



REPORTABLE

CASE NO: SA 15/2020

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

NEWPOINT ELECTRONIC SOLUTIONS (PTY) LTD

Appellant

and

PERMANENT SECRETARY, OFFICE OF THE

PRIME MINISTER

First Respondent

PRIME MINISTER OF THE REPUBLIC OF NAMIBIA

Second Respondent

Coram: FRANK AJA, LIEBENBERG AJA and UEITELE AJA

Heard: 18 March 2022

Delivered: 3 October 2022

Summary: During the year 2015 the then Tender Board of Namibia (the board), placed adverts in the media inviting expressions of interest from interested bidders for the implementation of the Oracle Payroll, Maintenance and Support of the Existing Human Capital Management Service under Tender No. E1/2-7/2015 (the tender). To be implemented at the Office of the Prime Minister.

On 5 April 2016, the secretary to the board informed the appellant that it was the successful bidder and it was awarded the tender. On 19 April 2016, the first respondent informed the appellant that the office of the second respondent was in the process of drafting a service level agreement, and requested the appellant to; in the meantime, prepare a project implementation plan including a detailed training plan.

On 30 June 2016, the appellant and the first respondent (acting on behalf of the second respondent) signed the Service Level Agreement. As of June 2016 the appellant proceeded to perform the contract, at least in part, in light of the letter of award and the Service Level Agreement.

It would appear that sometime during the year 2018, the respondents had complaints with regard to the performance of the appellant. The respondents thus engaged in consultations with their legal advisors in order to determine their approach to the dispute with the appellant. On 12 June 2018, the Government Attorney on behalf of the respondents sent a letter to the appellant, informing the appellant that the agreement was unenforceable and invalid *ab initio*.

On 30 June 2018, the appellant through its legal practitioner addressed a letter to the Government Attorney seeking clarity on which basis the agreement was cancelled. When the appellant did not receive a reply satisfactory to it, it on 18 August 2018 commenced review proceedings in the High Court seeking an order setting aside the 'cancellation' of the tender by the first respondent.

The respondents opposed the appellant's review application on the basis that the remedy for the alleged breach of the agreement was not a matter of administrative law but a contractual one. The respondents proceeded to also file a counter-application in terms of which they sought an order, declaring the agreement concluded by and between the appellant and the Office of the Prime Minister invalid *ab initio* and thus unenforceable.

The court *a quo* held that, the claim of the appellant sounded in contract, and that the appellant ought to find its relief in contract law, and seeking administrative relief in that instance is impermissible and refused the review application. The court *a quo* further held that, the agreement was void *ab initio*, as it was entered into in contravention of the provisions of the Tender Board of Namibia Act 16 of 1996 (the Act).

On appeal, the court *held that*, the appeal turns on whether on the proven and undisputed facts, the agreement concluded between the appellant and the second respondent was validly concluded.

Held that, if public functionaries purport to exercise powers or perform functions outside the parameters of their legal authority, they, in effect, usurp powers of the State entrusted to other public functionaries.

Held that, the Act does not alter or purport to alter the common law by excluding the State or its agencies' power to contract or conclude agreements, but solidifies that, as a legal *persona*, the State acts through functionaries, be it natural persons or statutory bodies.

Held that, when it comes to the procurement of services for or on behalf of the State, s 7(1) of the Act provides that unless otherwise provided in the Act or any other law, the board shall be responsible for the procurement of goods and services for the Government and s 21 of the Act expressly states that the second respondent is bound by the Act.

Held that, the respondents could not validly conclude a contract with the appellant for the provision of services.

APPEAL JUDGMENT

UEITELE AJA (FRANK AJA and LIEBENBERG AJA concurring):

Introduction and background

[1] The appellant in this matter is Newpoint Electronic Solutions (Pty) Ltd, a company duly registered and incorporated in terms of the company laws of this Republic. The first respondent is the Permanent Secretary of the Office of the Prime Minister, whereas the second respondent is the Prime Minister of this Republic.

[2] From the record before us it is not clear as to exactly when, but what is clear is that sometime during the year 2015, the now disbanded Tender Board of Namibia (the board), placed advertisements in the local media inviting expressions of interest from interested bidders under Tender No. E1/2-7/2015 (the tender) for the implementation of the Oracle Payroll, Maintenance and Support of the Existing Human Capital Management Service at the Office of the Prime Minister.

[3] On 5 April 2016, the secretary to the board by letter informed the appellant that it was awarded the tender. That letter in part reads as follows:

‘The Tender Board of Namibia, in terms of section 16(1)(a) of the Tender Board Act, Act 16 of 1996, hereby informs you that your tender was successful and was approved by the Board.

