



**REPORTABLE**

CASE NO. SA 44/2015

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

**FREE NAMIBIA CATERERS CC**

**Appellant**

and

**THE CHAIRPERSON OF THE TENDER BOARD OF  
NAMIBIA**

**First Respondent**

**THE MINISTER OF EDUCATION  
Respondent**

**Second**

**PERMANENT SECRETARY, MINISTRY OF  
EDUCATION**

**Third Respondent**

**DIRECTOR (PQA) MINISTRY OF EDUCATION**

**Fourth Respondent**

**Coram:** SHIVUTE CJ, MAINGA JA and HOFF JA

**Heard:** 19 June 2017

**Delivered:** 28 July 2017

**Summary:** This appeal arises from a tender for the provision of catering services to government school hostels countrywide. The Tender Board invited suitably qualified entities to submit tenders for the supply of foodstuffs to school hostels in each of the eight designated regions. The appeal concerns the rendering of catering services to

hostels in Ohangwena / Oshikoto educational region. It was a condition of the tender that a successful tenderer would be required to provide catering services for five years commencing on 1 April 2009 and ending on 31 March 2014.

Several tenders were received, including that of the appellant. Having been considered by the relevant Ministerial Committee, and after recommendations had been made, the Tender Board awarded the tender to a company named Conger Investments (Pty) Ltd t/a Atlantic Food Services, which is not a party to these proceedings.

After being advised of this decision of the Tender Board, the appellant brought an application in the High Court to review and set aside the decision of the Tender Board and joined the rest of the respondents to the application. The appellant also sought for an order that the tender for this region be awarded to it. The respondents opposed the application. The High Court found that the tender awarded to Conger Investments (Pty) Ltd was tainted by administrative irregularities and was unfair. It set aside the tender award but refused to award the tender to the appellant.

Dissatisfied with the setting aside of the tender, the respondents appealed to the Supreme Court. The appellant, also dissatisfied with the decision of the court *a quo* refusing its request for the tender to be awarded to it, noted a cross-appeal against that part of the judgment. After hearing argument, the Supreme Court dismissed both the appeal and the cross-appeal, with the consequence that the award of the tender remained set aside and meaning that the order of the court *a quo* remained

unchanged. The Supreme Court further directed that the tender be referred back to the Tender Board for reconsideration.

The Tender Board gave effect to the directives of the Supreme Court and eventually awarded the tender to the appellant. The notice to the appellant informing it of the successful award did not state the term of the tender. Instead, the appellant was informed that the period would be indicated in the contract. The appellant brought another review application in the High Court this time seeking, amongst others, an order that the tender awarded to it was for a five year period reckoned from 10 January 2014 to 10 January 2019. The High Court found that the Tender Board was directed by the Supreme Court to reconsider the original tender and not one for a longer term. Dissatisfied with the judgment and order of the High Court, the appellant has now appealed to this Court.

The Court *held* that the High Court was correct in finding that the Tender Board was directed to re-consider the original tender and not one for a longer term. Appeal dismissed with costs.

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### **APPEAL JUDGMENT**

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SHIVUTE CJ (MAINGA JA and HOFF JA concurring):

[1] This is an appeal against the judgment and order of the High Court dismissing a review application by the appellant. The application was principally aimed at exerting the assertion that the tender awarded to the appellant terminates on 10 January 2019 and not on 31 March 2014.

### Background

[2] The appellant is a close corporation providing, amongst others, catering services. The appellant has cited as respondents, the Chairperson of the Tender Board of Namibia (the Tender Board), the Minister of Education (the Minister), the Permanent Secretary in the Ministry of Education (the Permanent Secretary) and the Director of Programmes and Quality Assurance in the Ministry of Education (the Director) who will collectively be referred to as 'the respondents'.

[3] Briefly, events leading to this appeal are as follows. In January 2009 the Tender Board put up Tender Number A9-11/2009 for the rendering of catering services to government primary and secondary school hostels countrywide for the period of 5 years beginning on 1 April 2009 and ending on 31 March 2014. The tender was demarcated in eight educational regions of Namibia, namely Caprivi/Kavango, Ohangwena/Oshikoto, Omusati/Oshana, Erongo/Kunene, Khomas, Otjozondjupa, Omaheke and Hardap/Karas.

