



**REPORTABLE**

CASE NO. SA 43/2022

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

**CHAIRPERSON OF THE REVIEW PANEL**

**First Appellant**

**CHAIRPERSON: CENTRAL PROCUREMENT BOARD  
OF NAMIBIA**

**Second Appellant**

**CENTRAL PROCUREMENT BOARD OF NAMIBIA**

**Third Appellant**

and

**STREAM TWO PROPERTIES CC**

**Respondent**

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

**Heard:** 14 July 2023

**Delivered:** 15 December 2023

**Summary:** The appellants have appealed against the decision of the High Court reviewing and setting aside a ruling of the Review Panel constituted in terms of the Public Procurement Act 15 of 1995 (the PPA), brought on review to it by the respondent.

The respondent submitted a bid following an invitation by the Central Procurement Board (the Board) for bids for the provision of protein, sugar, salt and

transportation to blenders' warehouses. During the evaluation process, the respondent was asked to provide additional information, including the full birth certificate of its sole member. Subsequently, the respondent's bid was deemed 'unresponsive' due to a perceived conflict of interest, as the respondent's sole member shared the same surname and physical and postal addresses as the members of two other bidding corporations, namely Degrande Investments CC and Degree Power Investment CC.

Additionally, the respondent and the two other corporations had similar, if not identical laboratory reports which were submitted as a part of their respective bids. These findings, which did not form part of the appellants' reasons for disqualifying the respondent's bid, came to light during the procurement statutory review process, having been stated in the answering affidavit prepared on behalf of the appellants. In response, the respondent contested its disqualification, arguing that it has legal identity as a corporation separate from that of its member and denying any conflict of interest.

The Review Panel noted that while the bid documents permitted disqualification for conflict of interest, the similarities in surnames and addresses alone were not enough for such a decision. The Review Panel suggested a holistic review of all the documents and set aside the Board's initial decision, directing the Board to reconsider the respondent's bid and stating that if a conflict of interest was found to exist, the Board may disqualify the respondent and provide reasons for doing so.

The matter escalated to the High Court on judicial review. The High Court found that the Review Panel exceeded its authority by seeking additional reasons for disqualification beyond those initially provided by the Board. The court ruled that the Review Panel should have focused on the original reasons for the bid's exclusion. Consequently, the High Court substituted the ruling of the Review Panel for an order setting aside the decision and remitting the matter to the Board with the direction for the Board to consider the respondent's bid together with other

bids through all the stages of the bid evaluation process. It is this decision that the appellants have appealed against.

*Held that*, the pivotal question on appeal is whether the instruction by the Review Panel for the Board to consider the bid documents in totality and ascertain whether there was evidence of a conflict of interest is unfair or unreasonable or could be impugned on any of the other multiple grounds of review advanced by the respondent in the court a quo.

*Held that*, in the context of the PPA's legislative framework, the Review Panel has the power to set aside a decision of the Board and to remit the matter to the Board for reconsideration with specific instructions. That a matter may be referred back to an administrative body with instructions to consider past and later events that may have occurred is also a settled principle at common law.

*Held that*, an allegation or reasonable suspicion of appearance of a conflict of interest – a matter that could conceivably taint the procurement process – could and should not be ignored due to their potential detrimental consequences. It was thus open to the Review Panel to instruct the Board to look into the matter so as to ensure that all the bids meet the criteria set in the bidding documents and are above board.

*Held further that*, it was not unlawful for the Review Panel to have directed that the bids be disqualified if they are found unresponsive on the basis of a conflict of interest. This was not only a legal requirement, but it would be the logical thing to do. Although it was not necessary for the Review Panel to say so, stating the obvious does not make the direction unlawful.

Accordingly, the appeal succeeds with costs, such costs to include the costs of one instructed and one instructing legal practitioner.