- **Your company is awarded tender E1/2-7/2015 to the amount of N\$ 27 738 000-00.**

Any further enquiry should be directed to:

Ministry/Office: Office of the Prime Minister: Contact Person and Tel no: J Kangandjo/G Shilongo at 061-287 9111.

This notice is subject to an official Government order being issued or the conclusion of an agreement by O/M/A concerned and is not binding on any party involved.'

[4] On 19 April 2016, the Permanent Secretary of the Office of the Prime Minister addressed a letter to the appellant in which letter the Permanent Secretary made reference to the letter of 5 April 2016 quoted above, and also informed the appellant that it (the Office of the Prime Minister) was in the process of drafting a Service Level Agreement to be shared with the appellant once finalised. The appellant was furthermore requested to, in the meantime, 'prepare a project implementation plan including a detailed training plan.'

[5] It is common cause, that on 30 June 2016 the Managing Director of the appellant, acting on behalf of the appellant, and the Permanent Secretary in the Office of the Prime Minister, acting on behalf of the Government of the Republic of Namibia, signed the Service Level Agreement. It is further common cause, that as of June 2016 the appellant proceeded to perform the contract, at least in part, in light of the letter of award and the Service Level Agreement.

[6] It would appear that sometime during the year 2018, the respondents had complaints with regard to the performance of the appellant. The respondents thus engaged in consultations with their legal advisors in order to determine their approach to the dispute with the appellant.

[7] On 12 June 2018, that is a period of slightly more than two years after the appellant was informed of the award of the tender to it, the Government Attorney, Mr Matti Asino, sent a letter to the appellant. In the letter of 12 June 2018, Mr

Asino, among other matters, informed the appellant that the 'agreement' between it and the Office of the Prime Minister in pursuance of the award of the tender, was unenforceable and invalid *ab initio*. The letter furthermore disavowed the existence of any obligations between the parties. The letter reads as follows:

'We write to you in respect of the above matter on the instructions of the Prime Minister.

We have considered a number of agreements purportedly concluded by our respective clients and various correspondences in relation thereto.

We have advised our client that the agreements your client is relying on are unenforceable and invalid *ab initio* on various grounds including the fact that the agreements were not concluded by the Tender Board of Namibia (as it was) on behalf of the Government as peremptorily required in terms of sections 7(1)(a) and (b) and section 16(2)(a) of the Tender Board Act of 1996.

We therefore advise you of the invalidity of the agreements. Our client on that basis will have no further engagements with your client. In any event, even assuming that the agreements were valid (which is denied) your client is not entitled to any payment due to its defective and unsatisfactory work.

Any legal action shall be vigorously opposed.'

[8] On 30 June 2018, the appellant, through its legal practitioners, addressed a letter to the Government Attorney seeking clarity for the basis on which the 'agreement' between the parties was being 'cancelled'. When the appellant did not obtain a reply that was satisfactory to it, it on 18 August 2018 commenced proceedings in the High Court seeking an order:

'Reviewing and correcting or setting aside the decision by the Respondents to cancel Tender No. E1/2-7/2015 for the implementation of the Oracle Payroll, Maintenance and Support of the Existing Human Capital Management Service.'

[9] The respondents did not only oppose the appellant's application *a quo*, they proceeded to also file a counter-application in terms of which they sought an order, declaring the agreement concluded by and between the appellant and the Office of the Prime Minister invalid *ab initio* and thus unenforceable.

[10] The review application and the counter application were heard on 1 August 2019, and judgment was delivered on 6 February 2020. In its judgment the High Court found that:

- (a) The respondents were on the correct side of the law and that, 'the mere fact that the awarding of the contract is governed by a legislative enactment does not necessarily translate to saying that if the respondents hold the view that any imperative provision of the applicable Act has been breached, the applicant is *per se* entitled to be heard in terms of administrative law'. It accordingly dismissed the appellant's review application; and,
- (b) That the award of the tender to the appellant was not concluded in terms of the applicable legislative enactment. For that reason, said the court, 'it was invalid from inception as it did not comply with what are clearly mandatory provisions of the law. It would therefore be against the tenets of the rule of law to gloss over and allow such a contract, which is not even limping, but still-born, to be performed'.

[11] The court accordingly granted the counter application and set aside the award of the tender to the appellant.

[12] The appellant is aggrieved by the findings of the High Court, hence this appeal. At issue in this appeal is whether the relief sought by the appellant should have been granted and whether the High Court should have dismissed the respondents' counter application to set aside the agreement between the appellant and the respondents.

