REPORTABLE

CASE NO.: SA 37/2010

IN THE SUPREME COURT OF NAMIBIA

MINISTER OF EDUCATION	**1st Appellant**
CHAIR OF TENDER BOARD OF NAMIBIA	**2nd Appellant**
CONGER INVESTMENTS (PTY) LTD	
t/a ATLANTICFOOD SERVICES	**3rd Appellant**

In the matter between:

and

FREE NAMIBIA CATERERS (PTY) LTD	**Respondent**

Coram: MARITZ JA, CHOMBA AJA and MTAMBANENGWE AJA

Heard: **17 October 2011**

Delivered: **15 July 2013**

APPEAL JUDGMENT

CHOMBA AJA (MARITZ JA AND MTAMBANENGWE AJA concurring)

[1] The cradle of this hotly contested appeal was an administrative decision made on 9 May 2009, awarding a tender to the Atlantic Food Services, whichis said to be the trading name of Conger Investments (Pty) Ltd, the third appellant herein. At this juncture it is premature to particularise the maker of that decision, but it suffices to state that those involved in the decision making process were the Ministry of Education, represented by the Minister of Education, first appellant, and the Chair of

the Tender Board of Namibia, second appellant. The respondent, Free Namibia Caterers (Pty) Ltd, was the party dissatisfied with the said decision and hence the originator of the action which ultimately led to the current appeal. An elaboration of the scenario in which that decision was made is necessary for the purpose of appreciating what prompted the institution of the court action by the respondent; and it is to that scenario that I now turn.

[2] In the year 2009 the Ministry of Education(the Ministry) felt a need toinvite tenders from interested catering companies to provide a variety of food stuffs to government primary and secondary school hostels in eight regions of Namibia, namely Caprivi/Kavango, Ohangwena/Oshikoto, Omusati/Oshana, Erongo/Kunene, Khomas, Otjozondjupa, Omaheke and Hardap/Karas. The catering services were required to be provided over a period starting on 1 April 2009 and ending on 31 March 2014. To that end in January 2009 the Ministry advertised tender No. A9 – 11/2009; it was to close at 14h30 on Tuesday, 17 February 2009. Twenty-two catering companies showed interest and duly submitted bids as requested. The region of concern for the purpose of this appeal is Ohangwena/Oshikoto and it suffices to mention that the bidders for that region included the third appellant and the respondent. Mrs Christina LouizaMagriethaMentz (MrsMentz), Managing Director of the respondent company and deponent of the founding affidavit in this matter, in due course got wind that the Tender Board was to sit on 8 May 2009 to consider the bids. Thereafterand contrary to her expectations, she learned that the respondent was disqualified, but she was kept in the dark regarding the outcome of the consideration of the tenders.

[3] In the result,on 12 May, MrsMentz wrote a letter to the Tender Board which she couched in the following terms:

> **'Tender number A9-11/2009 catering services to Government school hostels of the Ministry of Education for the period 1 April 2009 to 31 March 2014**
>
> With reference to the Tender Board sitting on 8/5/2009.
>
> We (illegible) on not receiving any fax from the Tender Board that although we came through all the qualifying rounds, and have established stores and facilities in Ohangwena/Oshikoto region, that we are not successful to be allocated any part of the education tender.
>
> We are hereby requesting both the Ministry of Education and the Tender Board to answer the following questions:
>
> 1) Why have a system been instigated of grading tenderers and what role does it serve if on allocation the scores are ignored in allocating tenders to companies who had lower scores?
>
> 2) Why have a company been granted the tender which have no current infrastructure or trucks in the region while we have established infrastructure already? (As this was the major concern during the inspections)
>
> 3) If the Tender Board has used the reason that our price is too high to disqualify us – why then have Khomas been granted to OKG Food at an even higher price than ours?
>
> 4) *Please also supply us with full disclosure of the reasons and comparison made between us and the other company and why they were granted the tender and not us.* (The italics are mine)
>
> We need to have this addressed as a very urgent matter, and therefore the deadline for your reply is Monday 18th May 2009.'

The reply came from the Permanent Secretary in the Ministry and, in laconic terms, merely acknowledged receipt of MrsMentz's letter and confirmed that the respondent's bid had been disqualified. MrsMentz addressed a number of similar letters of inquiry to the Ministry of Education and the Tender Board. In due course,the latter, that is the Tender Board, sent to the respondent a reply. It was dated 26 June 2009, and because of the significance of its content,it is necessary to reproduce it in full. It read as follows –

> 'Dear Sir,
>
> **TENDER NO. A9 – 11/2009: CATERING SERVICES TO GOVERNMENT SCHOOL HOSTELS OF THE MINISTRY OF EDUCATION FOR THE PERIOD 1 APRIL TO 31 MARCH 2014.**
>
> Your faxed letter dated 23 June 2009 regarding the abovementioned tender has reference.
>
> *The Tender Board has requested the Ministry of Education to respond to the concerns raised in your previous letter, but to date no response has been received.*
>
> *Since the Ministry of Education has dealt with the entire process and the Evaluation Committee was appointed under the auspices of the Ministry, the latter is in the best position to answer to your letter.*
>
> Please be assured that feedback will be provided as soon as the Tender Board received same from the Ministry.
>
> Yours faithfully.' (The italics have been supplied for emphasis.)

It was signed by the Tender Board's Secretary. Despite the undertaking made in terms of the concluding sentence of the foregoing letter, the respondent's ultimate inquiry was never formally responded to.

[4] The management of the respondent not being satisfied with the outcome of the respondent's tender result resolved to and did commence court proceedings by way of judicial review under rule 53 of the Rules of the High Court. A notice of motion was to this end filed on 2 September 2009, with the first and second appellants herein as respondents. Three other respondents were added, namely Conger Investments (Pty) Ltd t/a Atlantic Food Services, Xantium Trading Services, t/a Xantium Catering Services, and Heritage Caterers (Pty) Ltd as third, fourth and fifth respondents respectively. However, in due course and after the respondent had examined the documents relevant to the impugned decision, the fifth respondent was dropped out of the proceedings and an amended notice of motion was issued. The principal prayers in the amended review application wereas set out below -

> '1. Reviewing and correcting or setting aside the award of the tenders to the thirdappellant in respect of the Ohangwena/Oshikotoarea in tender no. A9-11/2009.
>
> 2. Setting aside any agreement entered into, or any other action taken, in pursuance of the award of the tender referred to in prayer 1, *supra.*
>
> 3. Ordering that the said tenders for the Ohangwena/Oshikoto areawarded to the applicant, alternatively, referring the matter back to the Tender Board of Namibia to properly apply the recommendations of the adjudication committee.