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SHIVUTE CJ (MAINGA JA and HOFF JA concurring):

### Introduction

[1] This appeal lies against an order of the High Court reviewing and setting aside a decision of the Review Panel brought on statutory review before it by the respondent, Stream Two Properties CC (Stream Two or the respondent). The Review Panel is appointed in terms of s 58(1) of the Public Procurement Act 15 of 2015 and has the power to adjudicate on applications for review brought to it by a bidder or supplier against a decision or action taken by the Central Procurement Board of Namibia (the Board) or by a public entity. To fully appreciate the context in which the appeal is to be decided, it is necessary to give the history of the events that culminated in the review application before the Review Panel and the ultimate appeal from the High Court to this Court.

### Background

[2] In or about 2020, the Board invited bids on behalf of the Ministry of Education, Arts and Culture under Tender number G/ONB/ CBN-04-2020 for the provision of protein, sugar, salt and transportation to blenders' warehouses. Stream Two submitted a bid for the tender. It subsequently received a letter from the Board, requesting it to furnish the Board with the full birth certificate of its sole member, Mr Herman Ando Nekomba, for the purpose of completing the evaluation of its bid.

[3] Mr Nekomba provided the requested information. Three months later, Stream Two received a notice of selection of procurement award in terms of s

55(4) of the Public Procurement Act (the PPA) read with reg 38(1) of the Regulations made thereunder and the executive summary of the bid evaluation report issued in terms of s 55(8) of the PPA. Stream Two was advised in the notice of selection that its bid was found by the Board to be 'unresponsive' for the reasons recorded in the executive summary of the bid evaluation report as follows:

'Bidder had the same surname, physical and postal address in their founding statements as Bidder No 27 and Bidder No 15. This is regarded to be a conflict of interest as ITB 5.2(d) states that conflict of interest is to "have a relationship with each other, directly or through common third parties, that puts them in a position to have access to information about or influence on the Bid of another Bidder or influence the decision of the Purchaser regarding this bidding."

[4] Bidder numbers 15 and 27 referenced in the bid evaluation report above were respectively Degrande Investments CC and Degree Power Investment CC that also separately submitted bids for the same tender. The respective members of these close corporations and Stream Two's sole member shared the same surname. The three close corporations also shared the same physical and postal addresses.

[5] It would appear also that the three corporations submitted to the Board similar if not identical laboratory reports on the tests conducted by the Southern African Grain Laboratory (SAGL) on the required content of the soya beans they intended to supply in terms of the tender should they have been successful in their bids. It seems that the corporations invariably collaborated in sending certain commodity samples to SAGL for tests and the respondent appears to have issued

a Certificate of Service to Degrande Investment CC for the purpose of participating in the same tender.

[6] These observations emerged from the answering affidavit – which in the procurement statutory review parlance is styled ‘replying affidavit’ – deposed to on behalf of the appellants. It is not surprising that the introduction of these additional instances of alleged conflict of interest was roundly denounced by the respondent as an impermissible attempt to introduce new grounds for the respondent’s disqualification through an answering affidavit. This in fact remains the kernel of the respondent’s argument on appeal.

[7] Degree Power Investment CC and Degrande Investments CC also joined Stream Two in the statutory review before the Review Panel, but neither participated in the judicial review in the High Court nor are they parties to this appeal.

[8] Furthermore, the acronym ‘ITB’ mentioned in the report stands for ‘Instructions to Bidders’. Paragraph 5.2 of the Instructions to Bidders (ITB 5.2) in the bid documents reads as follows:

‘A Bidder shall not have a conflict of interest. All bidders found to have a conflict of interest shall be disqualified. Bidders may be in a conflict of interest with one or more parties in this bidding process if [they]:

- (a) Have controlling shareholders in common; or
- (b) . . .
- (c) . . .

- (d) Have a relationship with each other, directly or through common third parties that puts them in a position to have access to information about or influence on the Bid of another Bidder or influence the decisions of the Purchaser regarding the bidding process; or
- (e) . . .
- (f) . . . '

[9] Proceeding with the presentation of the background to the matter, for the reasons stated in the executive summary of the evaluation report, Stream Two's bid was disqualified upfront and was not subjected to the bid evaluation process consisting of six stages. As noted above, the Board's decision disqualifying Stream Two's bid was taken on statutory review before the Review Panel pursuant to s 59 of the PPA.