[4] The tender, which is the subject matter of these proceedings required of the successful tenderer to supply a variety of foodstuffs to public school hostels in Ohangwena/Oshikoto educational region. The tender invitation specified that catering services were to be provided over a period commencing on 1 April 2009 and ending on 31 March 2014.

[5] Appellant together with other entities responded to the invitation and submitted their tenders for the concerned region. On the basis of its overall evaluation of the tenders, the Tender Board awarded the tender to a company named Conger Investments (Pty) Ltd t/a Atlantic Food Services, which is not a party to these proceedings.

[6] Aggrieved by this decision, the appellant approached the High Court on notice of motion to have the decision of the Tender Board reviewed and set aside. The appellant also sought an order awarding the tender for Ohangwena/Oshikoto region to it. The respondents opposed the application.

[7] The High Court granted the application in part and set aside the decision awarding the tender but did not order that it be awarded to the appellant. Dissatisfied with the decision setting aside the tender, the respondents noted an appeal to the Supreme Court. The appellant, also dissatisfied with the decision of the court *a quo* refusing its request for the tender to be awarded to it, noted a cross-appeal against that part of the judgment.

[8] After hearing argument, the Supreme Court dismissed both the appeal and cross-appeal, with the consequence that the award of the tender remained set aside and meaning that the order of the court *a quo* remained unchanged.

[9] The Supreme Court considered how the tender could be corrected and ordered that the tender should be referred back to the Tender Board for reconsideration by it. Specifically, the Supreme Court directed that the only tenders

to be re-considered are those of the appellant and two other entities that submitted tenders for the concerned region, excluding Conger Investments (Pty) Ltd t/a Atlantic Food Services which had received the tender in an irregular manner resulting in the setting aside of the tender. In that way Conger Investments (Pty) Ltd t/a Atlantic Food Services fell off the litigation radar.

[10] The Tender Board gave effect to this Court's order by re-evaluating the tender. The result of the re-evaluation was that the tender was eventually awarded to the appellant. The notice to the appellant informing it of the successful award did not state the term of the tender. Instead, the appellant was informed that the period would be indicated in the contract. This is the principal dispute between the parties both in the High Court and here on appeal: what is the period for which the tender had been awarded to the appellant?

#### Findings of the High Court

[11] It was contended in the High Court that the tender was awarded to the appellant for the period up to 10 January 2019. The respondents rejected this proposition and maintained that the tender was up to 31 March 2014, the period the original tender would have ended. The respondents further argued that the appellant's contention would be contrary to the order of the Supreme Court made in earlier proceedings.

[12] The High Court observed that the Tender Board was directed by the Supreme Court to re-consider the original tender, which was to run until the end of March 2014. The court concluded that the Supreme Court never extended the original

tender. On this basis, the court held that the tender awarded to the appellant was for the remainder of the original tender period. In the result, the application was dismissed with costs.

#### Issues on appeal

[13] Aside from challenging the merits of the appeal, the respondents raised two preliminary points. The first is the alleged misjoinder of the Minister, the Permanent Secretary and the Director. The other is the alleged incompetency of prayer 1 of Part B of the amended notice of motion. Before the merits of the appeal and the defences raised by the respondents are considered, I deem it necessary to firstly consider these two points.

#### Preliminary points

##### *The alleged misjoinder of the Minister, Permanent Secretary and Director*

[14] On behalf of the respondents, Ms van der Westhuizen submitted that there has been a misjoinder of the Minister, the Permanent Secretary and the Director. Counsel contended that the decision sought to be reviewed is that of the Tender Board. Accordingly, it was not necessary to join the Minister, the Permanent Secretary and the Director to the present proceedings as they merely made recommendations to the Tender Board regarding the tender.

[15] If I understand this submission correctly, counsel appears to contend that the appellant should not have joined the Minister, the Permanent Secretary and the

Director because they do not have a direct and substantial interest in the case or will not be affected by the outcome of the case.

[16] It is trite that for a party to be properly joined to court proceedings, the requirement is that such party must have substantial interest in the proceedings or the outcome of the proceedings will have an effect on such party, whether direct or indirect.<sup>1</sup> It is incumbent upon a court to ensure that all persons, with the requisite interest in the subject matter of the dispute before it and whose rights may be affected by such dispute, are before the court as such notion is in line with the strict requirements of the rules of natural justice.