4. Ordering that the first, second, third respondents pay the applicant's costs on a scale of attorney and own client jointly and severally, the one paying the others to be absolved, alternatively that those respondents opposing the application pay the applicant's costs jointly and severally, the one paying the others to be absolved.'

[5] Suffice it to state at this juncture merely that the usual exchange of affidavits between the parties did take place. I shall delve into the contents of these as necessary in due course. What needs to be placed on record now is that the matter eventually went before Parker J, who, after a full hearing as it is in motion proceedings, upheld the application. The epitome of his judgment is to be found in paragraphs [15] and [16] of the judgment which, for a better appreciation, I quote hereunder:

'[15] Accordingly, I come to the following indubitable and reasonable conclusion: As the law stands, as explained previously, the second respondent's abdication to exercise the statutory power reposed in it, coupled with its failure to give reasons for its decision to reject the applicant's tender, as aforesaid, in violation of article 18 of the Namibian Constitution, as explained previously, there has been a failure of administrative justice within the meaning of article 18 of the Namibian Constitution. It follows reasonably and inexorably that the second respondent's failure to give reasons for its decision must, not may, lead to the setting aside of that decision.

[16] There is, moreover, the untenable argument that there has been an unreasonable delay in bringing this review application. Granted, it is necessary that application to review acts of administrative bodies and officials be launched within a reasonable time after the taking of the action. But, in the instant case, how could the applicant have brought the application earlier that (*sic*) it did when the second (applicant) in breach of the Act and the Namibian Constitution failed to give reasons for its decision when it was a peremptory and legal duty for the second (applicant) to give reasons for its decision according to the Act and the Constitution? Accordingly, on the facts and circumstances of this case, I find that there has not been an undue delay in bringing this application.'

[6] In keeping with his decision, the learned Judge ordered that the impugned administrative action, as well as the agreement entered into in consequence of the award, be, and they were, set aside. He, however, rejected the applicant's prayer to correct the decision by awarding the tender under dispute to the applicant. As expected, the respondents to the application, being dissatisfied with the learned Judge's decision, appealed his judgment to this Court. In its turn, the applicant, also being unhappy with the dismissal of its prayer for correcting the administrative decision and awarding to it the disputed tender, equally cross-appealed against that part of the judgment.

The appeal

[7] The first and second respondents to the application, to whom I shall henceforth refer as the first and second appellants (just as I shall also refer to the thirdrespondent as the third appellant), presented their heads of argument jointly, while the third appellant presented its heads separately. The first two appellants challenged the lower Court's judgment on the following grounds, that is to say that -

> '1. it erred in finding that the respondent had requested reasons.
>
> 2. it erred by finding that the second appellant had failed to provide reasons for its decision not to award the tender to the respondent.
>
> 3. it erred in failing to find thatthe respondent had been aware of the reason why the tender was not awarded to the respondent.
>
> 4. it erred in finding that a failure to provide reasons for administrative action invalidates a decision taken by an administrative body.
>
> 5. it erred in finding that the second appellant abdicated its statutory powers.

6. it erred in rejecting the second appellant's version in respect of awarding the tender.

7. it erred in finding that there has not been an unreasonable delay in launching the review proceedings.

8. it erred in setting aside the decision of the second respondent (*sic*).'

[8] In arguing the foregoing grounds on behalf of the first and second appellants, Advocate van der Westhuizen advanced the submissions that it was clear from the answering affidavit in the review proceedings that the overriding consideration and, in essence, the reason why the tender was not awarded to the respondent was the pricing. In other words, she contended that the respondent's pricing of its catering services was comparatively exorbitant,adding that,although it demanded for the reasons why its tender was disqualified, the respondent had been well aware of that overriding consideration. She attributed that supposed awareness to the fact that in the respondent's letter of 12 May, *supra,*MrsMentz had stated, *inter alia*, 'If the Tender Board has used the reason that our price is too high to disqualify us...'. In the alternative, learned counsel contended that, having regard to the totality of its inquiry correspondence addressed to both the first and second appellants, the respondent had never requested for the reasons why its bid was rejected. In her view, the respondent merely communicated questions which were in the nature of cross-examination.

[9] Advocate van der Westhuizen stressed the importance of the pricing factor in Tender Board matters by quoting in aid of her argument the *dictum* in *Cash*

Paymaster Services (Pty) Ltd v Eastern Cape Province and Others 1999(1) SA 324 (Ck),atpages 351G-H and 360A , to wit:

> 'The task of the tender board has always been and will always be primarily to ensure that the government gets the best service and value for that for which it pays. If that were not the prime purpose of the tender board and policy considerations were to override those considerations, the very purpose of the tender board is defeated and no tender board needs to exist. It would then be quite simple for the government simply, on the basis of policy determination, to enter into contracts for whatever it required without intervention of the tender board.If the tender board loses sight of its prime purpose as stated hereinbefore it becomes a threat to government and serves little purpose.'

At page 360A:

> 'Tender boards, more than any other government tribunals, have a particular responsibility in this regard. The value of annual contracts nationally probably run into billions of rands. If tender boards do not recognise that their primary task is procurement of the services of tenderers at the least possible cost to the State, mindful of the need to honour the demands of the "RDP", the ability of the government to balance its budget is greatly undermined.'

[10] It was further contended by Advocate van der Westhuizen that even if this Court were to hold that the Court below was right in finding that the respondent did request for reasons for the rejection of its tender and that the second appellant had failed to furnish such reasons, the failure to furnish reasons did not automatically have the consequence of invalidating the administrative action taken. In supportof that contention she cited the book,*JR de Ville, Judicial Review of Administrative Action in South Africa,* 1st Revised edition at pages 295-295 (*sic*) and the authorities cited there. She added that the failure to furnish reasons did not moreover justify an

inference that the second appellant had abdicated its statutory powers as was determined by the Court below.

[11] Furthering her submission on the issue of abdication of statutory power, Ms van der Westhuizen argued that, on the record and the papers, the Court *a quo's* finding was unsustainable. To that end she referred to Mr Schlettwein(the chairman of the Tender Board at the time of the events under consideration) who had deposed in his affidavit to the effect that the decision to award the tender to the third appellant was made by the second appellant alone.

