



REPORTABLE
CASE NO: SA 8/2014

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

NEW ERA INVESTMENT (PTY) LTD

Appellant

and

THE ROADS AUTHORITY

First Respondent

THE CHAIRPERSON OF THE BOARD

OF DIRECTORS – ROADS AUTHORITY

Second Respondent

CHINA JIANGSU JV OTJOMUISE

Third Respondent

CHINA JINGXI INTERNATIONAL (PTY) LTD

Fourth

Respondent

NAMIBIA CONSTRUCTION (PTY) LTD

Fifth

Respondent

Coram: DAMASEB DCJ, MAINGA JA and STRYDOM AJA

Heard: 5 November 2014

Order: 5 November 2014

Delivered: 8 September 2017

Summary: This appeal is against the judgment and order of the High Court dismissing an application to review the award of a tender for the construction of the first respondent's headquarters to the fifth respondent. The appellant sought to review the award on the following grounds: (a) impermissible bias; (b) non-engagement by the first respondent's board with the recommendation submitted to it by an evaluation committee composed of experts; (c) improper application of a ministerial policy by the statutory body which allegedly prejudiced the appellant in the manner its tender was evaluated; (d) failure to act fairly and reasonably, and (e) denial of the right to be heard in regard to information adverse to it.

On appeal, the appellant relied on the following additional grounds: (f) it was not furnished with reasons for the rejection of its tender, thereby constituting a reviewable irregularity, and; (g) the first respondent conducted the tender process in contravention of its own tender procedures. These grounds were not entertained.

The fifth respondent cross-appealed against the High Court's finding that (a) the matter was urgent; (b) that it was not prejudiced on account of appellant's failure to seek interim interlocutory relief, pending the finalisation of the review proceedings, and; (c) that it was not prejudiced by the appellant's waiver to first obtain the record of proceedings sought to be reviewed.

Court on appeal *held* that; (a) the first respondent was entitled to rely on expert advice in the adjudication of the tender; (b) the ministry's policy that a bid which was 15 % less

than the estimated net costs of the tender should be less favorably considered was rational and was applied even-handedly to all bidders; (c) the first respondent acted fairly and reasonably in the adjudication of the tender and that it would in the circumstances of the case have been impractical to grant the appellant *audi* in respect to the information adverse to it.

With respect to the cross-appeal, court on appeal *held* that (a) the Court could not interfere with the exercise of the court *a quo*'s discretion to entertain the application on an urgent basis, (b) there is no requirement that a party seeking review must first seek interim interlocutory relief; and (c) an applicant for review is entitled to waive access to the record of the proceedings sought to be reviewed. The appeal and cross appeal is dismissed.

APPEAL JUDGMENT (REASONS)

DAMASEB, DCJ (MAINGA JA and STRYDOM AJA concurring):

Introduction

[1] During the painstaking examination of the record, the judgment of the court *a quo* and the parties' written submissions in our preparation for this appeal, it became apparent that a great deal of commercial urgency attached to the case. Therefore, after hearing oral arguments we decided to dispose of the appeal by way of an immediate order, with reasons to follow. We took the view that uncertainty would be created if the parties were not at once advised of the outcome so that they arranged their financial and business affairs accordingly. Since we were firm and unanimous in our view as to the outcome, on 05 November 2014, we made the following order:

- '1. That the appellant's appeal is dismissed.
2. That the Fifth Respondent's cross appeal succeeds in part only as follows:
 - (a) Paras 1.1 and 1.2 of the cross-appeal are dismissed with costs, to include the costs of one instructing and instructed counsel; and
 - (b) Para 1.3 of the cross-appeal is allowed, and the order of costs in respect of the Fifth Respondent in the court *a quo* is set aside and replaced with the following order:

'The Fifth Respondent is awarded costs against the Applicant, to include the costs of one instructing and one instructed counsel.'
3. That the First and Second Respondents are awarded costs in the appeal against the Appellant, to include the costs of one instructing and two instructed counsel.
4. That the Fifth Respondent is awarded costs in this appeal against the Appellant to include the costs of one instructing and two instructed counsel.'

[2] The parties (especially the unsuccessful party) are entitled to the reasons that led to the outcome, and what follows are the reasons for the order we made.

Context and litigation history

[3] The case concerns a tender to construct a building for the headquarters of a statutory body, the Roads Authority (the first respondent), and the decision of the first respondent to reject the appellant's tender in favour of Namibia Construction (Pty) Ltd (the fifth respondent).