Condonation and reinstatement application

[13] As indicated earlier, both the review application and the counter application were heard in the High Court on 1 August 2019 and that court delivered an order on 3 February 2020, after which the full judgment was uploaded on the e-justice system on 6 February 2020. On 6 March 2020, the appellant's legal practitioners of record filed their notice of appeal, and on 6 May 2020 they filed an amended notice of appeal together with an application for condonation for the late filing of the amended notice of appeal.

[14] Rule 7(1) of the Rules of this Court provides that a notice of appeal must be lodged within 21 days of the judgment or order against which the appeal is noted. It thus follows that the appellant should have filed its notice of appeal by not later than 3 March 2020, however, the appeal was only lodged on 6 March 2020.

[15] Ms Vanessa Boesak, the appellant's instructing legal practitioner, deposed to the affidavit in support of the application to condone the appellant's non-compliance with rule 7(1). In her affidavit, Ms Boesak professed the appellant's

desire and intention to appeal against the judgment of the High Court as soon as the complete reasons for the court's order were made known. She indicated that the appellant took steps by analysing the judgment, discussing it with junior counsel and sought a senior counsel to deal with the matter. She further advanced the reason that the three days delay in filing the notice of appeal was caused by her interpreting the rule to mean that the computation of the period within which to file the notice of appeal would only commence once the full reasons for the order of 3 February 2020 were made available.

[16] It is now a well-established principle of our law that a litigant seeking condonation bears an *onus* to satisfy the court that there is sufficient cause to warrant the granting of condonation.¹ The authorities further state that a litigant must launch a condonation application without delay. This Court has in more than one judgment noted that an application for condonation is not a mere formality.² The trigger for it is the non-compliance with the Rules of Court.³ The application for condonation must thus be lodged without delay, and must provide a 'full, detailed and accurate' explanation for the delay.⁴

[17] This Court has also considered the range of factors relevant to determine whether an application for condonation for the late filing of an appeal must be granted. They include 'the extent of the non-compliance with the rule in question, the reasonableness of the explanation offered for the non-compliance, the *bona*

¹ *Petrus v Roman Catholic Archdiocese* 2011 (2) NR 637 (SC) paras 9-10.

² *Arangies t/a Auto Tech v Quick Build* 2014 (1) NR 187 (SC) and *S v S* 2013 (1) NR 114 (SC) paras 16–18.

³ *Beukes & another v South West Africa Building Society (SWABOU) & others* (SA 10/2006) [2010] NASC 14 (5 November 2010).

⁴ *Beukes* para 13.

fides of the application, the prospects of success on the merits of the case, the importance of the case, the respondent's (and where applicable, the public's) interest in the finality of the judgment, the prejudice suffered by the other litigants as a result of the non-compliance, the convenience of the court and the avoidance of unnecessary delay in the administration of justice.⁵

[18] In this matter the appellant filed its notice of appeal three days out of time (the notice of appeal was filed on 6 March 2020 instead of 3 March 2020). The appellant lodged its application to condone the late filing of the notice of appeal and the amended notice of appeal on 27 April 2020. Ms Boesak, who deposed to the appellant's affidavit in support of the application for condonation gave an explanation for the delay in filing the notice of appeal.

[19] I am of the view that the three days delay is not inordinate, that the appellant did not delay in lodging its application for condonation and that the explanation by Ms Boesak is not unreasonable. I am further of the view that from, the explanation advanced by Ms Boesak, it is quite evident that the appellant acted *bona fide* in its application for condonation and is desirous to have its appeal determined and finalised. This matter concerns the exercise of public power and that aspects needs to, in the public interest, be clarified. I have not been alerted to, nor do I see any prejudice, which the respondent will suffer if the appellants' late filing of the notice to appeal is condoned. For the reasons that I have set out in the preceding paragraph and in this paragraph I am of the view that the appellant's

⁵ See *Rally for Democracy and Progress & others v Electoral Commission for Namibia & others* 2013 (3) NR 664 (SC) para 68.

explanation for its delay in lodging the appeal is sufficient to warrant the granting of condonation and to reinstate the appeal.

In the High Court

The review application

[20] In the court below, the appellant sought to have ‘the decision taken by the respondents to no longer abide by the agreement, reviewed and set aside’ on the basis that that decision constituted administrative action. The appellant further contended that the decision was wrongful and was accordingly reviewable. The appellant furthermore contended that it was denied the right to be heard before the action to cancel the agreement was taken by the respondents.

[21] The respondents disagreed with the contentions by the appellant. The respondents contend that the agreement indicates that the matter is of a contractual nature and for that reason, the appellant was wrong in seeking a remedy in administrative law.