[12] Regarding the issue of delay in launching the review application presently under discussion, the first and second appellants' counsel, quite correctly, submitted that it was trite that such applications should be launched with reasonable alacrity, and that the decision whether or not there is a delay in the launch is relative and is based on the facts pertinent to each case. In supporting her submission on this issue, she cited the following decided cases: *Chesterhouse (Ltd) v Administrator of the Transvaal& Others* 1951 (4) SA421 (T), 424D-E*; Shepherd v Mossel Bay Liquor Licensing Board* 1954 (3) SA 852 (C); *and Radebe v Government of the Republic of South Africa and Other*1995 (3) SA 787 (N) 789-799E*.* Further buttressing the issue, counsel added that a court hearing a review application should consider the prejudice suffered by the respondent incidental to the delayed launch of the review application. Furthermore, she stated that it was desirable and of utmost importance that finality in review disputes should be reached within a reasonable time citing for this extended point, the case of *Disposable Medical Products v Tender Board of*

Namibia 1997 NR 129 (HC), 132D-Eand*The Civil Practice of the Supreme Court of South Africa*4 Edat p957 by Herbstein and Van Winsen.

[13] It is apposite to record that the point on delayed launch of the review application *in casu*was anchored on the fact that the impugned decision was made on 9 May 2009 and yet the review application was not filed until 2 September 2009, thereby occasioning an alleged delay of 15odd weeks. The learned counsel was concernedover the alleged delay because the tender was for a limited period, namely, as already noted, from the beginning of April 2009 to the end of March 2014, in conjunction with the fact that the successful tenderers had already invested financially and otherwise in ensuring that the desired services were supplied to the Government.

[14] Ms van der Westhuizen then responded to the point raised in MrsMentz'saffidavit on behalf of the respondent, namely that in arriving at the decision to reject the respondent's tender, the second appellant had not taken relevant considerations into account, but that it had instead employed irrelevant factors. This was related to the averment that the decision favouring the third appellant was hinged on the social responsibility,which was canvassed on its behalf having regard to the letters dated 14 April 2009, written by a certain Mildred Jantjies (Ms Jantjies), the spokesperson for the SWAPO Women's Council Secretariat to Mr Alfred Ilukena (MrIlukena), Deputy Permanent Secretary in the Ministry of Education and Chairman of that Ministry's Tender Committee, as read with the letter dated 20 April 2009 written by Mr CKKabajani (MrKabajani), Director: Programmes and Quality Assurance, Ministry of Educationto the same addressee, MrIlukena. As I

shall discuss these letters *in extenso*later in this judgment, I need not say anything more about them at this stage.

[15] There were several other submissions which Ms van der Westhuizen made. However, rather than deal with them presently, I shall, as becomes necessary, discuss or allude to them when I come to the stage of assessing the totality of the facts of this case and the law in the light of submissions put forward thereon. For now it suffices to record that in her conclusion Ms van der Westhuizen had the following to state:

> '...it is respectfully submitted that the court *a quo* erred in reviewing and setting aside the decision by the second appellant to award the tender to the third appellant. Given the authorities cited and referred to, it is submitted that the evaluation process and the subsequent award of the tender to the third respondent (*sic*) was not procedurally flawed and should not have been set aside.'

[16] Let me now turn to the third appellant's heads of argument. The third appellant was in this court represented by Advocate Heathcote. In setting out MrHeathcote's arguments and submissions,let me firsttake the opportunity to correct one misrepresentation he made in his introductory remarks to his heads of argument. He stated in the third paragraph that Free Namibia Caterers (Pty) Ltd, the respondent, 'had an inside track to the confidential deliberations of the Tender Board. It knew the decision even before successful tenderers were informed, *such as the third appellant....'.*My observation is that while the assumption that the respondent had an inside track may well be correct, the facts of the present matter do not lend supportto the further assumption that the respondent knew the Tender Board's

decision *even before other tenderers,such as the third appellant,* did*.* (Italics supplied.)

[17] The learned counsel's presumption was premised on the fact that on 12 May 2009 MrsMentz wrote the letter I have quoted in the third paragraph hereof in which, among other things, she queried that although the respondent's bid relating to the Ohangwena/Oshikoto region had sailed through all the qualifying rounds,she had learned that it ended up disqualified. My view is that in order to ascertain at what stage she came to learn that the respondent's tender had been disqualified, it is opportune to juxtapose her letter with the letter of grievance lodged by Ms Jantjies, who equally made a complaint but, in her case, concerning the third appellant. The latter letter was written on the third appellant's letterheads;it alleged unfairness on the Tender Board's partinrejectingthe third respondent's bid;and, significantly, it carried an even earlier date than that on MrsMentz's letter. It was written on 14 April 2009 while MrsMentz wrote hers on 12 May 2009. Ms Jantjies's letter brazenly showedthat she equally had an inside track to the confidential deliberations of the Tender Board. She stated at the very start of her letterthus:'As per our reliable information from within the Government it has come to our attention that our two companies, Atlantic Food Services and Catering Solutions were disqualified.'When one dispassionately compares the two letters, the more logical presumption is, and mustbe, that the third appellant had heard about the disqualification of its tender earlier than the respondent did.

[18] Coming to the heads proper, the first matter the third appellant's counsel took up was in regard to the letters MrsMentz wrote to both the Ministry and the Tender Board concerning the disqualificationof the respondent's tender. Counsel sets the

stage to this aspect by quoting the recommendation of the Ministerial Tender Committee in the Ministry to the Tender Board and the reason for the same, thus:

> 'That the Tender Board award Tender A9-11/2009 to the following tenderers for the period 1 May 2009 till 30 April 2014 to the total amount of N$207 351 283.00 per annum for 2009/2010 with an increment of 16% per annum for the next five(5) years, with the final year (2014) amount to be N$440 993 201.00.'

Atlantic Food Services, the third appellant, featured prominently in the list of eight companies which counsel reproduced underneath the above quotation. Then in as far as the third appellant was concerned, the reason why its tender qualified was quoted as follows:

> 'The tenderer was recommended for this catering region because it had the lowest tendered man-day price in the region. In addition, the tenderer has a clear social responsibility, for example to create and (*sic*) Education Trust, support disaster situations such as floods and provide bursaries. Furthermore, the tenderer focuses on the empowerment of women, youth and people with disabilities.'