[4] The tender process consisted of four stages, namely: (a) pre-qualification, (b) evaluation of tender bids (tenders), (c) recommendation to the Board of Directors of the first respondent (the Board) to award the tender, and (d) the award of the tender. Six tenderers participated in the pre-qualification conducted by a Steering Committee (SC)

established by the first respondent. The SC was made up of certain of the first respondent's senior employees and the professional construction team appointed by the first respondent. Four of the six tenderers, which included the appellant and third to fifth respondents, proceeded to the evaluation stage. The evaluation of the tenders was conducted by an evaluation committee (EC), which comprised of certain of the first respondent's employees and the appointed professional construction team. The EC recommended to the SC that the tender be awarded to the fifth respondent. The SC, for its part, unanimously adopted the recommendation and proposed to the Board that the tender be awarded to the fifth respondent. The Board in turn unanimously approved the recommendation, and on 03 December 2013 awarded the tender to the fifth respondent.

[5] In the wake of the award of the tender, the appellant on 21 January 2014 launched urgent review proceedings in the High Court in terms of rule 53¹ read with rule 6(12)² of that court, challenging the award.

[6] Ordinarily, a party seeking review relief is entitled, although not obliged, to have access to the record of the proceedings, including the reasons giving rise to the decision that it seeks to have reviewed and set aside. An applicant for review may, however, elect to seek review relief without the benefit of the record and the accompanying reasons.³ The inherent risk of doing so, as happened in this matter, becomes apparent below.

¹ Now rule 76 of the High Court.

² Now rule 73(4) of the High Court.

³ *Jockey Club of South Africa v Forbes* 1993 (1) SA 649 at 662 F – 663D and *Motaung v Makubela and Another, NNO, Motaung v Mothiba* 1975 (1) SA 618 (O) at 625 C – 626A.

[7] Although well within its rights to do so, the appellant also did not seek interim interdictory relief pending the finalisation of the review proceedings. For this reason, the appellant could not be heard to complain of prejudice if the ruling went against it and the execution of the project proceeded. As aptly submitted by Mr Tötemeyer for the fifth respondent, it was clear to all and sundry that the site handover was planned for February 2014, with the project conceived to materialise over a 27-month period. The urgent review application was heard on 31 January 2014 and judgment reserved. While reserving judgment, the learned judge *a quo* benevolently ordered that the execution of the tender be halted until judgment is delivered. This allowed the appellant (who had not sought interim relief) a reprieve of three weeks whilst the judge was considering his decision. Notwithstanding the judge's benevolence, having elected to forgo the potential protective cover of an interim interdict, it must have been obvious that the dismissal of the application would clear the way for the first and second respondents to commence implementing the project.

[8] On 20 February 2014, the High Court dismissed all the procedural objections raised by the respondents concerning urgency, the appellant's failure to ask for the record and the fact that the appellant had not sought interim relief. On the merits, the appellant's application for review was similarly dismissed.

Scope of the appeal

[9] The appellant appeals against the rejection of all its review grounds while the fifth respondent cross-appeals against the court a *quo*'s rejection of its procedural objections to the review application. The grounds in support of the cross-appeal were the court a *quo*'s findings that:

- (a) the matter was urgent;
- (b) allowing the appellant to pursue final review relief without an interim interdict and without seeking the production of the record of proceedings;
and
- (c) the award of costs limited to one instructed counsel.

[10] The cross-appeal in respect whereof the court a *quo* only awarded costs for one instructing and one instructed counsel (as opposed to one instructing and two instructed counsel) was not opposed. This ground therefore succeeded without more.

Preliminary procedural skirmishes

[11] I firstly consider the preliminary procedural skirmishes, to wit: whether or not the matter should have been heard as one of urgency and without a record, and whether or not it was competent to seek final review relief without an interim interdict.

Urgency

[12] In the court *a quo*, the appellant sought urgent final review relief to avert what it alleged would be adverse effects on its rights should the matter proceed in the normal course. In this regard, the appellant raised the professed difficulty of setting aside the tender should its implementation proceed whilst litigation is ongoing as well as the difficulty of quantifying its damages in due course if the only avenue open was to claim damages. The court *a quo* was satisfied that the appellant established urgency. On appeal the fifth respondent sought to impugn this finding, contending that the court *a quo* did not exercise its discretion judicially and accordingly misdirected itself, when it decided that the appellant established urgency and that the fifth respondent's rights were not prejudiced by the urgent application.