[22] Relying on the authorities to which it was referred, the High Court agreed with the respondents. The court held that it was clear from the facts of the case that the appellant’s claim is a contractual one and said:⁶

[18] . . . for that reason, it is clearly improper to then subject the respondents, as the applicant seeks to do, to the yoke of administrative law in cancelling the contract. If the respondents took the view that the contract was unenforceable for any reason, the applicant does have effective remedies provided in the law of contract to deal with that situation.

⁶ *Newpoint Electronic Solutions (Pty) Ltd v Permanent Secretary, Office of the Prime Minister* (HC-MD-CIV-MOT-REV-2018/00277) [2020] NAHCMD 40 (3 February 2020) paras 18–19.

[19] For the applicant not only to blur but to actually cross the lines and seek redress from administrative law, when it is abundantly clear that the dispute arises in contract, is in my view impermissible and that is the effect of the judgments quoted above, which resonate with my own views. I am of the view that the application should fail for that reason. The applicant, by seeking umbrage in administrative law, is clearly barking the wrong tree.'(sic)

The counter-application

[23] In the counter-application, the respondents claim that the conclusion of the contract *inter partes*, was not in keeping with the relevant legislation. In this regard, the court was referred to ss 7(1)(a) and 16(2)(a) of the Tender Board of Namibia Act 16 of 1996 (the Act or the repealed Act). The appellant on the other hand denied that the agreement was signed outside the scope of the Act. It contended that the Permanent Secretary of the Office of the Prime Minister was, in terms of s 18 of the Act, a delegee of the board and was thus authorised to sign the agreement.

[24] The court in its findings reasoned that, in the process of contracting with the board, the first step was that a tenderer must accept the tender awarded. A further step, which had legal consequences flowing from it, was then required to be taken within 30 days of the notification of the award of the tender namely, the conclusion of the contract between the tenderer, which has accepted the tender awarded, and the board.

[25] The High Court further found that, although the tender was awarded to the appellant and that it was duly accepted, there was no entry into the agreement by the appellant and the board within the period of 30 days from the appellant being

notified of the award. Nor, within any extended period that the board may have granted. The court further found that no agreement, after the acceptance of the award by the appellant, was ever entered into between the parties (that is the appellant and the board) which would give rise to an enforceable contract in terms of the law.

[26] As I indicated earlier the court *a quo* concluded that the tender awarded to the appellant was not concluded in terms of the applicable legislative enactment and for that reason concluded that the contract was invalid from inception, as it did not comply with what are clearly mandatory provisions of the law.⁷ The court accordingly reviewed and set aside the agreement signed between the Office of the Prime Minister and the appellant.

Submissions on appeal

[27] Mr Töttemeyer who appeared for the appellant argued that the High Court was wrong in its conclusions. He argued that the responsibility for the procurement of goods and services for the Government vests with the board in terms of s 7(1) of the Act. He proceeded and argued that the conclusion of any agreement that follows upon such tender award is not governed by peremptory terms in the legislature, but introduced a discretionary element in that the board may opt to conclude a contract following upon that award itself or permitting another entity to conclude such agreement. The exercise of that power, to permit another entity to conclude the agreement, again, would then be exercised subject to the powers of delegation, which vests in the board.

⁷ *Newpoint* para 28.

[28] Mr Töttemeyer continued and submitted that once a tender is awarded, the Government or any of its agencies would have the power to conclude a subsequent contract between the Government and the successful tenderer, based on such tender award. He further submitted that this agreement may be concluded not only by the board or its delegatee, but also by other agencies of Government (and on behalf of the Government). That would follow in terms of the well recognised 'common law prerogative' of the Government to conclude contracts for and on behalf of the State, which power is not presumed to be excluded by statute.

[29] Mr Töttemeyer furthermore submitted that the Permanent Secretary in the Office of the Prime Minister was empowered to conclude the contract on behalf of the Government in terms of the 'common law prerogative' of the Government to conclude contracts.

[30] He continued and argued that insofar as it may be held that the power to conclude a contract, resulting from a tender award, is exclusively vested in the board or its delegate in terms of s 7(1) of the Act (which he submitted is not the case), then the board expressly or at least tacitly delegated that power to the Office of the Prime Minister and its Permanent Secretary, alternatively, the appellant was lawfully entitled to assume that this is the case.

[31] Mr Töttemeyer partly relied on s 18 of the Act for the submission that, in as much as a delegation by the board to the Permanent Secretary of the Office of the Prime Minister was required in order to validly conclude the agreement, such

delegation indeed occurred, either expressly or by clear implication. He argued that s 18(3) of the Act defines, 'administrative head' to mean 'the permanent secretary of any office, ministry, or agency'. He argued that the tender award letter not only referred to a contract to be concluded with a Government office, Government agency, or agency of Government, but also specifically directed the appellant to the Office of the Prime Minister for further enquiries.

