



REPORTABLE

CASE NO: SA 49/2016

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

NAMIBIA AIRPORTS COMPANY LTD

Appellant

and

**FIRE TECH SYSTEMS CC
IBB MILITARY SERVICES AND
ACCESSORIES (PTY) LTD**

**First Respondent
Second Respondent**

Coram: MAINGA JA, SMUTS JA and HOFF JA

Heard: 03 April 2018

Delivered: 12 April 2019

Summary: This appeal lies against an order of the court *a quo* granting leave to the first respondent to institute an action for damages against the appellant (if so advised).

In a review application, the court *a quo mero motu* granted first respondent leave to institute an action for damages based on the provisions of Art 25 of the Namibian Constitution.

It was common cause that damages were never sought by the first respondent – neither in affidavits nor in oral argument. No *mala fides* were suggested by first respondent and there was no indication in the judgment of the court *a quo* that appellant had acted for ulterior reasons or extraneous to its empowering statute.

The general principle is that a court is competent to grant orders which were asked for by the litigants. It is wrong for a judicial officer to rely on his or her decision on a matter not put before him or her by the litigants either in evidence or written submissions. Where a judge comes across a material point not argued before him or her it is his or her duty to inform counsel on both sides and invite them to submit arguments either for or against the judge's point.

Ordinarily, a breach of administrative justice attracts public law remedies, not private law remedies. A claim for damages is a private law remedy.

The cross-appeal lies against an order of the court *a quo* refusing to set aside a tender awarded in favour of the second respondent by the appellant – the court having found that the award of the tender to the second respondent was unlawful and irregular.

It is common cause that by the time the review application was heard by the court *a quo*, the appellant and second respondent had already performed in terms of a contract signed by them, ie the equipment had been installed and the price fully paid.

At the stage when first respondent became aware of the fact that the tender had not been awarded to itself, it failed to seek to interdict performance under the contract neither did it institute urgent proceedings. In these circumstances the appellant was entitled and obliged to give effect to an extant administrative act.

The procedure where a litigant seeks the reviewing and setting aside of an alleged unlawful administrative act, is two-fold. Firstly, a court is required to make a finding of validity or invalidity. Where a declaration of invalidity is made, the court may proceed to the second stage where the court considers the effect of the declaration of invalidity on the parties and other stakeholders. At this second stage, a court enjoys a discretionary power, and must make an order which is just and equitable in the circumstances.

A court in the exercise of its discretion may face practical challenges and may thereafter decide not to set aside an administrative act where doing so will achieve no practical purpose. To set aside a tender award can have catastrophic consequences for an innocent tenderer and adverse consequences for the public at large.

The court *a quo* found that if it were to set aside the award of the tender to second respondent it would not only be 'disruptive' but would be totally 'impracticable' and would give rise to a host of other problems.

Held that the court *a quo* did not err or misdirect itself in applying the principles enunciated in the *Oudekraal* and *Sapela* matters in not setting aside the award of the tender to the second respondent.

Held – that the appeal succeeds and the cross-appeal is dismissed.

APPEAL JUDGMENT

HOFF JA (MAINGA JA and SMUTS JA concurring):

Introduction

[1] In a review application launched in the High Court, first respondent sought to set aside a decision of the appellant in awarding a tender to the second respondent. This application was opposed by the appellant and the second respondent.

[2] At the conclusion of the review proceedings, the court *a quo* made the following order:

- '1. The application against the first and third respondents is dismissed, no order as to costs;
2. The award of the tender of the fourth respondent is unlawful and irregular, but is not set aside;
3. The applicant is granted leave to institute (if so advised) an action for damages against the Namibia Airports Company as a result of that Company's infringement of the applicant's right to fair administrative action as envisaged in Article 18 of the Namibian Constitution;
4. That the second respondent and the fourth respondent must pay the applicant's costs of the review application, which costs include the costs of one instructing and two instructed counsel.'