[13] We were satisfied that the objection to the matter being entertained as one of urgency should fail. It is a well-established principle and practice that this court will not interfere with the High Court's exercise of a discretion under High Court rule 6(12) to either entertain or refuse to entertain matters on the basis of urgency. It was stated by Shivute CJ in *Namib Plains Farming & Tourism CC v Valencia Uranium (Pty) Ltd and Others* 2011 (2) NR 469 (SC) at 484B-D that:

'[U]rgency is not an appealable issue in any circumstance. Whether urgency exists in a particular case is a factual question which is determined on a case by case and discretionary basis. There are no public interests to be served for this Court to be seized with the determination of issues of urgency which are dealt with by the High Court on a regular basis and on which there are a plethora of authorities to guide that Court when faced with similar matters.'

[14] In *Shetu Trading CC v Chair of the Tender Board of Namibia and Others* 2012 (1) NR 162 (SC), at paragraph 31, O'Regan AJA stated that the underlying reasoning of *Valencia Uranium* is that the objective of urgent applications may be frustrated if such applications were appealable. However, O'Regan AJA drew a distinction between the factual scenario in *Valencia* where there was a cross-appeal against the exercise of a discretion (just like in this case) to entertain a matter on an urgent basis, and the situation in *Aussenkehr Farms (Pty) Ltd v Namibia Development Corporation Ltd* 2012 (2) NR 671 (SC), where the court refused to hear a matter as one of urgency. In the latter scenario, O'Regan AJA took the view that:

'substantial injustice may result if there is an absolute bar to appeals against orders refusing condonation for non-compliance on the grounds of urgency, no matter how final or definitive the effect of such findings may be on the substantive rights of the parties.'

[15] Even on the assumption that in exceptional circumstances this court may relax the rule stated in *Valencia*, there were no such circumstances present in this appeal. Once the High Court exercises its discretion to hear a matter on an urgent basis, the ratio in *Valencia* finds application. This principle is now firmly entrenched in our law: *Cargo Dynamics Pharmaceuticals (Pty) Ltd v Minister of Health and Social Services and Another* 2013 (2) NR 552 (SC); *Chair, Council of the City of Municipality of Windhoek v Roland* 2014 (1) NR 247 (SC).

Was it obligatory to seek an interim interdict?

[16] The fifth respondent contended that the appellant should have sought interim relief pending the finalisation of the review application so as to have its interests protected and the fifth respondent's rights minimally impacted. The court *a quo* found that the fifth respondent had not been prejudiced by the appellant's election not to seek interim relief.

[17] Not seeking an interim relief was an election that the appellant was entitled to make. A respondent in a review application has no right to demand that the party seeking review must seek interim relief. The court has an overriding discretion whether to grant or refuse interim relief and to regulate the further proceedings of any urgent application before it: *Chopra v Avalon Cinemas S.A. (Pty) Ltd and another* 1974 (1) SA 469 (D) at 472H-473A. Margo J in *C.D. of Birnam (Suburban) (Pty) Ltd and Others v Falcon Investments Ltd* 1973 (3) SA 838 (W) at 854G put the matter thus:

'[S]ince the grant or refusal of an interdict is a discretionary remedy, the Court exercising a judicial discretion clearly has the power in a proper case to add to the grant of an interdict such conditions qualifying or limiting the interdict as are best calculated to do justice between the parties.'

[18] It will be recalled that although not asked for, the court *a quo* suspended the implementation of the tender until it delivered its judgment. Consequently, the fifth respondent did not suffer prejudice as the suspension by the court had the same effect. The objection relating to the failure by the appellant to seek interim relief in the court *a quo* was therefore bound to fail.

Failure to require production of the record of proceedings

[19] It is trite that in review proceedings the production of the record of proceedings and the accompanying reasons sought to be reviewed is for the benefit of an applicant. It has been recognised in a long line of cases that an applicant seeking review may waive the right to obtain the record of the proceedings and the accompanying reasons and proceed to the hearing without first obtaining it.⁴ Accordingly, the cross-appeal directed at the absence of a record has no merit and was liable to be dismissed.