[32] As regards the court's finding that the agreement between the appellant and the Office of the Prime Minister was not concluded within the stipulated 30 days, Mr Töttemeyer argued that:⁸

- (a) The Permanent Secretary in the Office of the Prime Minister on 5 March 2016, addressed a letter, to the board in which she recommended the grant of the tender to the appellant;
- (b) On 28 February 2017, the Permanent Secretary of the Office of the Prime Minister addressed a letter to the appellant requesting a change in the scope of the work of the appellant;
- (c) On 19 April 2016, the Permanent Secretary of the Office of the Prime Minister authored the letter awarding the tender to the appellant and in that same letter requested the appellant to (and pending the finalisation of the contract – the service level agreement) '*in the meantime . . . prepare a project implementation plan including a detailed training plan*'.

⁸ Appellant's heads of argument para 22.4.

He argued that, 19 April 2016 was well after expiry of the 30-day period mentioned in s 16 of the Act;

- (d) On 19 May 2016, the appellant addressed a letter to the Permanent Secretary of the Office of the Prime Minister in terms of which the appellant forwarded the project plan to her;
- (e) On 23 June 2016, the appellant received an email communication from the Permanent Secretary of the Office of the Prime Minister in terms of which she confirmed that, after input from other parties, notably the office of the Attorney-General, the agreement was in order.

[33] Based on the facts that he enumerated as set out in the preceding paragraphs, Mr Töttemeyer submitted that it is apparent that the Attorney-General's office clearly sanctioned the conclusion of the agreement by the Permanent Secretary of the Office of the Prime Minister on behalf of the Government and did so well after the expiry of the 30-day period, belatedly relied upon by the respondents as allegedly invalidating the contract.

[34] He, relying on s 16(2)(a) of the Act, further submitted, that the facts of this matter, particularly those set out earlier in paragraph [29], demonstrate that there was an express or at least tacit extension of the 30-day period. It is to be noted, argued Mr Töttemeyer that s 16(2) of the Act does not require that such extension should be granted in writing.

[35] Mr Töttemeyer argued, relying on the matter of *Torbitt v The International University of Management* 2017 (2) NR 323 (SC)⁹ where the Supreme Court held as follows:

‘Peremptory provisions merely because they are peremptory will not by implication, be held to require exact compliance where substantial compliance with them will achieve the object of the legislature. The modern approach manifests a tendency to incline towards flexibility.

Where a statutory duty is imposed on a public body or public officers and the statute requires that such duty shall be performed in a certain manner or a certain time or under specified conditions, such prescription may well be regarded as intended to be directory only in cases when injustice or inconvenience to others who have no control over those exercising the duty would result if such requirement were essential or imperative.’¹⁰

He furthermore argued that the court *a quo* erred in not finding that the delegation was an internal requirement and that the appellant was entitled to assume that the internal requirement of such delegation has been met.

[36] Finally, Mr Töttemeyer argued that, based on the application of the *Turquand* rule, which would also apply to a public authority in the present circumstances, the contract was validly concluded. For this proposition he relied on the South African Appellate Division matter of *Potchefstroom Stadsraad v Kotze* 1960 (3) SA 616 (A)¹¹ which restated the *Turquand* rule as follows:¹²

⁹ *Torbitt & others v International University of Management* 2017 (2) NR 323 (SC) paras 30-36.

¹⁰ See appellant's heads of argument para 25.

¹¹ See appellant's heads of argument para 26.3 and *Potchefstroom Stadsraad v Kotze* 1960 (3) SA 616 (A); and *Walvis Bay Municipality v Occupiers, Caravan Sites, Longbeach* 2007 (2) NR 643 (SC) paras 95-100.

¹² *Morris v Kanssen & others* 1946 AC 459 (HL) at 474-475; see also *Big Dutchman (South Africa) v Barclays National Bank* 1979 (3) SA 267 (WLD) 280B-C.

‘. . . persons contracting with a company and dealing in good faith may assume that acts within its constitution and powers have been properly and duly performed, and are not bound to inquire whether acts of internal management have been regular. . . It is a rule designed for the protection of those who are entitled to assume, just because they cannot know, that the person with whom they deal has the authority which he claims. This is clearly shown by the fact that the rule cannot be invoked if the condition is no longer satisfied, that is, if he who would invoke it is put upon his enquiry. He cannot presume in his favour that things are rightly done if inquiry that he ought to make would tell him that they were wrongly done.’