[3] The appellant in its notice of appeal, appealed against the whole judgment of the court *a quo*. In a notice of cross-appeal, the first respondent noted a cross-appeal in respect of para 2 of the order of the court *a quo* not setting aside the award of the tender to the fourth respondent (the second respondent on appeal).

Judgment of the court *a quo*

Background

[4] On 8 January 2014, the appellant called for tenders for the supply, delivery, installation and commissioning of hold baggage, carry-on baggage scanners, metal detectors and the provision of after sales service for a period of two years. A total of 19 companies including the first respondent responded to the invitation and submitted tenders to provide the goods and services requested by the appellant.

[5] The closing date for the tenders was set for 31 January 2014. The tender document guided the tenderers in the compilation of their offers and provided for a tender evaluation and award process. The tender document provided for eight phases of the evaluation and award process.

[6] On the closing date (31 January 2014), the appellant in the presence of the tenderers or their representatives opened the tenders and read out the prices quoted by the different tenderers. The quote by the first respondent was the cheapest.

[7] On 7 February 2014, the appellant's Tender and Technical Committee held a meeting to evaluate the tenders. The minutes in respect of that evaluation reads as follows:

'After the thorough understanding of the comparison analysis done by the user department, the meeting agreed to endorse the appointment of IBB Military Equipment for the supply of the screening equipment based on option 2 for N\$4 397 316 because they proposed value for money. The same be referred to the Board for approval.'

[8] On 13 February 2014, the Technical Committee prepared and made a submission to the appellant's board of directors. On 21 February 2014, the board of directors convened a special board meeting, and amongst other matters, considered the recommendations from the Technical Committee in respect of the tender. It appears from the minutes of that meeting that the board was informed that from the 19 tenders received, five companies were shortlisted for evaluation. The first respondent was not amongst the shortlisted companies. After considering the submission, the board awarded the tender to the second respondent.

[9] On 3 March 2014, the second respondent accepted the award and indicated that it will start to make arrangements for it to execute the tender. On 29 August 2014, the appellant and the second respondent signed the agreement, as contemplated in the tender documents. In terms of clause 6 of the agreement, the appellant had to pay a third of the contract price no later than five days after the agreement was signed.

[10] On 19 September 2014, an article was published in the Namibian newspaper in which it was alleged that the appellant was likely to install scanners at four airports in Namibia, and that these scanners do not have a system to detect dangerous metal objects and explosives as per aviation requirements. The article further alleged that appellant's spokesperson confirmed that the tender was awarded to the second respondent.

[11] On 13 October 2014, the first respondent's legal practitioners sent a letter to the appellant's chief executive officer and to the board, in which letter the legal practitioners stated that the second respondent never received any communication from the appellant as regards the acceptance or rejection of the tender it had submitted. In this letter the legal representatives requested confirmation as to whether or not the tender was awarded to the second respondent; requested information that if the tender was awarded to the second respondent, when it was so awarded; and if the tender was awarded to the second respondent, the reasons why first respondent's tender was rejected.

[12] By 24 November 2014, the appellant had not yet replied to the letter sent by the first respondent's legal representatives. The first respondent then resolved to launch a review application in the court *a quo*. The review application was only heard on 19 April 2016.

[13] At the inception of the review application two points *in limine* were raised in opposition to the application. The first point was an alleged unreasonable delay in bringing the application. The court *a quo* dismissed this point. The second point was an alleged misjoinder of the appellant and the chairperson of the tender board of the appellant (third respondent in the court *a quo*). This point was raised on behalf of the first three respondents in the court *a quo*, which included the appellant. The court *a quo* stated that in terms of rule 76(1) a notice of motion (in review proceedings) must be 'directed' to the chairperson of the administrative body and further found that the citation of the appellant and the Chairperson of the Tender Board of Namibia Airports

Company was an 'unnecessary proliferation of parties', and upheld the point *in limine*. The citation of the company (appellant) separately and distinct from the chairperson was a misjoinder, it was found.