New review grounds raised on appeal

[20] A further preliminary matter requires attention before I proceed to consider whether or not there is merit in the appeal against the High Court's dismissal of the review application. The first respondent contended that the appellant relied on two additional review grounds in this appeal not raised *a quo*⁵, namely, that:

- (i) the appellant was not furnished with reasons for the rejection of its tender, and that the absence of such reasons constituted a reviewable irregularity; and
- (ii) the first respondent contravened its own tender procedures.

[21] It was apparent from a consideration of the record that the appellant was furnished with the reasons for the decision to award the tender to the fifth respondent. This is apparent from the documents annexed to the first respondent's response to the

⁴ *Jockey Club of South Africa v Forbes* 1993 (1) SA 649 at 662F – 663D and *Motaung v Makubela and Another, NNO, Motaung v Mothiba* 1975 (1) SA 618 (O) at 625C – 626A.

⁵ And that since they are new review grounds the Supreme Court must not consider them.

appellant's letter of demand.⁶ The issue of absence of reasons is therefore a moot one. With respect to the second additional review ground, we were satisfied that it was new and thus not available to the appellant on appeal. I next discuss why that is so.

[22] For the first time on appeal, the appellant advanced the argument that the first respondent contravened its own tender procedures, in that the evaluation process was secretive and conducted by improperly constituted committees. That was never advanced as a review ground in the founding affidavit.

[23] In *Immanuel v Minister of Home affairs and Others* 2006 (2) NR 687 (HC), the High Court stated that an applicant seeking review is confined to the grounds of review advanced in the founding affidavit. Besides, a court of appeal is loath to allow the raising of new points on appeal. In *Di Savino v Nedbank Namibia Ltd* 2012 (2) NR 507 (SC), at paragraph 33, Ngcobo AJA held that the court may exceptionally use its discretion to allow a new point to be raised on appeal, having regard to whether or not:

- (a) the point is covered by the pleadings;
- (b) there would be unfairness to the other party;
- (c) the facts upon which it is based are disputed; and
- (d) the other party would have conducted its case differently had the point been raised earlier in litigation.

⁶ First respondent's letter dated 14 January 2014, enclosing submissions of the SC to the Board demonstrates that the fifth respondent out-performed the appellant as regards the conditions and requirements of the tender. Those reasons are fully canvassed in our discussion of the judgment of the High Court and more fully set out in our reasons for dismissing the appeal.

[24] The circumstances and the manner in which the issue was raised does not fall within any of the exceptions stated in *Di Savino*. The new review ground was therefore not available to the appellant as the respondents were denied the opportunity to meaningfully engage with it in the answering affidavit. It could therefore not be considered on appeal as a viable review ground.

Analysis of the properly pleaded review grounds

[25] Asserting that the first and second respondents acted unfairly and unreasonably in the tender adjudication process, the appellant pleaded the following review grounds in the founding affidavit:

- (a) Existence of or the appearance of bias against it by the decision makers. This was coupled with the alleged impermissible application and or misapplication of the Ministry of Works and Transport Policy (MoW&T Policy) that provided that a tender should be less favorably considered if it is 15% below the estimated net costs of the project as determined by the quantity surveyors⁷;
- (b) Lack of critical engagement by the Board with the recommendation submitted to it (in other words, that the Board failed to apply their minds independently and instead uncritically adopted a recommendation made to them by expert advisors); and

⁷ It is common cause that on this measure the appellant's tender was below the 15% threshold.

- (c) Denial of *audi alteram partem* in so far as the information stating that the appellant had exhibited poor performance on previous projects and that its spend on BEE subcontractors, skills transfer, and commitments to local students was not competitive compared to the fifth respondent ought to have been put to it to make representations on before it was put in the scale of factors that operated to make its bid less favorable than that of the successful bidder.

Alleged bias or ulterior motive and the impermissible and or misapplication of the Ministry of Works and Transport Policy (MoW&T Policy)

[26] In the founding affidavit, the appellant averred that the tender process was tainted by bias. In support of this contention, it was asserted that:

- (a) The impermissible application and or misapplication of the MoW&T Policy unreasonably and arbitrarily resulted in the appellant not being awarded the tender, although its price was lower than that of the fifth respondent;
- (b) The EC gave disproportionate weight to the two negative performance evaluations relating to it, while not attaching sufficient weight to past positive performance evaluations in its favor⁸; and

⁸ Performance evaluation reports from architects from 2009-2013 reflecting that the appellant's work was rated to be of good workmanship on nine projects.