[37] Mr Namandje, who appeared on behalf of the respondents, on the other hand argued that the judgment of the court *a quo* is unassailable on several grounds. He argued that the repealed Act had a specific legislative policy namely that, if the title of a particular tender required a written contract after acceptance of the tender, then it must be the board as the statutorily nominated repository of power that must be the governmental party with competence, authority, and jurisdiction to execute that contract. He continued and argued that this would mean that the terms of the written contract would have been a subject of deliberation and a valid decision of the board, a body comprised of various prescribed functionaries.

[38] Mr Namandje further argued that the statutory context, scheme and structure of the repealed Act overwhelmingly point to the effect that the written contract contemplated under s16(2)(a) of the Act must, as expressly provided for, be executed and concluded only between the board and the tenderer. He argued that, that conclusion was supported by the fact that, the invitation of tenders, the acceptance or rejection of tenders, and the enforcement or cancellation of

agreements concluded pursuant to an award of a tender, is the responsibility of the board.

[39] Relying on the matter of *President of the Republic of Namibia & others v Anhui Foreign Economic Construction Group Corporation Ltd & another*¹³ Mr Namandje furthermore argued that, in procurement matters, it is a requirement that the doctrine of legality and the rule of law must be respected and complied with.

[40] As regards the contention that the board delegated its power to conclude agreements on behalf of Government to the Permanent Secretary in the Office of the Prime Minister, Mr Namandje argued that in the present case the board was the proper functionary to exercise the powers to conclude agreements on behalf of the State. He argued that the board never did; nor could it lawfully delegate that power to the Permanent Secretary of the Office of the Prime Minister. He thus submitted that the delegation relied upon by the appellant was *ultra vires* and null and void.

Discussion

[41] This appeal turns on whether on the proven and undisputed facts, the agreement concluded between the appellant and the Office of the Prime Minister was validly concluded and whether the respondents' counter application to declare that agreement unlawful, should have been dismissed by the court *a quo*.

¹³ *President of the Republic of Namibia & others v Anhui Foreign Economic Construction Group Corporation Ltd & another* 2017 (2) NR 340 (SC). See further *TEB Properties CC v MEC, Department of Health and Social Services, North-West* [2012] (1) All SA 479 (SCA) (1 December 2011).

[42] It is now axiomatic that the Republic of Namibia is a Constitutional State and in a Constitutional State, the principle of legality reigns supreme. What this means is that all State institutions and public officials (there is no denial that the Permanent Secretary of the Office of the Prime Minister, the Prime Minister and the now disbanded board are State institutions) may act only in accordance with powers conferred on them by law.¹⁴

[43] This Court has on numerous occasions stressed that the principle of legality demands that the exercise of any public power must be authorised by law, either by the Constitution itself or by any other law recognised by or made under the Constitution. The court furthermore made it clear that the exercise of public power is only legitimate where lawful.

[44] If public functionaries purport to exercise powers or perform functions outside the parameters of their legal authority, they, in effect, usurp powers of the State constitutionally entrusted to legislative authorities and other public functionaries.¹⁵ It is against that background that it seems relevant to first set out the statutory framework for the acquisition of goods and services on behalf of the Government.

The statutory framework for the acquisition of goods and services on behalf of the Government

[45] The long title of the Act provides that the object of the Act is 'to regulate the procurement of goods and services for, the letting or hiring of anything or the

¹⁴ *Rally for Democracy and Progress & others v Electoral Commission of Namibia & others* 2010 (2) NR 487 (SC) para 23.

¹⁵ *President of the Republic of Namibia & others v Anhui Foreign Economic Construction Group Corporation Ltd & another* 2017 (2) NR 340 (SC).

acquisition or granting of rights for or on behalf of, and the disposal of property of, the Government . . .'. Section 2 of the Act established the board, which was amongst other functions 'responsible for the procurement of goods and services for the Government'.

[46] Section 7(1) of the Act sets out the powers and the functions of the board, which include the power to:

- (a) conclude an agreement with any person for the furnishing of goods or services to the Government on its behalf;
- (b) invite tenders and determine the manner in which they should be submitted;
- (c) inspect and test or cause to be inspected and tested the goods or services offered; and
- (d) accept or reject any tender and take steps to enforce or resile from any agreement concluded.

[47] Section 8 of the Act empowers the board to from time to time, among its members appoint a committee to deal with any specific case on behalf of the board and designate a chairperson for that committee,¹⁶ and subject to such conditions as it may determine, delegate any of the powers conferred upon it by or

¹⁶ Section 8(1) of the Act.

under the Act to that committee.¹⁷ The section further provides that a delegation under s 8(2) shall not divest the board of any power so delegated, and the board may at any time vary or set aside any decision made thereunder by the committee.¹⁸

[48] Section 16(1) of the Act, deals with the acceptance of tenders and the entry into force of agreements. It provides that the board must in every particular case:

- (a) notify the tenderers concerned in writing of the acceptance or rejection of their tenders, as the case may be, and the name of the tenderer whose tender has been accepted by the board must be made known to all the other tenderers;
- (b) on the written request of a tenderer, give reasons for the acceptance or rejection of his or her tender.