[10] Stream Two's principal ground in that review was that upon registration, Stream Two acquired its own legal personality, rights and responsibilities separate from those of Mr Nekomba's. Therefore, when it submitted its bid it did so in its own name. This was not said in so many words in Stream Two's papers, but the implication for the above contention is that the Board thus erred by appearing to conflate the identity of the corporation with that of its member.

[11] Moreover, Stream Two also contended – following the wording of ITB 5.2 above regarding the type of the conflict of interest proscribed in the bid documents – that it neither had a relationship with any other bidder nor a relationship through common third parties that would give the bidders access to information about other bidders nor was it in a position to influence the Board as it did not have a relationship with anyone on the bid evaluation committee or the Board itself.

[12] It was argued that once Stream Two's disqualification by the Board is found to be unlawful as contended for by Stream Two, then its bid must be assessed and evaluated together with other bids through all six stages of the evaluation process. The Review Panel was thus urged to review, correct and set aside the Board's decision to disqualify Stream Two upfront.

*Review Panel ruling*

[13] In its ruling, the Review Panel observed that the bid documents made provision for the disqualification of bidders who were found to be conflicted. It noted the Board's finding of conflict of interest based on the surname, physical and postal addresses of the relevant applicants but found that these instances alone would not be sufficient to constitute a conflict of interest. It postulated that 'the strongest possible evidence to suggest a conflict of interest could be found in the laboratory reports, the stamps used and the lease agreement between Degree Power Investment CC and Degrande Investments CC'.

[14] It urged the Board 'to examine all documents in [their] totality to determine whether there was a conflict of interest or not'. In the interest of fairness and transparency, so the Review Panel reasoned, it set aside the Board's decision and directed the Board to consider all the documents provided by the applicants to determine if there was a conflict of interest or not. It directed further that – it would appear, merely stating a conclusion of law or logic – that if a conflict of interest was found to exist, the Board may disqualify Stream Two and provide reasons for doing so.





### Review before the High Court

[15] The decisions of the Review Panel and the Board were taken on judicial review before the High Court. In this review application, the respondent expressly stated that the Review Panel's decisions setting aside the Board's decision embodied in the notice of selection and remitting the matter to the Board for reconsideration were not impugned. The respondent's grievance was against 'a number of findings in the reasoning' of the Review Panel and the order it made directing the Board to 'determine holistically if there is a conflict of interest' between the respondent and the other two corporations, the members of which share a surname. It is axiomatic that an appeal lies against a judgment, ruling and/or order of a court or tribunal and not against the reasons therefor.

[16] All the same, the decision was impugned on multiple and wide-ranging grounds, including unfairness and unreasonableness; impermissibly broadening of the Review Panel's powers and functions inconsistent with the scheme of the PPA; failing to consider the complaint that the Board was not entitled to rely on grounds it initially did not rely on in disqualifying the respondent; relying on matters not raised in the pleadings; unfairly prescribing to the Board how to determine the matter upon its remittal to it; failing to order the Board to evaluate the respondent's bid along responsive bids; offending the *functus officio* principle by 'instigating' the Board to reassess allegations of conflict of interest, etc.

[17] The respondent also complained about the position taken by members of the Review Panel during the hearing of the matter, that they were at liberty to consider materials and information not attached to the parties' review pleadings

and affidavits, and that they were free to consider any other matter, whether raised by the parties or not. This complaint does not appear to have been persisted with on appeal.

[18] As regards the decision of the Board, despite this having been set aside by the Review Panel, it was sought to be reviewed on the grounds that: it was unlawful, unreasonable and irrational; it failed to distinguish between the respondent as a legal persona and its member; it found new reasons to *ex post facto* justify its decision; and it was so unreasonable that no reasonable decision maker would have made it.

#### High Court's approach

[19] Obviously aggrieved by the Review Panel's decision to disqualify it from further participation in the tender process, Stream Two took the decision on judicial review before the High Court, which found in its favour.

[20] The High Court noted that the Review Panel did not find the reasons given by the Board to exclude Stream Two valid, but that instead of setting aside the Review Panel's decision on this basis, the Review Panel examined the tender documents and came to its own conclusion that there may be evidence of a conflict of interest. The court reasoned that by embarking on this process, the Review Panel exceeded its powers as it was bound by the reasons given by the Board and could not find additional reasons to set aside the Board's decision on that basis.