[17] In its review application, the appellant sought wide-ranging relief from the four respondents. It is not in dispute that specific relief was directed at the Minister, the Permanent Secretary and the Director. It is common cause that the respondents were not only joined to the review application but also participated in the proceedings before the court *a quo*. What it is not explained is why this point was not raised at the commencement of the review proceedings between the same parties on the same issues. I am persuaded that in the circumstances of this matter, the Minister, the Permanent Secretary and the Director have a direct and substantial interest in these proceedings and that their interests will undeniably be affected by such proceedings. As such they were therefore properly joined as interested parties. The point of misjoinder was argued as part of the process of arguing the appeal on the merits and not much time was spent on it.

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<sup>1</sup> See *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A); *Kleynhans v Chairperson of the Council for the Municipality of Walvis Bay and others* 2011 (2) NR 437 (HC).



*Incompetent relief*

[18] Counsel for the respondents, submitted that it was incompetent for the appellant to seek relief against the decision of the Ministry's Tender Committee to make recommendations to the Tender Board, because that decision is not an administrative action subject to judicial review.

[19] In order to fully appreciate the conclusion I reach on this aspect, I deem it necessary to reproduce the impugned prayer in its entirety. It is formulated as follows:

'Reviewing the decision by the Ministry of Education (MOE) Tender Committee chaired by fifth respondent reflected in the written recommendation dated 4 November 2013 (Annexure "ES1" to first respondent's answering affidavit deposed to on 19 March 2014) to recommend that the Tender Board award Tender A9-11/2009 for the Ohangwena/Oshikoto hostel catering region to Free Namibia Caterers CC for the period 1 October to 31 March 2014 and correcting it to recommend the award of the tender for the period 10 January 2014 to 10 January 2019.'

[20] The decision in question was made in the following context. The Tender Board put up an advertisement calling for public tenders for the rendering of catering services to government school hostels countrywide. Once the tenders were received, the Ministry of Education's Tender Committee assessed the tenders and then made recommendations to the Tender Board. The Tender Board in turn assessed the recommendations made to it and awarded the tender.

[21] The decision-making process noted above demonstrates that the Tender Committee merely made recommendations to the Tender Board and the ultimate decision as to how and to whom to award the tender was made by the Tender Board.

Therefore the decision to be impugned, if at all, is that of the Tender Board and not that of the Tender Committee. As the decision sought to be reviewed is that of the Tender Committee, I accept the appellant's contention that the relief sought in this prayer is incompetent. Accordingly, the point on the incompetent relief sought is well taken.

#### Argument on the merits

[22] Mr. Coleman, appearing for the appellant, commenced his argument by submitting that the appellant lost the five year tender due to unlawful conduct on the part of a senior Ministry of Education official. As a result of this conduct, so counsel argued, the appellant was entitled to damages or to be placed in a position it would have been in but for the commission of the wrong by the official. In support of this contention, counsel cited as authority the work of Visser and Potgieter<sup>2</sup> and submitted that as a basic principle a party is entitled to be placed in a position it would have been but for the commission of the wrong.

[23] The appellant's basic assertion on this point is that it lost a period of the tender due to the tainted award initially made by the Tender Board. Consequently, it is entitled to be put in the position it would have been in had the initial wrong not been committed, amongst others, by the official in the Ministry of Education (the Ministry).

[24] Counsel continued to argue that the respondents created an impression and a legitimate expectation that the contract would be for 5 years. The contention advanced by the appellant is that the Tender Board did not stipulate the period of the tender in its notification of the award to it. Counsel submitted that the Tender Board

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<sup>2</sup> P.J. Visser and J.M. Potgieter. *Visser and Potgieter's Law of Damages* (2003) at 14-15

expressly informed his client that the period of the tender would be indicated in the contract.

[25] Counsel further argued that the issue of the term of the contract had been raised with the respondents at least on five occasions, to which they all failed to react. To illustrate his argument, counsel referred the court to a series of letters addressed to the respondents. Counsel maintained that as a result of the respondents' failure to stipulate the period of the tender and their subsequent failure to react to the appellant's letters on the issue, the appellant assumed that the tender awarded to it was for the five years up to January 2019. Counsel contended with reference to *Minister of Mines and Energy and Others v Petroneft International Ltd and Others* 2012 (2) NR 781 (SC), that his client had a 'legitimate expectation' to be heard before the Tender Board could impose a shorter period of the tender.