The foregoing was followed by a reproduction of the reason why, on the other hand, the tender of the respondent was disqualified,*viz* -

> 'Though the tenderer met all the requirements their man-day price was too high.'

After the above references,MrHeathcotethen reproduced a number of letters which the respondent addressed to the first and second appellants. He labelled the cumulative effect of the letters as interrogations and not requests for the reasons why the respondent's tender was disqualified. Then heechoed the submission made

by Ms van der Westhuizenthat the letters amounted to fore knowledge on the part of the respondent that its tender was not successful because of its exorbitant prices.

[19] I am convinced that the foregoing submissions made by counsel have painted a lop-sided picture of a plain sailing success by the third appellant in its bid. To the contraryand as I shall demonstrate later, the third appellant's tender was at first disqualified. Therefore, to paint a balanced picture,counsel should also have alluded to the initial stumbling block which this appellant had met before scoring eventualsuccess. A biased picture has equally been painted purporting to show that the respondent's tender was outrightly rejected. I shall elaborate on this later and show that the respondent's tender was initially successful.

[20] As regards the third appellant's tortuous route to success, quite apart from the respondent's say-so, the evidence to the effect that its tender was initially rejected is preponderant. Firstly, the extract from MsJantjies' letter,hereinbefore referred to,unmistakeably makes that point. Secondly, in his letter of 20 April 2009 addressed to MrIlukena, MrKabajani stated the following as captured at page 1393 in volume 13 of the common bundles of documents in the record of appeal:

> **'THE CASE OF "ATLANTIC CATERERS" AND "CATERING SOLUTIONS"**
> I noted from the document provided to me that the two companies of Atlantic Caterers and Catering Solutions lodged a complaint with the office of the Permanent Secretary *after they came to realize that they were disqualified.'* (Emphasis supplied.)

Thirdly, again in the common bundles of documents, there is at page 1327 in volume 12 a document entitled, 'ADDENDUM A – FIRST AND SECOND DRAFT

SUBMISSIONS'.Under cover of that document,at page 1328,there is a draft letter of recommendations by the Adjudication Committee addressed to the Tender Board.The recommendations relate to the Government tender under consideration and include the following observations concerning the third appellant. The observations are on page 1331 and read as follows:

> '10. Atlantic Food Services –The Tender Bond, Performance Bond and Overdraft Facility are not in the name of the tenderer, but in the name of the shareholder, namely Independent Management Project. The Certificate of Good Standing (Tax Certificate) was issued in the name of Conger Investments. There is no evidence of a company registration certificate orchange in name issued in the nameof Atlantic Food Services.'

The foregoing observationsfall under the heading '**TENDERERS WHO ARE DISQUALIFIED',** occurring at paragraph 3.3 of the previous page. Finally, there are handwritten notes occurring at pages1367 to 1370 of the same volume 12. With consent from all the parties, a typescript of these notes was handed in during the hearing of this appeal. The notes, which are apparently minutes of a meeting of the Adjudication Committee, make interesting reading.I now reproduce them hereunder in their entirety:

> '16/04/2009
>
> With MrKhama to sign document/covering letter. Covering letter endorses submission to the Director:PQA. However, MrKhama didn't want to sign the covering letter. Suggestion was made to allocate Omaseke to Atlantic to eliminate all problems. Meeting with other Committee members was scheduled for 14.30. ? ± 14.45 Present: Ms GD Enssle, Mr Idachebe, Ms Karamata.
> Chair thought covering letter is improper. Doesn't like submission to go through Director: PQA.Wants to take it through PSfor handling.MrKhamahad discussion with

Ms Ilukenaand PS - message was Gov committee has to relook at awarding Atlantic, to waive criteriain the light of the letter written by Atlantic. Doesn't want to veto this tender by Mr Kabajani, when one looks at womenempowerment.

2 MsKaramata: Why should it go to the Director of PQA (internal arrangement mentioned by our (unclear) on previous daythat all tenders should go through the Director**)**

Committee has guidelines and these 2 companies had not comply, if requirements are waived only for these 2, then same should be done for all.

AG also advised not to relax requirements. All the tenderers knew the criteria.

(Mr Chairread the letter from Atlantic to acquaint himself on the content).

(Tender Board has powerto relax requirement and (unclear) to the legal advisor)

Mr Chair read from the letter: 'we were the lowest of all the catering companies (unclear) our social responsibilities (unclear) needs to be

3 Chair: I warned you previously at the meeting respect the criteria, let us waive where women are involved (unclear) this letter is already cc to Hon Amadhila (Min of Finance). I said for the spirit of (unclear) and empowerment, waive the compulsory criteria.

Let us formulate: 'We looked at the criteria, and waived the compulsory criteria to include Atlantic because of the social responsibility of the company.

Who gave the guys all the information exactly as in the submission? (unclear) problems:

a) How did Atlantic get hold of the content of the letter
b) Chair mentioned that he has a problem to sign the covering letter (Mr Enssle explained the channelling of the NSFP and other tenders)

Mr Enssle: As much as we would like to assist them we do not have any power to change: letters should go to TB who should waive the criteria

To single out one us, we would be in trouble. Whether we could add 'we had waived (unclear) who (unclear) i.t.o.....'

Ms Karamata don't agree, if you (unclear) women empowerment, what about the other Co that didn't qualify

4 Chair: I understand you, but you cannot compare this Co with other companies

Mr (unclear): Beware

Chair: Politics: If I sign this to go to Mr Kabajani and this (unclear) bak, what then?

Mr (unclear): Let the PS then guide us in a letter

Mr E: Do not have any problem.

21/04/2009

Meeting with Mr Ilukena
Complete certain sections
3.6 price preference (11)
Shareholding – put in/add Conger Investment and Conger/companyAtlantic / + % + remarks
5. Recommendations
Regions × free – Atlantic N$18.15
In Ohangwena region
Omaheke – catering instead of Supreme
Next page
- Take to successful
Motivation
Cheaper in region
Women empowerment Co
i.t.o.affirmative action will enhance status of women
Comprehensive social responsibility
Package (unclear) page 7
To the (unclear)
Next page
× Check final price preference for Atlantic and Catering Solution.'

According to these minutes, it goes without saying that the members of the committee had received unpalatable promptings from higherauthorities who wanted the committee to reverse its earlier adverse recommendation against the third appellant. The Committee eventually obliged.