Findings of court a quo

[14] After analysing the evidence presented before it, the court *a quo* concluded that there was no logical and no rational reason advanced by the company (the appellant) why it had not considered the offers by the other 14 tenderers. The court stated that the inevitable conclusion was that the company acted capriciously and irrationally when it failed to consider or disqualify the offers of the 14 tenderers including the applicant's (first respondent's).

[15] The court *a quo* found that the appellant's decision to award the tender to the second respondent was not fair, as it was in contravention of Art 18 of the Namibian Constitution and thus amounted to an unlawful administrative act.

[16] In respect of the remedy, the court *a quo* stated that if the court were to set aside the tender awarded to the second respondent it would not only be disruptive but would be totally impracticable and would give rise to a host of problems not only in relation to a new tender process, but also in relation to work already performed, ie the equipment which had been delivered and installed (at three airports) and the purchase price which had been paid.

[17] The court *a quo* stated that the provisions of Art 25 of the Namibian Constitution empowers a court to decline to set aside an invalid administrative action and to award monetary compensation in respect of any damage suffered by an aggrieved party. The court *a quo* then stated that since the applicant (first respondent) suffered as a result of the irregular procedures followed by the company (appellant), the court would grant leave to the first respondent (if it is so advised) to approach the court and claim from the appellant the damages it suffered as a result of the infringement of its right to fair and reasonable administrative procedure as envisaged by Art 18 of the Namibian Constitution. The court *a quo* thereafter made the orders referred to above in para 2.

Submissions on appeal

[18] It was submitted by Mr Gauntlett, who appeared on behalf of the appellant, that the appeal and cross-appeal turns on two main questions.

[19] Firstly, in relation to the appeal: was it permissible for the court *a quo mero motu* to grant orders relating to constitutional damages? Flowing from this, could the court *a quo* have done so despite the applicant (first respondent) expressly restricting the relief it sought to review and setting aside of a tender, formally recording that it did *not* seek or desire damages? And could the court *a quo* have granted such relief even if in an instance where damage (ie loss, or *damnum*) was *not* established before it, *no* finding was made in relation thereto, no finding was made that damages constituted

an appropriate relief, and *no* finding was made regarding the existence of exceptional circumstances (which is a necessary pre-requisite)?

[20] The anterior question, it was submitted, relates to the merits, namely, whether the court *a quo* correctly declared the award of the impugned tender unlawful and irregular. It was submitted, that in the light of the court *a quo*'s exercise of its remedial discretion to refuse setting aside the award of the tender, the declaration of invalidity (of the tender to IBB Military Services), is academic.

[21] Secondly, it was submitted by Mr Gauntlett, that only if the 'purported' cross-appeal is entertained, on appeal, that the High Court's refusal to grant consequential relief (in the form of setting aside the tender award) arises for consideration by this court. In that event the multiple questions introduced by the cross-appeal arise. It was submitted that the numerous grounds of cross-appeal entail the question whether the High Court enjoys discretionary remedial powers to temper the consequences of a finding of irregularity in tender proceedings – more specifically, may the High Court exercise its remedial power, capriciously?

[22] Mr Töttemeyer, on behalf of the first respondent, submitted that the finding of the court *a quo* that the award of the tender to the second respondent, was unlawful and irregular, cannot be faulted. It was submitted that in this regard that no rational basis nor reasonable basis was presented for rejecting the first respondent's tender, and that the irregular and unlawful rejection of the first respondent's tender

culminated in the awarding of the tender to the second respondent, meriting the granting of the relief sought in the augmented notice of motion.¹

[23] Mr Töttemeyer, with reference to the matter of *President of the Republic of Namibia & another v Anhui Foreign Economic Construction Group Corporation Ltd & another*,² submitted that under ‘the common law, once invalid administrative action is established in review proceedings, the default remedy is to set aside the impugned act and to remit it to the decision makers for a fresh decision.’ It was submitted that it was incumbent upon the appellant to show that it would be very impractical, impossible, or untenable to have the tender reversed. Restitution is and remains possible, it was submitted, and if the relief sought in the augmented notice of motion is granted it will have to follow that the appellant is to return the equipment to IBB (second respondent) and for second respondent to restore the purchase price to the appellant.