[26] On the facts stated above, counsel contended that the respondents let appellant to believe that its assumption regarding the term was not contradicted and as such, the respondents were estopped from vindicating that the tender was to end by March 2014. Counsel further submitted that the contractual framework on which the Permanent Secretary relied on to impose the obligations on appellant stipulated a five year term and as such the Permanent Secretary should not be allowed to ignore the appellant's rights as contained in that contract. In support of the estoppel ground, counsel relied on *Concor Holdings (Pty) Ltd t/a Concor Technicrete v Potgieter* 2004 (6) SA 491 (SCA), in which the South African Supreme Court of Appeal dealt with the doctrine and set out the requirements for representation by conduct. It should immediately be noted that the contract on the basis of which the Permanent

Secretary allegedly relied to impose obligations on the appellant has not been signed by the parties.

[27] On the restitution argument, counsel for the respondents submitted that the appellant's attempt to equate review proceedings to an action for damages based on equity and fairness is a misconception of the nature of review proceedings. Counsel contended that the appellant failed to appreciate the unique nature of review applications and the distinction drawn between it and contractual or delictual claims. Counsel therefore argued that if the appellant felt aggrieved by the conduct of the Ministry's officials, which led to the appellant suffering alleged loss or damages, the appropriate course of action open to the appellant would be to institute a damages claim, either in delict or in contract.

[28] Counsel also raised issue with the way the appellant wanted its predicament to be addressed. Counsel submitted that the main purpose of a review (which is a discretionary remedy) is the setting aside, correction, prevention or remedying of the impugned action. Counsel contended that although courts have wide powers and can give extensive directions when deciding on appropriate remedy, such powers can only be exercised if a party asks for it at the commencement of the review application. It was submitted that in considering the appropriate remedy, in a particular case, courts must first establish the presence of various aspects as demonstrated in *Allpay Consolidated Investments Holdings (Pty) Ltd and others v Chief Executive Officer of the South African Social Security Agency and others* 2014(1) SA 604 (CC) at paras 4-5 of the order.

[29] Counsel submitted that the appellant's amended notice of motion had failed to assert a claim based on damages. Counsel argued that the appellant at all times wanted the tender to be set aside and to be awarded to it, the position confirmed by the relief sought in the amended notice of motion. It was furthermore argued that the notion based on the alleged wrong done cannot prevail given that the judgment of the Supreme Court confined the award of the tender to the then existing tender. The reason for this, so the argument progressed, is that such a situation would mean that the Supreme Court has to review and set aside its own previous decision. This would be untenable given that the appellant did not ask the Supreme Court in the previous appeal to decide the duration of the tender.

[30] Regarding the issue of legitimate expectation, counsel submitted that the arguments based on legitimate expectation cannot stand as the appellant had failed to request an extension of the original tender from the Tender Board and no such extension had been granted. Counsel contended that in awarding the tender to the appellant, the Tender Board had complied with the order of the Supreme Court and there were no irregularities on its part. According to counsel, there was no duty on the Tender Board to go out of its way and determine a new term. Counsel argued that if the appellant wanted to extend the original term, it should have approached the Tender Board and enquired about the extension of the term. It was further contended on behalf of the respondents that if the appellant had wished for the term of the tender to be extended, it should have made out a case for such extension in the previous litigation, which it failed to do.

[31] Counsel submitted that the attempt by the appellant to review in a roundabout manner the decision of the Supreme Court should not be accepted. The Supreme Court directed that the Tender Board re-consider the original tender - and not one for a longer term - and that is exactly what the Tender Board did. In this respect the appellant cannot, because it failed to persuade the Supreme Court to correct the decision by extending the term of the tender, now attempt to rectify that failure to get the High Court 'correct' that should have been sought and obtained in the original review application.