[21] The court held furthermore that the overall objectives of the PPA and the need to allow a competitive bidding process were matters known by the Board at the time it decided to exclude Stream Two from further participation in the bidding process. As such, those considerations should have guided the Board when deciding whether there was a conflict of interest or not. The reason of a conflict of interest based on similarity of the surname of members of the corporations and the same physical as well as postal addresses of those corporations were the bases upon which the review application was launched before the Review Panel.

[22] As such, the Review Panel erred in finding additional reasons. To remit the matter to the Board to find additional possible instances of a conflict of interest as the Review Panel had done, would allow the Board to have ‘a second bite at the cherry’ and this was impermissible.

[23] The High Court thus substituted the ruling of the Review Panel for an order setting aside the decision and remitting the matter to the Board with the direction for the Board to consider Stream Two’s bid together with other bids through all the stages of the bid evaluation process. It is this decision that the appellants have appealed against.

#### Legislative context

##### *The Public Procurement Act*

[24] Certain provisions in the PPA were amended in 2022. The Public Procurement Amendment Act 3 of 2022 came into force on 7 October 2022, subsequent to the finalisation of proceedings giving rise to the present appeal.

Therefore, the relevant provisions of the PPA in this appeal are those in force at the time of the hearing of the review application prior to amendments. With this caveat out of the way, it remains to briefly summarise the legislative context in which the appeal stands to be decided.

[25] The overall objects of the PPA are, amongst others, to promote integrity, accountability, transparency, competitive supply, effectiveness, efficiency, fair-dealing, value for money, responsiveness and informed decision-making.<sup>1</sup> In the execution of its functions, the Board is enjoined to strive to achieve high standards of transparency and accountability considering the objects of the PPA and the need to obtain value for money.<sup>2</sup> The above principles including those of consistency, legality, integration and accountability are some of the fundamental values underpinning the procurement system in the country.<sup>3</sup>

#### *The Board*

[26] The Board consists of nine members appointed by the Minister responsible for finance 'after an open, fair and transparent prescribed process of invitation, interview and recommendation by a recruitment committee'.<sup>4</sup> A member of the Board owes a fiduciary duty to act with fidelity, honesty, integrity and in the best interest of the Board and the procurement system.<sup>5</sup> He or she must strive to achieve the highest standards of transparency, accountability and the need to obtain best value for money.<sup>6</sup>

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<sup>1</sup> Section 2(a) (as amended).

<sup>2</sup> Section 9(2).

<sup>3</sup> Section 6(2).

<sup>4</sup> Section 11(1)(c).

<sup>5</sup> Section 10(1)(a).

<sup>6</sup> Section 10(1)(c).

[27] In relation to procurement or disposal of assets, the Board's functions include the power to examine such records or other documents and to take copies or extracts from them<sup>7</sup> as well as to commission any studies relevant to the determination of the award of procurement or disposal contracts.<sup>8</sup> It is also the Board's function to review the recommendations made by its bid evaluation committee.<sup>9</sup>

[28] In terms of s 55, the Board must award a procurement contract to the bidder having submitted the lowest evaluated substantially responsive bid which meets the qualification criteria specified in the pre-qualification or bidding documents. 'Responsive' in relation to a bid, is defined in the definitions section of the PPA as meaning 'responsive to the basic requirements of a bid regarding ability to perform and complete on time'.

[29] The phrase 'bidding document' is defined as meaning 'any document issued by a public entity on the basis of which bidders prepare bids; and includes any document which contains instructions to bidders, specifications, maps, designs, terms of reference, work schedules, evaluation criteria, bills of quantities, conditions of contract or other similar items'. The Board or public entity is required to promptly and in a prescribed manner publish a notice of every procurement or disposal award together with the executive summary of the bid evaluation report.<sup>10</sup>

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<sup>7</sup> Section 9(1)(b).

<sup>8</sup> Section 9(1)(c).

<sup>9</sup> Section 9(1)(l).

<sup>10</sup> Section 55(8).