[24] It was submitted that, the court *a quo* erred by refusing to set aside the award of the tender, by failing to take into account the paramount considerations of peremptory tender specifications, public safety, and the rule of law. It was contended, further on this score, that the simple reality of the matter was that the second respondent’s tender was in critical respects non-compliant with the tender specifications, whilst first respondent’s tender which complied with all the tender

¹ In its augmented notice of motion the first respondent sought, firstly, an order reviewing and setting aside a decision by appellant’s Tender and Technical Committee awarding the tender to the second respondent and not awarding and/or recommending the tender of the first respondent; secondly, reviewing and setting aside the decision by the appellant awarding the tender to the second respondent and/or not awarding the tender to the first respondent; and thirdly, and order setting aside the contract concluded between the appellant and the second respondent.

² 2017 (2) NR 340 (SC) para 61.

specifications was ignored. It was also submitted that failing to give any reasons by the appellant for granting the award to the second respondent, the tender to second respondent should be impugned and the relief sought should have been granted by the court *a quo*.

[25] Mr Töttemeyer confirmed that the first respondent (as applicant) never sought damages in the court *a quo*, but that the order which the court *a quo* ultimately granted relating to damages, accorded to the first respondent no more rights than it initially had in regard to the issue of damages, and is therefore meaningless.

Consideration of issues on appeal

[26] In respect of the question whether the court *a quo* could have *mero motu* granted orders relating to constitutional damages, it is common cause that damages were never sought by the applicant (first respondent) in the court *a quo* – neither in affidavits in support of the review application nor in oral argument. The purpose of the review application was to review and set aside certain decisions relating to a tender, as well as the cancellation of a ‘purported’ contract between the appellant and the second respondent.

[27] The issue of damages was raised by the court *a quo* for the first time at the hearing (on 19 April 2016). The court *a quo* stated that ‘wittingly or [un]wittingly’ the first respondent’s constitutional right to fair administrative action’ was violated. No *mala fides* were suggested by the first respondent and there is no indication in the

judgment of the court *a quo* that the appellant acted for ulterior reasons or acted extraneous to its empowering statute.

[28] The court *a quo mero motu* granted the relief without a case being made out for such relief and without the issue being ventilated by the respondents (appellant and second respondent).

[29] The general principle is that a court is only competent to grant orders which were asked for by the litigants. The approach to allocating an appropriate remedy in administrative applications was authoritatively established by this court in a number of decisions:

In *Lisse v Minister of Health and Social Services*,³ it was reiterated that:

‘Courts have often stressed that unlawful administrative action does not automatically give rise to delictual liability.’

Damages are thus not ordinarily awarded.

[30] In *Free Namibia Caterers CC v Chairperson of the Tender Board of Namibia & others*,⁴ this court concluded that the principles are clear; namely, whereas any ‘improper performance of an administrative function attracts the application of Art 18 of the Namibian Constitution’, and notwithstanding that ‘a breach of the right to administrative justice entitles an aggrieved party to ‘appropriate relief’ as contemplated in Art 25 of the Constitution’, it remains essential that a crucial point is

³ 2015 (2) NR 381 (SC) para 21. This court referred with approval to a number of authorities eg *Knop v Johannesburg City Council* 1995 (2) SA 1 A at 33B-E; *Olitzki Property Holdings v State Tender Board & another* 2001 (3) SA 1247 (SCA); *Rail Commuters Action Group & others v Transnet Ltd t/a Metrorail & others* 2005 (2) SA 359 (CC); and *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC).

⁴ 2017 (3) NR 898 (SC) para 36 (This judgment post-dates the judgment of the court *a quo*.)

made, and that is that, 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 domain'.

[31] A claim for damages is a private law remedy which primarily invokes the common law. The first respondent never sought damages in the court *a quo* therefore damages were not the appropriate remedy.