[32] Counsel further submitted that in the circumstances of this case, a legitimate expectation to be heard did not arise at all. Counsel contended that the appellant initially accepted that the award to it would be for the remainder of the initial term. In support of this contention, counsel referred to two letters addressed by the appellant to the Government Attorney and the Secretary to the Tender Board dated 22 July 2013 and 22 August 2013 respectively. It is not necessary to reproduce the entire content of the letters. It is enough to highlight their relevant parts. In the letter dated 22 July 2013, the appellant's legal practitioners, recorded that the appellant was prepared to render the services pending the evaluation of the tender, adding: 'Due to the substantial time that has already lapsed *and the short period left before the tender expires*, we are instructed to request that the order of the Supreme Court be implemented without delay.' (Emphasis supplied). In the letter dated 22 August 2013, the appellant's legal practitioners, amongst other things, urged the Tender Board to award the tender to the appellant and demanded that: '*This should happen as soon as possible because the tender expires on 31 March 2014. . . .*' (Emphasis added).

[33] According to counsel, these observations by the appellant are wholly at odds with its contention now that it was unaware of the term of the tender. Counsel submitted that the appellant explicitly in these letters acknowledged that the tender was coming to end by 31 March 2014 and urged this Court to dismiss the appellant's reliance on legitimate expectation on this basis.

[34] As for the alleged breach of contract relied upon by the appellant, counsel contended that this allegation is without merit. Counsel submitted that the purported agreement the appellant relies on for enforcement of its rights relating to this tender was not signed by the parties. Counsel further submitted that in any event, the very agreement relied upon by the appellant clearly states that the term of the tender is fixed as from 1 April 2009 to 31 March 2014. Therefore counsel urged this Court to dismiss this ground as well.

#### Analysis of the submissions

[35] The thrust of the appellant's argument in this appeal is that the court *a quo* had erred in finding that the period of the tender awarded to it was to endure until March 2014. According to the appellant, the contract was supposed to run until 2019. The respondents on the other hand contended that the contract offered was to run up to 2014.

[36] On the issue of appropriate remedy, principles regulating administrative law are clear. Any improper performance of an administrative function attracts the application of Art 18 of the Namibian Constitution. With the advent of our constitutional dispensation, a breach of the right to administrative justice entitles an

aggrieved party to 'appropriate relief' as contemplated by Art 25 of the Constitution. What the court will consider an appropriate remedy depends on the facts and circumstances of each case. However, it is essential that this point is made at the outset. Ordinarily, a breach of administrative justice attracts public law remedies and not private law remedies. Thus it is only in exceptional cases that private law remedies will be granted to a party for a breach of a right in public law domain.<sup>3</sup>

[37] As already noted, the appellant contended that because of the unlawful action by a senior Ministry official, it has been deprived of the full benefits of the five year tender and for that, it was entitled to damages or to be placed in a position it would have been in had the wrong not been committed. The respondents on the contrary argued that the appellant in its application in the High Court failed to seek such corrective remedy. The respondents further argued that the appellant at all times wanted the tender to be reviewed, set aside and to be awarded to it, not that the appellant should be placed in the same position it would have been in.

[38] On the facts of this case, I am of the view that the appellant's reliance on delictual or contractual principles of an award of damages and restitution in review proceedings cannot be accepted as correct. The appellant has always approached the courts to review the decisions of the respondents and that is the exact issue this court and the court *a quo* have adjudicated upon in previous proceedings.

[39] The appellant also raised the issue of tacit acceptance of the term of the tender by the respondents. The appellant had argued that the respondents let appellant to believe that its assumption regarding the period of the tender had not

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<sup>3</sup> *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) para 29



been contradicted. The appellant also contended that the facts of the case created a legitimate expectation with appellant regarding its entitlement to a five year tender and it should have been granted a hearing by the Tender Board prior to the taking of its decision to impose a shorter period of the tender. In light of the assumption on its part, the appellant raised the doctrines of estoppel and legitimate expectation to support its contention that the tender awarded to it was for a five year period ending in January 2019.

[40] In reply, the respondents submitted that there was no tacit acceptance on the part of the respondents that the tender awarded to the appellant was for the period until 2019 and that the principle of estoppel was not of application to the facts of this matter.

[41] I commence the analysis with the doctrine of estoppel. This doctrine is based on the English doctrine of promissory estoppel emanating from equity. This remedy can only be granted at the discretion of the court.<sup>4</sup> It is trite law that estoppel cannot operate where there is a clear contravention of the regulatory statute by a statutory body or person to render legal what is clearly unlawful.<sup>5</sup> The courts have rejected the operation of estoppel where it would have led to the authorisation of *ultra vires* action, such as where a public authority exceeds its powers<sup>6</sup>, acts in contravention of

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<sup>4</sup> *Durham Fancy Goods v Michael Jackson (Fancy Goods) Ltd* [1968] 2 All ER 987. *Combe v Combe* [1951] 2 KB 215.