- (c) It was improper to disqualify its tender as being inferior to that of the fifth respondent on technical functionality as its competence was recognised during the pre-qualification stage and a further assessment subsequently in the adjudication process was unnecessary.

[27] The nub of the appellant's objection to the MoW&T Policy is that its application constituted an impermissible change in the tender specification because it was not brought to the notice of the tenderers. Further, the MoW&T Policy was not part of the first respondent's procurement policies. It was contended that the MoW&T Policy was used to exclude its tender and led to the irrational and arbitrary rejection of its tender – which was N\$21 million less than that of the fifth respondent. Alternatively, the MoW&T Policy was misapplied in that the first respondent benchmarked the appellant's net as opposed to the total tender price to determine whether its tender price exceeded the 15% margin and thereby causing it to fall foul of the MoW&T Policy.

[28] Significantly, the appellant accepted that it was not a requirement that the lowest tender be accepted (suggesting it appears to me) that for the lowest tender not to be accepted there should be very cogent reasons – which it claims was not the case in the present case. The appellant further acknowledged that the first respondent's procurement policy, the procurement regulations and the Procurement and Tender Procedures Manual mandate the first respondent to enter into agreements – including the procurement of goods and services – in terms of s 16(3) of the Roads Authority Act

17 of 1999, subject to 'policies, regulations and guidelines aimed at operationalising the aspirations of the legislation with regard to procurement of goods and services.'

[29] Not least for the reasons advanced by the respondents and set out below, we were satisfied that the court *a quo* was correct in finding that the MoW&T Policy was rational, constituted well-established practice in the construction industry and that the first respondent was entitled to apply it.

[30] In rebuttal, the respondents stated that the appellant did not contest:

- (a) that compliance at the pre-qualification stage only meant that the appellant satisfied the minimum criteria for its tender to be adjudicated upon;
- (b) that the fifth respondent outscored it on technical competence;
- (c) the propriety of taking into account negative comments made about its management skills and performance, only the weighting attached to it; and
- (d) the use of the MoW&T Policy to benchmark tender prices is a well-established practice in the construction industry to mitigate the financial risk of awarding the tender to the lowest bidder.

[31] The court *a quo* accepted the respondents' submission that a tender price substantially below a benchmark may result in serious prejudice and risk to the first

respondent, in addition to the fact that it is a well-established practice in the construction industry. The court *a quo* stated that the first respondent was entitled to apply the MoW&T Policy as it is a sound practice based on rational considerations. The court *a quo* held that the use of the MoW&T Policy to benchmark the tender price was reasonable and further that the crucial consideration was that it was applied even-handedly to all tenderers and that it was the decision-maker's prerogative to decide how to weigh factors according to its needs. We were in agreement with this approach for the reasons that follow.

[32] The appellant's contention that the application of the MoW&T Policy was designed solely to exclude it is unsubstantiated and that the appellant's passage to the pre-qualification stage demonstrates that the process could not have been prejudged. It is clear from a reading of the MoW&T Policy that it is rational as it is intended to benchmark the tender prices so as not to:

- (a) expose the Government to financial risk;
- (b) compromise completion deadlines;
- (c) place the tenderer under financial strain with the risk of bankruptcy;
- (d) prevent tenderers cutting corners in carrying out the required work; and
- (e) constitute unfair competition *vis a vis* other tenderers who tender fairly in order to pay a living wage to their employees and to pay greater taxes to the fiscus.

[33] Mr Hendrick Herselman, the President of the Association of Quantity Surveyors of Namibia, who deposed to an affidavit on behalf of the first and second respondents, supported the policy's rational and asserted that it was common practice in the construction industry. This was unchallenged by the appellant.

[34] We accepted the respondents' version that the purpose of the pre-qualification stage was meant to identify those tenderers who met the minimum requirements for further evaluation in the tender process: That version was not far-fetched or untenable.⁹ We accepted that price was not the decisive factor during the evaluation stage. Not only is it undisputed that the fifth respondent out-scored the appellant on the technical assessment, but the first respondent advanced cogent reasons for the application of the MoW&T Policy to benchmark the tender price: To limit the financial risk posed to Government through underperformance, increased revenues for the State as well as to ensure fair competition.