[32] In the matter of *Kauesa v Minister of Home Affairs & others*,⁵ the general principle that a court is competent only to grant orders which were asked for, was emphasised as follows:

'It is the litigants who must be heard and not the judicial officer.

It would be wrong for judicial officers to rely for their decisions on matters not put before them by litigants either in evidence or in oral or written submissions. Now and again a Judge comes across a point not argued before him by counsel but which he thinks material to the resolution of the case. It is his duty in such circumstances to inform counsel on both sides and to invite them to submit arguments either for or against the Judge's point.'

[33] In *Molusi & others v Voges N.O. & others*,⁶ it was confirmed that the 'purpose of pleadings is to define the issues for the other party and the court. And it is for the court to adjudicate upon the disputes *and those disputes alone*'.⁷

⁵ 1995 NR 175 (SC) at 183E-G; See also *Teek v President of the Republic of Namibia* 2015 (1) NR 58 (SC) para 30.

⁶ 2016 (3) SA 370 CC para 28.

⁷ Emphasis provided.

[34] The court *a quo* in respect of the order granting leave to institute an action for damages relied on a minority judgment in the matter of *Moseme Road Construction CC & others v King Civil Engineering Contractors (Pty) Ltd & another*,⁸ where Theron AJA, stated that in ‘appropriate circumstances, a court should be innovative and use its discretion as a tool “for avoiding or minimising injustice”. Courts should not shy away from carefully fashioning orders which meet the demands of justice and equity’. The court *a quo* in relying on this quotation erred both in respect of the facts and the law.

[35] The minority judgment in *Moseme* made a cost order against a government department, an order different from the majority judgment cost order – this was the extent of the innovative discretionary remedy Theron AJA, would have granted. The minority in *Moseme* further concurred with the majority in every other aspect. It must be kept in mind that a cost order is always in the court’s discretion, and may even be granted *mero motu*. This, however, does not apply to substantive relief relating to damages.

[36] The court *a quo* embarked by itself on a question of constitutional law (ie the appropriateness of damages under Art 25(4) of the Constitution) and granted relief to that effect. The court *a quo* thus, for the aforementioned reasons, erred in granting leave to pursue damages. Furthermore, the court *a quo* having found that the citation of the appellant was a misjoinder, (holding that the appellant was not properly before court), nonetheless went on to make an order against the appellant in relation to

⁸ 2010 (4) SA 359 (SCA) 368B-C.

damages. Para 3 of the court order was clearly incorrectly granted and stands to be set aside.

The cross-appeal

[37] The first respondent appealed against para 2 of the order of the court *a quo* in that the award of the tender to the fourth respondent [the second respondent on appeal] is unlawful and irregular, but is not set aside, including such portions of the judgment underpinning the underlined portion, and in its stead seeking an order varying same to provide that the award of the tender to the fourth respondent [the second respondent on appeal] is set aside’.

[38] Mr Tötemeyer, in his heads of argument summarised the grounds of appeal as follows:

- ‘4.1 the learned Judge erred in finding that: it is “impractical” to set aside the tender; that setting same aside would be “disrupted” and “will give rise to a host of problems not only in relation to a new tender process but also at the three different airports and the price paid” and that there existed “appropriate circumstances” to decline to exercise its discretion to set aside the invalid administrative act.⁹

- 4.2 The learned Judge erred in, in the circumstances of this matter – applying the principles enunciated in *Chairperson, Standing Tender Committee and Others v JFE Sapela Electronics Ltd & Others* 2008 (2) SA 638 (SCA); in placing reliance on Article 25 of the Namibian Constitution (and findings relating thereto) and in finding the presence of the “same difficulties” as existed in the *Oudekraal* matter 2004 (6) SA 222 (SCA) (and in placing reliance thereon),

⁹ This relates to grounds (a), (b) and (c) in the notice of appeal.

and further erred in making the quoted finding concluding that the “invalid administrative act must be permitted to stand”;¹⁰

- 4.3 the learned Judge erred in finding a limited scope for the granting of effective relief and in not setting aside the award of the relevant tender¹¹ (and in not granting the linked relief sought).¹²

[39] In respect of the first and second (summarised) grounds of appeal Mr Töttemeyer submitted that by October 2014 the appellant was aware of the impending review application and nonetheless persisted with the implementation of a contract which was fundamentally flawed and tainted in respect of non-compliant equipment. It was submitted that the board of directors of the appellant and its Chief Executive Officer were on 13 October 2014 (by way of a letter) already informed of the envisaged review application.