<sup>5</sup> *Bekker v Administrateur, Oranje-Vrystaat* 1993 (1) SA 829 (O), 823B – C

<sup>6</sup> *Ibid.*

prescribed formalities<sup>7</sup>, acts without authority<sup>8</sup>, or where the operation of estoppel would lead to the non-performance of a mandatory statutory duty<sup>9</sup>.

[42] I agree with the respondents and the court below that the Tender Board in accordance with the order of this court had reconsidered the original tender - and not one for a longer term. Subsequent to the Supreme Court order, the Tender Board sought to give effect to the underlying directives of the court. In my view, to have expected the Tender Board to act otherwise would have amounted to exercising a power beyond the directions of the Supreme Court. This the law does not sanction.<sup>10</sup> It thus follows that the reliance upon the doctrine of estoppel is of not much assistance to the appellant and the contention falls to be rejected.

[43] I now move to consider the doctrine of legitimate expectation. In determining whether the appellant had a legitimate expectation, it is helpful that I set out some of the authorities on the issue. One such authority is the celebrated English case of *Council of Church Services C v Minister of the Civil Service*<sup>11</sup> where it was stated that legitimate expectation arises either from an expressed promise on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue.

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<sup>7</sup> *Strydom v Die Land –en Landboubank van Suid-Afrika*, 1972 (1) SA 801 (A).

<sup>8</sup> *Khani v Premier Vrystaat en Andere*, 1999 (2) SA 863 (O).

<sup>9</sup> *Jacobs en 'n Andere v Waksen Andere*, 1992(1) SA 521 (A); *Durban City Council v Glenmore Supermarket and Café*, 1981(1) SA 470 (D), 475A – 479G

<sup>10</sup> See, for example, *University of the Western Cape v MEC for Health and Social Services* 1998 (3) SA 124 (C) at 134C-G.

<sup>11</sup> [1984] 3 All ER 935 (HL).

[44] In a judgment of this Court<sup>12</sup> relied upon by the appellant for the submission based on legitimate expectation, O'Regan AJA stated to the same effect that a legitimate expectation of consultation ordinarily only arises where there was an established practice of consultation, or where a promise or representation had been made that consultation would occur.

[45] In *Uffindell t/a Aloe Hunting Safaris v Government of Namibia and others*,<sup>13</sup> the High Court observed that the test for legitimate expectation is whether the demand for procedural fairness required such a hearing before the decision was taken. In dealing with the concept, the court approved the approach adopted in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*,<sup>14</sup> where it was stated that the question whether an expectation is legitimate and will give rise to the right to a hearing in any particular case depended on whether, in the context of that case, procedural fairness required a decision-making authority to afford a hearing to a particular individual before taking the decision.

[46] In the present matter, the Tender Board in its notification informed the appellant that the tenure of the tender would be indicated in the contract. In the notification, no representation is made to the effect that the tenure will be up to 2019. It is also clear that no representation by word or conduct is made that the term of the contract will be negotiated by the parties. It is apparent from the notification that all the Tender Board promised was that, the term of the contract would be indicated in the contract. Indeed this was so indicated in the draft contract, but as already noted, the contract document had not been signed by the parties due to a dispute regarding

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<sup>12</sup> *Minister of Mines and Energy and others v Petronet International Ltd and others* 2012 (2) NR 781 (SC).

<sup>13</sup> 2009 (2) NR 670 (HC).

<sup>14</sup> 2000 (1) SA 1 (CC) at para 216

the production of a performance bond and overdraft facility. In my respectful view, the Tender Board did its part in terms of what it promised the appellant and for that it cannot be faulted.

[47] It must further be pointed out that the appellant's argument loses sight, not only of the directives of this court in earlier proceedings, but more importantly, the appellant's own admission as seen from its letters of 22 July 2013 and 22 August 2013 referred to above, one of which explicitly acknowledge that the tender in question was to run up to March 2014. The appellant's letters are not only clear but are also unequivocal. Therefore the appellant's contention on the term of the tender, in my view, is not borne out by the contents of these two letters. It follows that the contention based on legitimate expectation must also fail.