[35] The rational of applying the MoW&T Policy to the net (as opposed to the total tender price) was explained as follows by the first respondent's quantity surveyor, Mr Frankel: Tenderers have no control over the fixed tender price when comparing tender results. It is therefore important to compare the net tender prices as this 'reflects the actual value of the work for which the tenderer has submitted his tender.' In any event, in the adjudication process the first respondent analysed both the total tender price as

⁹ *Plascon-Evans Paints Ltd v Van Riebeeck Paints Ltd* 1984 (3) SA 623 (A), applied by this court in *Mostert v Minister of Justice* 2003 NR 11 (SC).

well as the net tender price as is evident in the record – a point overlooked by the appellant.

[36] In *Trustco Ltd t/a Shield Namibia and Another v Deeds Registries Regulation Board and Others* 2011 (2) NR 726 (SC) at 736, this court stated that a court will only concern itself with whether or not an administrative decision was arrived at rationally when confronted with administrative decisions that are policy-laden. In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* [2004] ZACC 15¹⁰, O'Regan J, stated that:

'The Court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution.'

[37] In our view, the SC was best placed to determine how much weight to accord different factors in the evaluation of the tenders. It is not for the court, removed from the practical realities of the task at hand and ill-equipped with the knowledge of the business of construction, to determine the proper weighting to different factors considered.

[38] Given the above reasons, this court could not accept the submission by the appellant that the tender process was biased against it and that the policy was improperly applied.

Failure to apply the mind

¹⁰ *Dumani v Nair and Another* (144/2012) [2012] ZASCA 196 (30 November 2012).

[39] The appellant contended that there was a lack of critical engagement by the Board with the recommendation given to it by the expert committees under the guidance of the professional construction team and that the absence of reasons is evidence that the Board failed to independently apply their mind.

[40] The first and second respondents responded that the reasons for awarding the tender to fifth respondent were given to the appellant, and further that the technical nature of the procurement process required the use of experts whose recommendations the first respondent was entitled to rely on.

[41] We were satisfied, in keeping with *CSC Neckartal Dam Joint Venture v The Tender Board of Namibia* 2014 (1) NR 135 (HC), that the record shows that the first respondent, given the technical nature of the tender, made use of and relied on the recommendation of experts which recommendations fully reflected the views relied on. It bears mention that the appellant knew of the involvement of experts from the beginning and did not object to their involvement during the entire process until its tender failed to be selected.

Denial of *audi alteram partem* (*audi*)

[42] The appellant's submission in the court *a quo* and on appeal, is that the decision maker should have afforded it an opportunity to be heard before taking into consideration factors adverse to it in the tender award.

[43] In response, the first and second respondents submitted that the appellant's contention did not gainsay the relevance of the factors considered in the evaluation process or that the factors considered were rooted in fact. The court *a quo* held that, generally, fairness dictates that an administrative body should give the person affected by the adverse information an opportunity to make representation. The court *a quo* however drew a distinction between information and the evaluation of such information during the process of the decision-making itself. Adverse comments regarding the quality of work of the appellant were evaluated during the course of the procurement process, but such prejudicial information was not the only factor that led to the rejection of the appellant's bid. In other words, 'but for' the prejudicial information regarding its past performance, it is not certain that the decision would have resulted in a different outcome. I agree.

Just and equitable not to review and set aside

[44] According to Mr Maleka for the first and second respondents, the implementation of the tender already commenced and the appellant knew that the site handover took place immediately after the judgment of the court *a quo*. This was on account of the appellant's failure to take steps to prevent its implementation. This court was therefore requested to exercise its discretion not to set aside the tender even if any of the grounds raised on appeal were sustained.

[45] Given our conclusion on the other grounds, it is strictly not necessary to decide this ground. It however bears mention that in electing to seek urgent review without

interim interdictory relief, the appellant accepted the risk that came with such an election. The point made by Mr Maleka should therefore serve as a warning to applicants who seek review without seeking interim interdictory relief.

Disposal

[46] It was for the above reasons that we made the order previously stated.

DAMASEB DCJ

MAINGA JA

STRYDOM AJA

APPEARANCES

APPELLANT: N Cassim, SC (with him A W Corbett and E Schimming-Chase)
Instructed by Sisa Namandje & Company Inc. Windhoek.

FIRST & SECOND RESPONDENT: I V Maleka, SC (with him G S Hinda)
Instructed by Dr Weder, Kauta & Hoveka Inc, Windhoek

FIFTH RESPONDENT: R Töttemeyer (with him G Dicks)
Instructed by Koep & Partners, Windhoek