[40] In this letter the legal representative of the first respondent stated that the first respondent accepted, unless advised to the contrary, that ‘pending the aforementioned response thereto and our intimation regarding the review application, the (NAC) will not implement any decisions relating to the captioned tender’. It was submitted by Mr Töttemeyer in as far as the first to fourth respondents¹³ (in the application in the High Court) insistence of performing the terms of the ‘contract’, and which they knew would be challenged, they acted entirely at their own risk – at their own peril – and such unacceptable conduct should not count against the first respondent.

¹⁰ This relates to grounds (d), (e), (f), (g), (i) and (k).

¹¹ This relates to grounds (j).

¹² This relates to grounds (l), (m), (n) and (o).

¹³ Which included the appellant and second respondent.

[41] It was pointed out,¹⁴ that 50 percent of the contract price was paid in early September 2014 after the signing of the agreement. The equipment delivery only occurred in January 2015, and further 40 percent of the contract price was allegedly paid in February 2015, after the review application had already been launched,¹⁵ and without alerting the first respondent. Thus by the time of the delivery of appellant's answering affidavit, it announced that the 'equipment had been paid for in total'.¹⁶

[42] Mr Töttemeyer emphasised that the relief sought in the augmented notice of motion was and remains pre-eminently in the public interest – national security and public safety issues are at play, and that no factual basis was set out by the appellant for the conclusion that it would be severely inequitable or disastrous if the requested relief were to be granted.

[43] It is common cause, firstly, that the first respondent had not as soon as it became aware of the facts through the newspaper article in September 2014, or immediately thereafter, institute urgent proceedings – its notice of motion sought relief in the ordinary course. Secondly, the first respondent had not sought to interdict performance under the contract. In these circumstances the appellant was not only entitled, but indeed obliged to give effect to an extant administrative act.

¹⁴ With reference to second respondent's answering affidavit.

¹⁵ Filed on 26 November 2014.

¹⁶ Appellant's answering affidavit deposed to on 4 September 2015.

[44] I agree with the submission by Mr Gauntlett, that because the first respondent elected to lodge its application only in November/December 2014, despite reasonably being in a position to do so already in September 2014, but importantly, in my view, because the first respondent elected not to seek urgent interim relief, the equipment was shipped in January 2015, and that is why by the time of the hearing of the application in the court *a quo* the contract had already been fully performed.

[45] In *Chico/Octagen Joint Venture v Roads Authority & others*,¹⁷ the appellant in an attempt to persuade the Roads Authority to award the tender to it, launched an application to review and set aside the decision of the Roads Authority. This application was coupled with an application for an urgent interdict preventing the implementation pending the review application. The parties in that matter not only agreed to expedite the proceedings in the review application, but after the application was dismissed agreed to expedite the appeal hearing. The first respondent in this appeal elected not to follow this route and cannot now complain that the appellant ignored its request not to implement any decisions relating to the said tender, since the appellant never sought interim relief.

[46] My understanding of Mr Tötemeyer's submission in para [39] *supra* is that the appellant and the second respondent should immediately (and prudently) have desisted from giving effect to the terms of the concluded contract. In this regard it is in my view instructive to refer to the judgment of Mogoeng CJ, in the matter of *City of Tswane Metropolitan Municipality v Afriforum & another*,¹⁸ where it was stated that it

¹⁷ An unreported decision of this court in case no. SA 81/2016 delivered on 21 August 2017.

¹⁸ 2016 (6) SA 279 (CC) para 74.