[21] It is, therefore, without doubt that the vaunted qualification of the third appellant's tender materialised only after some intervening questionable manoeuvrings.

[22] Regarding the disqualification of the respondent's tender, that was not outright as already mentioned. There is enough evidence to that effect. The factual situation is that the respondent's tender was initially held to be qualified. This is shown,first by

the fact that in the same draft letter from the Adjudication Committee addressed to the Tender Board, there is asub-headingtitled **'TENDERERS WHO ARE FOUND *SUITABLE* FOR THE RESPECTIVE CATERING REGIONS'**(the italics are supplied for emphasis)and under that sub-heading there is at page 1332the followingentry relating to Free Namibia Caterers, the respondent:

> '2. Ohangwena/Oshikoto
> Despite having the highest price preference,it is the only tenderer that has storage in the Ohangwena/Oshikoto Catering Region. OKG Food Services, Kunene Catering and Supreme Caterers do not have storage facilities in this catering region.'

Secondly, in MrKabajani's letter,earlier referred to,in which he reflected the Adjudication Committee's adverse recommendation against the third appellant, he alsoreflected that Committee's list of successful tenderers. That listincluded Free Namibia Caterers, the respondent.

[23] From the foregoing, the inference is inescapable that, just as the eventual success of the third appellant's tender was the result of improper interventions, it is equally beyond peradventure that the disqualification of the respondent's tender was the consequence of the same interventions. I shall elaborate on this in due course.

[24] The next submission MrHeathcote made related to that part of the Court *a quo's* judgment in which it was held that, because of its failure to give reasons for disqualifying the second respondent's tender, when requested to do so by the respondent, the second appellant had failed to perform its duty stipulated by section 16(1)(*b*) of the Tender Board of Namibia Act, No16 of 1996. Counsel further faulted that Court's holding that that failure amounted to a violation of the respondent's basic

human right guaranteed to it by Article 18 of the Namibian Constitution. Subjected to equal criticism was the trial Court's holding that the second appellant had abdicatedto the first appellant itsstatutory duty of processing tenders and making decisions thereon. The focal point of counsel's criticism was that the Court below erred in as much as it premised its *ratio decidendi*to justify the review and setting aside the impugned administrative decision solely on the failure to give reasons and the alleged abdication of the TB's statutory duty. In counsel's view the Court below also failed to appreciate that the respondent's intermediate interdict application to stop the second appellant from signing service agreements with all the successful tenderers had a bearing on the timing of giving reasons in response to the respondent's letters. In other words, as I understood him, counsel felt that any delay that might have occurred in timeously providing the reasons was engendered by the respondent's intervening interdict application.

[25] For a better appreciation of these holdings by the Court below, it is fitting to reproduce theaforementioned legal provisions.Article 18 states:

> 'Administrative Justice
> Administrative bodies and administrative officials shall 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.'

And section 16 provides:

> '(1) The Board shall in every particular case –
> (a) …

(b) on the written request of a tenderer, give reasons for the acceptance or rejection of his or her tender.'

[26] I am favourably disposed to counsel's submission and, therefore, accept that the learned Judge of the Court *a quo* fell into error as regards his *ratio decidendi.* The learned trial Judge lost sight of the fact that an application for a review and setting aside an administrative action is intended to secure justice where there has been a failure of justice. The failure must be a necessary component of, and intrinsic to, the decision making process itself. Consequently an application for review and setting aside must be premised on one of two grounds, namely gross irregularity or clear illegality in the process of taking the administrative action concerned. (*Introduction to South African Law and Theory,* 2 ed.para4.2.2.2. at p1074). In other words, the applicant's attack should be based on an illegality or irregularity intrinsic to the action itself and not on the basis of what happens either prior or subsequent to the decision making process. Moreover, the burden to establish these grounds rests on the applicant for review. (*Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd and Another* 1988(3) SA 132 (A)*; Davies v Committee of the JSE,*1991(4) SA 43 (W)). That is why in *Davies v The Committee of the JSE,*Zulman J made the following statement confirmatory of this legal position, *viz*:

'(t)hereis no onus on the body whose conduct is the subject matter of review to justify its conduct. On the contrary, the onus rests upon the applicant for review to satisfy the court that good grounds exist to review the conduct complained of. (See for example, *The Administrator, Transvaal, and the First Investments (Pty) Ltd v Johannesburg City Council*1971(1) SA 56 (A) at p 86 A-C.)'

In the alternative, the essence of, and the justification for,judicial intervention is to ameliorate the situation when administrative action has occasioned a failure of justice.

[27] *In casu,* thelearned trial Judge granted the review and set the impugned decisionaside based on failure by the Tender Board to give reasons coupled with the alleged abdication of its statutory duty to itself consider the tenders and make decisions thereon. Neither of these factors was intrinsic to the actual administrative action of awarding the service contract to the third appellant nor to that of disqualifying the respondent's tender. The factors relied on by the Court took place either beforethe decision was made, as in the case of the allegation of abdication, or after the decision was made, as regards the failure to give reasons. Therefore it can be said with justification that the learned trial Judge shied away from the core issue of determining whether or not there was a failure of justice in the *actual* granting of the award to the third appellant or the disqualification of the respondent's tender, so as to justify the review and setting aside of the Tender Board's decision aforesaid. It is to that untouched issue that I now turn my attention. The discussion of that issue also presents me with the opportunity to provide the elaboration which I deferred regarding the manner in which the third appellant's tender succeeded while that of the respondent failed.

[28] As a preface to the discussion of that issue, let me outline the procedure of processing tenders leading to the awarding of service contracts to successful tenderers. The ensuing résumé of the process is based on the affidavit of MrIlukena

whose personal identity and position in the tender process has earlier been briefly high-lighted.

[29] Tenderers lodge their bids with the Tender Board, which is a section of the Ministry of Finance.After a short scrutiny by the Board the tenders are passed on to the Adjudication Committee. There they are evaluated, adjudicated on and singly recommended on either favourably or unfavourably. This exercise entails checking on whether, *inter alia*, they meet certain preset criteria prescribed in the tender documents. Upon completion of its part, the Adjudication Committee submits the tenders to the Director: Programmes and Quality Assurance who scrutinises them further and makes his own comments thereon before submitting them to the Ministry'sTender Committee. The last mentioned Committee gives its own scrutiny to the recommendations, comments and any other observations before making its own final recommendations to the Tender Board. The Tender Board is the decision maker. The Board may, however, if need arises, refer back to the Ministry's Tender Committee any tender recommendation for further evaluation and/or adjudication before it is finally resubmitted to it for decision making.