[48] One issue that needs further attention is the question of whether an adverse inference should be made against the respondents on the basis of their failure to respond to the appellant's letters regarding its assumption of the term of the tender. The appellant in oral argument raised the issue of tacit agreement founded on the respondents' failure to express their stance regarding the duration of the tender in the face of the letters written for the appellant reflecting its understanding of the period of the tender.

[49] In *McWilliams v First Consolidated Holdings (Pty) Ltd* 1982 (2) SA 1 (A), Miller JA stated at 10E- G:

'I accept that "quiescence is not necessarily acquiescence" and that a party's failure to reply to a letter asserting the existence of an obligation owed by such party to the

writer does not always justify an inference that the assertion was accepted as the truth. But in general, when according to ordinary commercial practice and human expectation firm repudiation of such an assertion would be the norm if it was not accepted as correct, such party's silence and inaction, unless satisfactorily explained, may be taken to constitute an admission by him of the truth of the assertion, or at least will be an important factor telling against him in the assessment of the probabilities and in the final determination of the dispute. And an adverse inference will the more readily be drawn when the unchallenged assertion had been preceded by correspondence or negotiations between the parties relative to the subject-matter of the assertion.' (Reference to authorities omitted).

[50] In its application the appellant averred correctly that it was informed that the term of the tender would be indicated in the contract. The application further reveals that the Tender Board had not pronounced itself on the term of the tender awarded to the appellant. This understanding was confirmed by the content of the letter dated 12 December 2013 addressed to the Secretary to the Tender Board by a member of the appellant in which it was stated that '[t]he Tender Board has not pronounced themselves (*sic*) on the pricing and term of contract, when granting this tender to us, or inviting us to make presentation on the pricing and term.'

[51] Unlike in the *McWilliams* matter, the appellant in this case does not communicate in the clearest terms that the tender awarded to it is up to January 2019. At best, what the appellant is communicating is its understanding that the tender awarded to it is for a period of five years not that the tender ran for five years to January 2019. This coupled with its apparent acceptance at the very least in its letter of 22 August 2013 that the tender expires on 31 March 2014, I am not persuaded that an adverse inference should be made against the respondents on this score. It must further be noted on the authorities cited above that an adverse

inference cannot also be made against the respondents in the absence of a representation either by word or conduct that the term of the contract will be negotiated by the parties. In the result the argument based on the failure to react to the appellant's assumption of the term of the tender also fails.

[52] The court was informed from the Bar that at present the appellant is rendering catering services to the Oshana/Oshana educational region pursuant to a temporary interdict obtained in the earlier application before the High Court. The court then enquired from the parties what effect the possible dismissal of the appeal would have on the services now being rendered by the appellant.

[53] Counsel for the appellant submitted that theoretically the respondents would demand that the appellant vacate the premises and stop the services immediately because it would mean that the appellant is not entitled to continue providing the service. The practical effect of such disruption is that the appellant would incur damages as it would sit with stock and infrastructure that the appellant had been using in the furtherance of the service. Counsel submitted that the immediate disruption of the catering services might conceivably be prejudicial to the affected schools. Counsel on behalf of the respondents had little to add on this aspect except that the responsible authority would ensure that appropriate steps were taken to avoid disruption.

[54] Following the probable ramifications provided to this Court, it becomes clear that the disruption of catering services will be deleterious to the affected schools and learners. The appellant would cease with the delivery of food stuffs to schools and

thousands of innocent learners at those schools may be deprived of food stuffs during the period of disruption. The practical consequences of such a disruption may threaten the right of thousands of learners to education and food. It is thus to be expected that the parties will regulate their relationship in such a way that such possible disruption is avoided. Having made these remarks, it remains of me to propose the order of the court.

Order

[55] The following order is made:

- (a) The appeal is dismissed.
  
- (b) The appellant is ordered to pay the respondents' costs in this Court and in the High Court.
  
- (c) Such costs to include the costs of one instructing counsel and one instructed counsel.

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**SHIVUTE CJ**

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**MAINGA JA**

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**HOFF JA**

## APPEARANCES

APPELLANT:

G B Coleman

Instructed by AngulaCo. Inc.

Windhoek.

RESPONDENTS:

C E van der Westhuizen

Instructed by the Government Attorney