[49] Section 16(2) of the Act, furthermore provides that where in terms of a title of a tender:

- (a) a written agreement is required to be concluded after the acceptance of a tender. The board and the tenderer concerned must not later than 30 days from the date on which that tenderer was notified of the acceptance of its, his or her tender, or within such extended period as the board may determine, enter into such an agreement; and

¹⁷ Section 8(2) of the Act.

¹⁸ Section 8(3) of the Act.

- (b) where a written agreement is not required to be so concluded, the agreement will come into force on the date on which the tenderer concerned is notified of the acceptance of its, his, or her tender.

[50] Section 16(3) furthermore provides that where in terms of a title of a tender, a written agreement is required to be concluded after the acceptance of a tender and the tenderer fails to enter into a written agreement within the 30-day period, or if that period has been extended by the board within the extended period, or if the tenderer, when required to do so, fails to furnish the required security for the performance of the agreement the board may withdraw its acceptance of the tender in question and accept any other tender from among the tenders submitted to it; or invite tenders afresh.

[51] Section 18 of the Act deals with the administrative work of the board. It provides that all administrative work, including the payment and receipt of moneys, in connection with the exercise of the powers and the performance of the functions of the board, must be performed by staff members designated by the Permanent Secretary of the Ministry of Finance, from among the staff of the Ministry of Finance.¹⁹

[52] Despite the fact that s 18(1) provides for the Permanent Secretary of the Ministry of Finance to designate staff members of that ministry to perform the board's administrative functions, the Act,²⁰ still empowers the board to require a staff member of any other ministry, or office, or agency to assist the board with the

¹⁹ Section 18(1) of the Act.

²⁰ Section 18(2) of the Act.

evaluation of any tender or to make recommendations to the board in connection with any tender. In addition, the section furthermore empowers the chairperson of the board or any administrative head designated by the board to execute any document on behalf of the board.²¹

[53] Having set out the statutory framework, which regulates the acquisition of services or goods on behalf of the Government of Namibia, I now proceed to consider the facts of this case.

[54] A contract is of course an agreement, which is binding at law. Therefore, the first enquiry is whether, on the facts of this matter, a valid agreement, was entered into between the appellant and the respondents. In a thorough presentation of the appellant's case, Mr Töttemeyer submitted that the answer was in the affirmative.

[55] The essence of Mr Töttemeyer's argument was that, although the power to acquire services or goods on behalf of the Government of Namibia vested in the board, the Permanent Secretary of the Office of the Prime Minister was, by virtue of the 'common law prerogative' power of the Government empowered to conclude contracts on behalf of Government.

[56] He additionally relied on s 18(3) of the Act, and argued that the board delegated its discretionary power to conclude a contract to the Permanent Secretary of the Office of the Prime Minister. Counsel thus contended that the

²¹ Section 18(2) of the Act.

appellant and the Office of the Prime Minister validly concluded the service level agreement.

[57] In my view, the argument by Mr Töttemeyer cannot be sustained. I say so for the following reasons: It is true that a number of authorities cited by counsel support the principles he contended for but, in my view, these cases are distinguishable on the facts from the one before us and that those authorities are therefore of no assistance to the appellant. Obviously, as argued by Mr Töttemeyer and on the authorities that he cites, the State and its agencies and or organs can contract or conclude agreements. The agreements must, however, be entered into on behalf of the State by the nominated functionaries.

[58] In my view, the Act does not alter or purport to alter the common law by excluding the State or its agencies' power to contract or conclude agreements. In fact, the Act recognises the State and its agencies' powers to contract, but prescribes the formalities relating to the exercise of the State's power to contract. It goes without saying that the State, as an artificial or legal *persona*, can only exercise its powers through some natural person or a constituted entity or body and that is what the Act regulates. The question that then arises is which functionary or entity has the power to conclude agreements on behalf of the State.

[59] When it comes to the procurement of services on behalf of the State, s 7(1) of the Act provides the answer to that question. Section 7(1) clearly provides that:

'Unless otherwise provided in this Act or any other law, the Board shall be responsible for the procurement of goods and services for the Government . . .'