[30] In the preceding paragraph I have referred to preset criteria with which tenderers were required to comply in order to be eligible for entry into agreementsfor the provision of services. The criteriawere in two categories, namely compulsory or obligatory criteria, and additional criteria. The compulsory/obligatory criteria (also known as main criteria) were used to determine the tenderers who can qualifyfor an award of tenders. *The tender documents provided that non-compliance with these*

was to result in automatic disqualification of affected tenders. (Italics supplied.) These crucial criteria were listed as:

> ‘1. The Tender Bond
>
> 2. The Performance Bond
>
> 3. Proof of Overdraft Facility and
>
> 4. Letter of Good Standing from a financial institution.’

The additional criteria are:

> ‘1. Inspection reports of visits to school hostels
>
> 2. Man-day price (Minimum N$14.14 for primary and N$17.81 for secondary based on actual wholesale price as per menu, excluding overhead costs
>
> 3. Shareholding (Tenderer can only be granted a maximum of two catering regions, including if shareholders have cross-ownership in other companies.’

[31] In the light of the foregoing, let us now look at how Atlantic Food Services, in the name of which Conger Investments (Pty) Ltd traded, and Free Namibia Caterers (Pty) Ltd, the third appellant and respondent respectively, faired.

[32] In order to satisfy the obligatory criteria, the third appellant produced three letters the source of all of which was the Standard Bank of South Africa and, as expected, were all addressed to the Permanent Secretary in the Ministry. The first was dated 12 February 2009, and the following was its full text:

‘Business Banking Expert
KwaZulu Natal

The Permanent Secretary
Ministry of Education
Office of the Permanent Secretary, 3rd Floor, Ministry of Education
Government Office Park, Luther Street, Windhoek
Private Bag 13185
12 February 2009

Dear Sir/Madam,

TENDER APPLICATION REFERENCE NUMBER: A9-11/2009

We hereby confirm that Independent Management and Projects (Pty) Ltd conducts their banking account in our books. The account details are:
Account Number: 252902459
Branch: Umhlanga Ridge
Branch Code: 05782944

We confirm that Independent Management and Projects (Pty) Ltd have an overdraft facility in our books and have sufficient working capital to complete the contract.

This letter is issued as a letter of comfort without recourse to the bank.
If you require any further details please do not hesitate in contacting me.

DHM Raw
Account Executive
Business Banking KZN’

The next letter was dated 13 February and it suffices to reproduce only its substantive text.It reads:

‘1. Our Bid Guarantee Number: 902130155116774

By this guarantee, The Standard Bank of South Africa Limited (hereinafter called “the bank”), herein duly represented by S.Wakefield and L.A.Stockwell as Managers guarantee herewith as instructed by the bank’s client Independent Management and Projects (Pty) Ltd (hereinafter called the “Tenderer”) who has participated in the Catering Tender for the supply of foodstuffs to Government schools under contract reference no. A9-11/2009 (hereinafter called “the tender”), the exclusive credit and benefit of the Purchaser, upon formal demand made by the Purchaser indicating that:

1.1 The Tenderer has withdrawn his tender before it was awarded; or

1.2 The Tenderer after being awarded the tender in question, withdrew and/or failed to provide the performance guarantee required; or

1.3 The Tenderer had merely tendered to achieve the objective of manipulating the tender process/price and/or withdrew the submitted tender to achieve such objective;

To pay the amount of NAD100,000.00 (Namibian Dollars one hundred thousand only) (hereinafter called “the Guaranteed Amount”) and no alternation in the terms of the tender nor any forbearance nor any forgiveness nor any forgiveness in respect of any matter concerning the tender on the part of the Purchaser shall in any way release the bank from any liability under this guarantee.

2. This guarantee shall lapse and become unenforceable against the bank if:

2.1 the tender is accepted by the Purchaser within sixty (60) days from the closing date of the tender, and the tenderer has provided a performance guarantee in terms of the conditions, specifications and terms of the Tender A9-11/2009; or

2.2 the tender is not accepted within the said period of sixty (60) days; or

2.3 before the expiration of the said sixty (60) days of the closing date, a tender from another tenderer for the supply of foodstuffs has been accepted.

3. The bank's liability under this guarantee will expire on the 30th April 2009 (hereinafter called "the Expiry Date"), after which date this guarantee will automatically be cancelled whether returned to the bank or not and any claim received in respect thereof should reach the bank not later than the Expiry Date. Any claim received after the said Expiry Date will not be entertained by the bank.

4. No variations to the terms and/or conditions on the guarantee are permitted without prior written agreement of all the contracting parties who are legally bound thereby.

5. This guarantee is subject to the International Chamber of Commerce Uniform Rules for Demand Guarantees no. 458.

6. Payment under this guarantee will only be made of the original guarantee.

7. This guarantee is neither negotiable nor transferable and is restricted to the payment of money only.

Signed at Durban for and on behalf of The Standard Bank of South Africa Limited this 13th day of February 2009.'

The third and last letter reads as follows:

'13 February 2009

Dear Sir/Madam

INDEPENDENT MANAGEMENT AND PROJECTS (PTY) LTD
ACCOUNT NUMBER: 252902459
BRANCH UMHLANGA RIDGE
BRANCH CODE 05782944

> We hereby confirm that the above business conducts their banking account in our books. The account was opened on the 22 June 2006 and since then the account has been very well conducted with no dishonours on record. We are happy to recommend client as good for normal business for an amount of R10 million over 39 days.
>
> Based on the information at our disposal, we are of the opinion that should the company secure a tender with yourselves, it would have the means to secure a Performance Guarantee for 3% of the contract amount from ourselves, subject to the Bank's normal credit criteria being met.
>
> If you require any further details please do not hesitate in contacting me.'