'is a restraining order itself, as opposed to the sheer hope or fear of one being granted, that can in law restrain'.

and he continued at para 75:

' . . . there was no obligation on Council to desist from removing old street names upon becoming aware of an urgent application for a restraining order had been filed. Only sheer choice or discretion, but certainly not any legal obligation or barrier, would lead to action being desisted from in anticipation of a successful challenge or application for an interdict.'

[47] This court in *President of the Republic of Namibia and Others v Anhui Foreign Economic Construction Group Corporation Ltd & another*,¹⁹ referred with approval to *Kirland Investments*,²⁰ which in turn referred to *Oudekraal Estates (Pty) Ltd v City of Cape Town & others*,²¹ where the position was explained as follows:

'Until the Administrator's approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked. The proper functioning of a modern State would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside.'

¹⁹ 2017 (2) NR 340 (SC) at 350E-G.

²⁰ *MEC for Health, Eastern Cape & another v Kirland Investments (Pty) Ltd t/a Eye and Lazer Institute* 2014 (3) SA 481 (CC) para 101.

²¹ 2004 (6) SA 222 (SCA) para 26.

[48] The court in *Anhui (supra)*, quoting Baxter where the learned author stated in this regard that, 'we are entitled to rely upon decisions of public authorities and intolerable uncertainty would result if these could be reversed at any moment'.

[49] It is common cause that by the time the application was heard the purchase price was fully paid and all the equipment were installed at the airports for which it was procured, except one.

[50] The procedure where a litigant seeks the reviewing and setting aside of an alleged unlawful administrative act, is twofold. Firstly, a court is required to make a finding of validity or of invalidity. Where a declaration of invalidity is made, the court may proceed to the second stage, where the court considers the effect of the declaration of invalidity on the parties and other stakeholders. It is at this second stage that a court enjoys a discretionary power, and must make an order which is just and equitable in the circumstances.

[51] A court in the exercise of its discretion may be faced with practical challenges as aptly explained by Jafta J, in the matter of *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province & others*,²² as follows:

'The difficulty that is presented by invalid administrative acts, as pointed out by this court in *Oudekraal Estates*,²³ is that they often have been acted upon by the time they are brought under review. That difficulty is particularly acute when a decision is taken

²² 2008 (2) SA 481 SCA para 23.

²³ Footnote omitted.

to accept a tender.²⁴ A decision to accept a tender is almost always acted upon immediately by the conclusion of a contract with the tenderer, and that is often immediately followed by further contracts concluded by the tenderer in executing the contract. To set aside the decision to accept the tender, with the effect that the contract is rendered void from the outset, can have catastrophic consequences for an innocent tenderer, and adverse consequences for the public at large in whose interests the administrative body or official purported to act. Those interests must be carefully weighed against those of the disappointed tenderer if an order is to be made that is just and equitable.'

[52] Courts therefore have a discretion not to set aside administrative acts where doing so will achieve no practical purpose. This approach was confirmed by Scott JA, in *JFE Sapela (supra)* quoting Brand JA,²⁵ who stated that 'there is a public interest element in the finality of administrative decisions and the exercise of administrative functions'. To this, Scott JA added, 'considerations of pragmatism and practicality'.

[53] This court in *Anhui* confirmed that these precedents apply,²⁶ and that 'the approach and guidelines articulated accord with Namibian Constitutional principles and the common law'.²⁷ The court *a quo* was in my view correct in applying the principles enunciated in the *Oudekraal* and *Sapela* matters to the facts of this case.

[54] The court *a quo* found that if it were to set aside the award of the tender to the second respondent, it would not only be 'disruptive', but would be 'totally impracticable', which in turn would give rise to a host of problems, *inter alia*, in respect of the work already performed and the purchase price paid. I agree that it

²⁴ As in this case – (footnote provided).

²⁵ In *Associated Institutions Pension Fund & others v Van Zyl & others* 2005 (2) SA 302 (SCA) para 46.

²⁶ At para 63.