[60] Section 21 of the Act, amongst other matters, provides that the provisions of this Act shall apply in respect of the procurement of all goods and services, by offices, ministries, and agencies for or on behalf of the Government. The section creates some exceptions but those exceptions are not relevant to this matter. It thus follow that the reference in s 7 to any other law cannot be interpreted to mean the common law. There is therefore no merit in the submission that the Office of the Prime Minister can, based on the State's prerogative power to conclude contracts, disregard the formalities prescribed by the Act, because s 21 clearly states that the Act applies to the Office of the Prime Minister.

[61] As I observed earlier, 'power' in legal parlance means lawfully authorised power. Public authorities possess only so much power as is lawfully authorised. I therefore conclude that only the board or an entity, to which the board has properly delegated its power, could, pursuant to an award of a tender, conclude contracts or agreements for the procurement of services on behalf of the State.

[62] This brings me to Mr Töttemeyer's argument that the board, in terms of s 18(3) of the Act properly delegated the power to conclude the agreement pursuant to the award of the tender to the Permanent Secretary of the Office of the Prime Minister.

[63] Section 18(3) of the Act provides that:

'The chairperson or any administrative head designated by the Board shall be competent to execute any document on behalf of the Board.'

The fallacy in Mr Töttemeyer's argument lies in the fact that, from the papers before us, there is no suggestion that the Permanent Secretary of the Office of the Prime Minister signed or executed the agreement on behalf of the board. In the recital part of the Service Level Agreement, which is the subject matter of this appeal, the parties are indicated as '*The Government of the Republic of Namibia (Office of the Prime Minister) (the Client) and Newpoint Electronic Solutions Pty (Ltd) (the Service Provider)*', and in the execution part, the agreement indicates that the Permanent Secretary signed for and on behalf of the client.

[64] The only logical conclusion is that the Permanent Secretary of the Office of the Prime Minister did not act as a delegate of the board but as a representative of the Office of the Prime Minister. I have found earlier on that only the board or an entity to which the board has lawfully delegated its power could, pursuant to the award of the tender, contract or conclude an agreement on behalf of the State.

[65] The reliance by Mr Töttemeyer on s 18(3) of the Act can also not assist or rescue the appellant. I say so because, in my view, s 18(3) does not deal with the delegation of the powers of the board, but only provides for the persons who must perform the administrative functions of the board. As I have indicated earlier the contention by Mr Töttemeyer that the board delegated its powers to the Permanent Secretary of the Office of the Prime Minister is not borne out by the facts of this case. The Permanent Secretary did not sign the agreement on behalf of the board but she signed it as a representative of the Office of the Prime Minister.

[66] Mr Töttemeyer's reliance on the *Turquand* rule is in my view equally misplaced. I say so for the reason that, in my view, the *Turquand* rule does not arise on the facts of this matter. In *River View Estate CC v DTA of Namibia* (SA 85/2019) [2022] NASC (30 June 2022), Damaseb DCJ stated that:²²

' . . . The rule [that is the *Turquand* rule] "cannot be used to create authority where none otherwise exists"; and it "only has scope for operation if it can be established independently that the person purporting to represent the company had actual or ostensible authority to enter into the transaction. The rule is thus dependent upon the operation of normal agency principles; it operates only where on ordinary principles the person purporting to act on behalf of the company is acting within the scope of his actual or ostensible authority".'

[67] In the present matter, the Act does not empower the Office of the Prime Minister to conclude agreements with successful tenderers. It is also so that the Act does not empower the board to delegate its power to the Office of the Prime Minister. It is further so, as I have indicated earlier that on the papers before us, there is no indication that the Permanent Secretary of the Office of the Prime Minister acted as a delegate of the board. We are therefore, in the present instance, dealing with a matter where the entity which concluded the agreement on behalf of the State had no power to contract on behalf of the State and thus exceeded its powers or acted unlawfully. The *Turquand* rule is therefore not applicable in the circumstances of this case.

Conclusion

[68] For the reasons set out in this judgment, I have concluded that the agreement between the appellant and the Office of the Prime Minister is invalid.

²² *River View Estate CC v DTA of Namibia* (SA 85/2019) [2022] NASC 20 (30 June 2022) para 57.

The High Court did not err when it declared that the contract between the appellant and the respondents is a nullity in law and is thus invalid. The appeal therefore fails and costs must follow the result.

Order

[69] In the result, the appeal is dismissed with costs consequent upon the employment of one instructing and one instructed legal practitioner.

UEITELE AJA

FRANK AJA

LIEBENBERG AJA

APPEARANCES

APPELLANT: R Töttemeyer (with him W Boesak)
Instructed by ENSAfrica | Namibia,

FIRST & SECOND RESPONDENTS: S Namandje
Instructed by Government Attorney