[33] The foregoing three letters were the ones on which the Adjudication Committee initially based the disqualification of the third appellant's tender. It is quite apparent from the letters that they were all intended to show that the third appellant met the obligatory/compulsory/main criteria and was thus eligible to be considered whether or not to get a tender to provide the required services. Alas, however, all the three letters were recommending a company called Independent Management and Projects (Pty) Ltd and not Conger Investments (Pty) Ltd. I understood the appellants' counsel to contend – and indeed there is evidence to show – that Independent Management and Projects (Pty) Ltd was the majority shareholder in the third appellant with a stake of 55% shareholding. The impression the appellants' counsel intended to portray was that the apparent recommendations of the company actually named in the letters notwithstanding, the ultimate beneficiary of the recommendations was the third appellant. Therefore, according to them, the third appellant had met the compulsory criteria.

[34] That contention cannot stand the test of the law.It is trite that in commercial law a corporate body has a personality separate from its shareholders*(Salomon v Salomon & Co.*[1897] A.C. 22*).* Thatprinciple is basic and beyond question. In that vein, Conger Investments (Pty) Ltd was a separate legal persona with its own capacity to sue and be sued. That means that if there was a justiciable difference between the Tender Board and Conger Investments (Pty) Ltd relating to any of the obligatory criteria, the Tender Boardcould not sue Conger Investments (Pty) Ltd on the basis of any of the three letters.It would equally be unable to sue Independent Management and Properties because there was no privity of contract between it and that company in as far as the tender issue was concerned. In any event the tender documents required that the tenderer himself/herself or itself (in this case Conger Investments) must provide the Tender Bond, Performance Bond and Overdraft Facility in its own behalf. However, since the letters quoted above did not refer to Conger Investments, it is inescapable that the third appellant must be adjudged to have failed to comply with the compulsory, obligatory or main criteria. Consequently, the initial determination by the Adjudication Committee was inevitable.

[35] In the instant case, despite the clear stipulation of the tender documents, when the bids reached the stage of the Director: Programmes and Quality Assurance, the following events took place. After poring over all that had been recommended, including comments and observations thereon made by the Adjudication Committee, MrKabajani, the then Director,was evidently unhappy with the adverse recommendation against the third appellant. He therefore wrote the letter of 20th April 2009, to which I have earlier made reference. In that letter he first acknowledged that the third appellant and a company called Catering Solutions,

wereamong thirteen companies which had been disqualified on the basis that they did not meet the compulsory criteria requirements, namely the tender bond, performance bond, letter of good standing and overdraft facility. The following are excerpts from MrKabajani's letter:

> 'However the two companies have all the three documents (i.e. documents relating to the obligatory criteria) provided in their tender, but the ball of contention (*sic*) is in whose name the documents were written. That the three documents are written in the name of the shareholders and not in the name of the tenderer seems to be the issue. The issue is therefore not that they were not provided but in whose name they were written. This is the matter for the Tender Committee to decide.
>
> The business principle of the two companies seeks change the entire catering history. In the life that I have supervised hostel catering I have never come across an attractive or lucrative social responsibility and social development as that contained in the principles of these two companies. I read through all companies that tendered and the business principle of the two companies can be compared to none. . . . the two companies have social responsibilities that make them move into hostels, habilitate hostels by ploughing back funds through an established Trust Fund.
>
> They have the best social development principle that stands to support and serve the Ministry of Education better than any other company that tendered.
>
> The two companies are the cheapest in four regions of Erongo/Kunene, Otjozondjupa, Hardap/Karas and Omaheke.
>
> RECOMMENDATIONS
>
> - That a legal advisor for the Ministry of Education, MrAdechaba be tasked to study the tender documents of seven (7) recommended companies and advice (*sic*) the Tender Committee on the specific wording of the Tender Bond, Performance Bond and Overdraft Facility as to whether these companies meet the stipulations of the tender document.

- The Tender Committee has the jurisdiction to decide whether Catering Solutions and Atlantic (Food) Caterers are viable for inclusion based the on the entrenched social responsibility and business principles provided.

- I recommend that a rechecking be done on the companies that have been recommended as many of them do not articulate government principles well enough. I trust that these comments will go a long way in assisting the process of warding (*sic*) the tender.

(Signed C.M.Kabajani)'

[36] In its consequential letter, signed by all its three members on 24 and 27, the Ministry of Education Tender Committee stated the following in paragraph 3.4 headed 'SUCCESSFUL TENDERERS' of its letter to the Tender Board:

> 'These are the tenderers who complied with the main (compulsory) criteria as well as the additional criteria and emerged as the most suitable tenderers for the respective Catering Regions. In the final allocation, the price comparative schedule was considered (Annexure 5).'

In the ensuing list of the successful tenderers Atlantic Food Services was second and the following was written about it:

> 'Ohangwena/Oshikoto Atlantic Food Services:
> The tenderer was recommended for this Catering Region because it has the lowest tendered man-day price in the region. In addition, *the tenderer has a clear social responsibility, for example to create an Education Trust, support OVCs, support disaster situations such as floods and provide bursaries. Furthermore, the tenderer focuses on the empowerment of women, youth and people with disabilities.'*(Italics supplied for emphasis.)

[37] In their respective heads of argument both Ms Van der Westhuizen and MrHeathcote have emphasised that the overriding consideration which the Tender Board took into account in awarding the tender to the third appellant was the costing factor, namely the man-day price the third appellant charged being the lowest. However, the sequence of events after the interventionsbyMs Jantjies, the spokesperson of the SWAPO Women's Council Secretariat, on behalf of the third appellant, and MrKabajani as noted above, irresistiblylead to the inference that the Adjudication Committee changed its mind in favour of the third appellant because it was prevailed upon through those interventions.

[38] I find this to be the case because, in the first place, the factor of the third appellant's price being the lowest in the Ohangwena/Oshikoto region was before the Adjudication Committee at the very time when it disqualified the third appellant initially. Secondly, there is no evidence that the third appellant resubmitted a substitute tender to replace the earlier one which lacked the decisive compulsory criteria, for which reason its tender was disqualified initially. It is consequently doubtless that the comment which the Ministerial Tender Committee made to the effect that all tenderers who ultimately obtained tender awards had complied with the main (compulsory) criteria, was not true in so far as the third appellant was concerned. Thirdly, in the favourable reassessment on basis of which the third appellant's tender was reclassified as successful, there was an unusual emphasis on social responsibility beinga relevant tender attribute. I cannot avoid the inference thatMrKabajani's disposition as reflected in his letter of 20 April, *supra,* played no mean role in introducing that attribute into the process. In any event, the rest of the

tenderers had not been given an intimation, through the tender documents, that social responsibility would be a relevant *and decisive*factor.