²⁷ At para 65.

would have been totally impractical in the circumstances (the terms of the contract having been fully complied with) to have set aside the award of the tender to the second respondent. It would similarly be impractical and disruptive if restitution is ordered (though not impossible) with concomitant additional costs implications should appellant decide to re-advertise the tender. The machines are by now second hand machines. It is doubtful whether the second respondent will return the price so tendered and already paid for these machines, whose value had in the interim period been reduced. The second respondent, an innocent party, would be saddled with machines for which it has no use for and this will be to its prejudice. Who is going to purchase these imported machines and at what price and for what purpose?

[55] In respect of the third summarised ground of appeal the court *a quo* stated that the applicant's (first respondent's) option to speedily approach the court *a quo* for relief was greatly hampered by the company (the appellant) when it withheld information from the first respondent, consequently the scope of granting an effective relief to vindicate the infringed rights has been greatly reduced. This statement by the court *a quo* must, however, be seen in the context of the failure of the first respondent to apply for interim relief which in turn has as a consequence on the conclusion of the terms of the contract signed by appellant and second respondent, which in turn was the basis for a finding of impracticality and disruptiveness.

[56] In these circumstances, I am of the view that the court *a quo* has not erred or misdirected itself when it refused to set aside the tender awarded to the second respondent.

[57] Mr Gauntlett, submitted that the first respondent's cross-appeal is preempted by its particulars of claim. It was submitted that by its notice of appeal (dated 20 September 2016) first respondent expressed an intention to cross-appeal but afterwards in its particulars of claim (dated 28 February 2017) took steps in litigation which contradicted the notice of appeal.

[58] Mr Töttemeyer, submitted that the point of preemption is without merit – the requisites for proving waiver have not been alleged or established on admissible evidence before this court. It was contended that the particulars of claim are premised on the unlawful denial and violation of the first respondent's common law rights and fundamental constitutional rights and freedoms contained in the Namibian Constitution.

[59] I have dealt with the merits of the cross-appeal (as summarised) and I am of the view that it is not necessary to deal with the point of preemption. The cross-appeal must fail on its merits since it has not been shown that the court *a quo* failed to properly exercise its discretion in deciding that the default principle in these circumstances should not apply.

[60] The issue of costs remains. The appellant appealed against the whole judgment of the court *a quo*. Rule 5(2) of the rules of this court (the old rules) provides that a notice of appeal shall state whether the whole or part only of the judgment or order of the court appealed from is applied and, if part only then what part. Mr

Tötemeyer submitted that, should the appeal succeed then the first respondent was entitled to resist it because of the broad nature of the appeal because the appeal also challenged the unlawful and irregular part of the award of the tender made to the second respondent.

[61] It was argued on appeal by Mr Gauntlett that, the appellant could live with the second order of the court *a quo* as it stands. However, in its heads of argument the appellant addressed the merits of the second order of the court *a quo* arguing that the court *a quo* did not err or misdirect itself when it found that the award of the tender to the second respondent was unlawful and irregular. This is a factor to be taken into account in considering the cost order. The first respondent was in my view fully entitled to argue and resist the appeal in respect of the second order of the court *a quo*. However, since the appellant is successful in its appeal it is entitled to costs.

[62] In the result the following orders are made:

- (a) The appeal succeeds with costs, which costs shall include costs of one instructing counsel and two instructed counsel. The appellant is being restricted to 70% of its allowable costs in respect of its preparation of heads of argument on appeal.
- (b) The third paragraph of the High Court's order is deleted.

- (c) The cross-appeal is dismissed with costs, including the costs of one instructing counsel and two instructed counsel.

HOFF JA

MAINGA JA

SMUTS JA

APPEARANCES

APPELLANT:

J J Gauntlett SC, QC (with him F B Pelsler)

Instructed by Ellis Shilengudwa Inc., Windhoek

FIRST RESPONDENT:

R Töttemeyer (with him D Obbes)

Instructed by ENSAfrica | Namibia, Windhoek