a decision to reconsidered the applications filed in terms of s 55(4A)) are taken. The Board's failure to inform the applicant and afford it an opportunity to be heard in respect of reconsideration applications amounts to a failure to comply with the procedural fairness obligations outlined in Art 18 of the Constitution and thus renders the reconsideration exercise invalid and it must for that reason be set aside.

[58] In light of the conclusion that I have come to, particularly the conclusion to set aside the Board's decision to grant the reconsideration applications, I will not deal with the argument whether or not the Review Panel's decision to dismiss the applicants' review application as contemplated under s 59 is irregular or not. I

#### The appropriateness of the further relief sought

[59] The next question that arises is whether the applicant is entitled to the further relief which it seeks in paragraph 4 of the amended notice of motion, namely an order directing the Central Procurement Board of Namibia to act in terms of s 55(5) of the Act and award contracts to the successful bidders in terms of the first Notice for Selection of Procurement Award dated 26 April 2023.

[60] What the applicant, in essence, is seeking from this Court is that this Court must substitute its own decision for that of the Board. In *Waterberg Big Game Hunting Lodge Otjahewita (Pty) Ltd v Minister of Environment and Tourism*<sup>35</sup> the Supreme Court relying

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<sup>35</sup> *Waterberg Big Game Hunting Lodge Otjahewita (Pty) Ltd v Minister of Environment and Tourism* 2010 (1) NR 1 at p32.

on *Masamba v Chairperson, Western Cape Regional Committee, Immigrants Selection Board, and Others*<sup>36</sup> Shivute CJ stated that:

'The purpose of judicial review is to scrutinise the lawfulness of administrative action in order to ensure that the limits to the exercise of public power are not transgressed, not to give the courts the power to perform the relevant administrative function themselves. As a general principle, therefore, a review court, when setting aside a decision of an administrative authority, will not substitute its own decision for that of the administrative authority, but will refer the matter back to the authority for a fresh decision. To do otherwise would be contrary to the doctrine of separation of powers in terms of which the legislative authority of the State administration is vested in the Legislature, the executive authority in the Executive, and the judicial authority in the courts.'

[61] The learned Chief Justice proceeded and stated that:

'Whether there are exceptional circumstances justifying a court to substitute its own decision for that of the administrative authority is "in essence ... a question of fairness to both sides"...

Where the end result is in any event a foregone conclusion and it would merely be a waste of time to order the tribunal or functionary to reconsider the matter, the Courts have not hesitated to substitute their own decision for that of the functionary ... The Courts have also not hesitated to substitute their own decision for that of a functionary where further delay would cause unjustifiable prejudice to the applicant ... Our Courts have further recognised that they will substitute a decision of a functionary where the functionary or tribunal has exhibited bias or incompetence to such a degree that it would be unfair to require the applicant to submit to the same jurisdiction again ... It would also seem that our Courts are willing to interfere, thereby substituting their ... own decision for that of a functionary, where the Court is in as good a position to make the decision itself. Of course the mere fact that a Court considers itself as qualified to take the decision as the administrator does not per se justify usurping the administrator's powers or functions. In some cases, however, fairness to the applicant may demand that the Court should take such a view.'

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<sup>36</sup> *Masamba v Chairperson, Western Cape Regional Committee, H Immigrants Selection Board, and Others* 2001 (12) BCLR 1239 (C).

[62] In the present matter, the applicant has not placed before me any such exceptional circumstances that would require this Court to substitute its decision for that of the Board. It will therefore not be just and equitable to grant the further orders sought in paragraph 4 of the applicant's amended notice of motion. For these reasons, I refuse to grant the relief sought in paragraph 4.

[63] What stands over is the question of costs. The general rule is that costs must follow the result. Nothing emerges from this matter warranting a deviation from this principle.

#### Order

[64] In the premises, and for the reasons and conclusions that I have arrived at in this judgment, I make the following order:

1. The decisions of the Central Procurement Board of Namibia taken on 9 May 2023 and 12 May 2023, and in particular the decisions to grant the reconsideration applications from the following bidders namely; Cospharm Investments (Pty) Ltd (the 1<sup>st</sup> respondent), Broad Pharma (Pty) Ltd ( the 15<sup>th</sup> respondent), Econo Investments (Pty) Ltd ( the 12<sup>th</sup> respondent) and Erongo Med Health Distributors (Pty) Ltd (5<sup>th</sup> respondent) and to order the Bid Evaluation Committee to re-evaluate the bids, are reviewed and set aside.
2. The decision of the Central Procurement Board of Namibia communicated to the bidders by Notice for Selection of Procurement Award on 03 August 2023 (and thereafter varied and communicated to the bidders on 27 September 2023) awarding the bid to the bidders, in accordance with the re-evaluation of the bids pursuant to the reconsideration applications of the bidders referred to above in paragraph 1, is reviewed and set aside.

3. The first and second respondents must, jointly and severally, the one paying the other to be absolved, pay the applicant's costs of suit.
4. The matter is regarded as finalised and is removed from the roll.

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UEITELE SFI  
Judge

## APPEARANCES

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SECOND, THIRD &  
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