[39] In the final analysis, it is quite clear, and I so hold, that the third appellant's tender was irregularly altered from being disqualified, on proper and valid grounds, to being qualified, for improper and invalid reasons. I am consequently fortified in further holding that the decision by the learned trial Judge in reviewing and setting aside the impugned administrative action was impeccable, save that in arriving at it he used a wrong route, namely by basing it on the failure to provide reasons and the alleged abdication by the Tender Board of its statutory duty. I am satisfied that all the evidence which the learned Judge could have used in coming to the samedecision was starkly before him in the record of appeal. I therefore uphold his decision.

[40] Another bone of contention in this appeal concerns the finding by the Court below that the Tender Board abdicated its statutory responsibility to consider and make determinations on tenders.Without much ado, I am supportive of the trial Judge's finding that the Tender Board's letter dated 26 June 2009 addressed to the respondent lent credence to that view. That is because that letter clearly stated that '*the Ministry of Education dealt with the entire tender process'*, and that the Ministry '*is in the best position to answer'*tothe complaint letters from the respondent expressing dissatisfaction with the manner in which its tender was disqualified. Thestatement in that letter was unequivocal,but unfortunately it was diametrically inconsistent with the deposition of MrSchlettwein, who claimed in his affidavit that 'at *the meeting of the Tender Board, the Board deliberated all documents and recommendations and applied its mind to the award of tenders herein'.* If

MrSchlettwein, who was at the time the Tender Board's chairman, is to be believed, why did he allow his own office to attribute the entire tender process to the Ministry of Education? The second appellant, by contradicting the assertion by his own office's unequivocal confession of abdication, was proverbially blowing hot and cold. That is intolerable and I feel that the learned Judge in the court below was entitledto attach an uncharitable epithet toMrSchlettwein's evidence regarding this issue.

[41] The only other marginally contentious issue which requires attention relates to the timing of the review application. The appellants have made it a plank of attack against the respondent by highlighting the fact that thedecision at issue was taken on 9 May 2009 and had inferentially come to the knowledge of the respondent by 12 May, but that the review application was not instituted until 2 September 2009. They have cited irrefutable judicial authority which requires that persons aggrieved by administrative action must not act dilatorily in instituting judicial review proceedings.

[42] In the light of the irregularity I have found to be incidental to the impugned administrative action which resulted in gross injustice to the respondent; the fact that the appellants have been unconvincingly at pains to establish that the imagined delay occasioned a prejudice to them; and the fact that the alleged delay itself was for only about three months during which the second appellant was not readily responsive to the respondent's requests for reasons for the disqualification of its tender - a fact showing that the second appellant did not come to court with clean hands - this issue cannot advance the appellants' case any further. I am, in any event, satisfied that the learned Judge in the court below dealt with it adequately.

The Cross-Appeal

[43] Coming to the cross-appeal, I construe the respondent's prayer made in the Court below and repeated in this Court, that the Ohangwena/Oshikoto tender be awarded to itby the Court instead of being referred back for reconsideration by the Tender Board, as a request for this Court to act arbitrarily.Tender processing is a specialised calling in as far as it entails examination of a variety of circumstances. In fact, there is weighty judicial authority that, as a general rule, a court will not substitute its own decision for that of the designated functionary. That was, for example, the majority position this Court took in *Waterberg Big Game Hunting Lodge Otjahewita (Pty) Ltd v Minister of Environment and Tourism*2010 (1) NR 1 (SC) at 31F-G.Shivute,CJ, had the following to say:

> 'When setting aside a decision of an administrative authority, a review court will not, as a general rule, substitute its own decision for that of the functionary, unless exceptional circumstances exist. (*SA Jewish Board of Deputies v Sutherland NO and Others* 2004(4) SA 368 at 390B*).*
>
> Thus, in *Masamba v Chairperson, Western Cape Regional Committee, Immigrants Selection Board and Others* 2001 (12) BCLR 1239 (C),the Cape Provincial Division of the High Court of South Africa stated at 1259D-E:
>
> > *"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, 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."* '

I respectfully associate myself with this dictum.

See also *Ruyobeza and Another v Minister of Home Affairs and Others* 2003 (5) SA 51 (C) at 63G-J.

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.'*(Livestock Meat Industries Control Board v Garda* 1961 SA 342 (A) at349G*; Jewish Board of Deputies v Sutherland NO and Others (supra); Erf One Six Seven Orchards CC v Great Johannesburg Metropolitan Council (Johannesburg Administration) and* Another 1999 (1) SA 104 (SCA) at 109C-E.)

Chief Justice Shivute then went on to amplify that view by quoting the dictum of Hlophe J, in *University of Western Cape and Others v Member of the Executive Committee for Health and Social Services and Others* 1998 (3) SA 124 (C) at 131D-G**,** depictingthe rare cases in which a court would be justified to substitute its own decision for that of the administrative authority. HlopheJ in that case said:

> '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 not also 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.'

[44] This Court is bound by its own decision in *Waterberg Big Game Hunting Lodge Otjahewita (Pty) Ltd,supra.*In any case I do not consider that the present case falls into the category of those cases where a court should substitute its own decision for that of the designated functionary. According to the holding of the Court *a quo*, which I have endorsed, the impugned decision herein was not made by the Tender Board. Therefore there is no apprehension of bias by the Board against the respondent if the case is referred back; nor is it the position here that this Court is in as good a position as the Tender Board to make a decision.I therefore feel unpersuaded by the respondent's prayer in this connection.

[45] In the final analysis, I make the following orders:

1. The appeal is dismissed.

2. The cross-appeal is equally dismissed.

3. The appellants are hereby mulcted in two-thirds (2/3) of the entire costs in this Court jointly and severally, the one paying the other to be absolved.

4. This matter is referred back to the Tender Board to be reconsidered, but is hereby directed that the only tenderers to be

reconsidered are the respondent and two companies, other than Atlantic Food Services, which submitted tenders for the Ohangwena/Oshikoto Region.

_____

CHOMBA AJA

_____

MARITZ JA

_____

MTAMBANENGWE AJA

APPEARANCES

1 & 2ND APPELLANT:	Ms C E van der Westhuizen Instructed by Government Attorney
3RD APPELLANT:	R Heathcote (with him G Dicks) Instructed by Ellis Shilengudwa Inc.
RESPONDENT:	GColeman (with him Ms E N Angula) Instructed by AngulaColeman Legal Practitioners