### *The Review Panel*

[30] Subsection (1) read with subsec (3) of s 58 provided that when the Minister thinks it necessary on account of allegations made in the review application submitted to the Review Panel, he or she may appoint five suitably qualified and experienced persons in specified fields to constitute a Review Panel. As noted earlier, the Review Panel is appointed to, amongst other things, adjudicate on applications for review of a decision or action taken by the Board or a public entity.

[31] The Review Panel has wide powers to deal with the review application. It may dismiss the application;<sup>11</sup> it may direct the Board or public entity to act in compliance with the PPA;<sup>12</sup> it may set aside the decision or action wholly or in part and refer the matter back to the Board or entity for reconsideration with specific instructions;<sup>13</sup> it may instead correct the decision or action that is not in compliance with the PPA;<sup>14</sup> it may also confirm such decision<sup>15</sup> or order that the procurement proceedings be terminated and started *de novo*.<sup>16</sup>

[32] Regulation 43(4) of the Public Procurement Regulations empowers the Review Panel to request or allow the submission of additional statements by parties to a review application and non-parties alike 'as may be necessary for the fair resolution of the review application'. Additionally, sub-reg (1) read with (2) of reg 43 authorises the Review Panel any time before the date of hearing of a review application to request any party to the review application to furnish the

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<sup>11</sup> Section 60(a).

<sup>12</sup> Section 60(b).

<sup>13</sup> Section 60(c).

<sup>14</sup> Section 60(d).

<sup>15</sup> Section 60(e).

<sup>16</sup> Section 60(f)

Review Panel with additional information, document or evidence relating to the application.

The parties' contentions

[33] The appellants argue, with reference to decided cases that once a decision or action is set aside on review, it ceases to exist. Therefore, so the argument proceeded, the court a quo erred in upholding the respondent's contentions to the contrary. It was contended that where a matter under review is remitted to the administrative body for reconsideration, such body is at large to consider all relevant factors in coming to a new decision, thereby entitling it to the proverbial second bite at the cherry. Therefore, so it was argued, after the Board's decision disqualifying the respondent was set aside, the Board could not be bound by the reason it initially relied upon regarding the similarities of the surname and addresses.

[34] As to new matters which were allegedly not raised before the Review Panel, the appellants contend that those matters were not specified in the respondent's papers, but argue that if they relate to the alleged conflict of interest between the respondent and the other two entities, then any document or record, including bid submissions of all the entities, would be relevant in the determination of the conflict of interest.

[35] On behalf the respondent, it was submitted that the finding by the Review Panel of a possible conflict of interest based on laboratory reports, the stamps and the lease agreement was correctly set aside by the High Court. It was argued that



such finding was inconsistent not only with the remedy sought by the respondent, but also with the scheme of the PPA and the principle that administrative bodies are bound by the reasons initially given to justify their decisions.

[36] As to the scheme of the PPA, it was contended that the Review Panel was appointed by the Minister considering the allegations made in the review before that body. Given that position, so the argument developed, the decision by the Review Panel remitting the matter to the Board with the direction for the Board to 'determine holistically if there is a conflict of interest' is inconsistent with the scheme of the PPA and the principle that a public body is bound by the reasons given.

[37] On the issue of the alleged conflict of interest, the respondent argued that the High Court was correct in determining that issue only on the basis of the ground pleaded by Stream Two before the Review Panel in light of the reasons furnished by the Board.

[38] It was argued that the court a quo did not misdirect itself in holding that the appellants were bound by the reasons given for Stream Two's disqualification. This was contended to be so, because Stream Two's review application was informed by the reasons advanced by the Board in the executive summary of the bid evaluation report. The 'additional reasons' given by the Board in its answering affidavit before the Review Panel were not embodied in the evaluation report and were not considered by the Minister when appointing the Review Panel pursuant to subsec (1) read with subsec (3) of s 58.

[39] Finally, it was argued that the court a quo was correct to direct the Board to evaluate Stream Two's bid through all the stages, because it was bound to do so once the Review Panel's decision was set aside. In oral arguments, the respondent's legal practitioner submitted that the decision by the Review Panel to refer the matter back to the Board, was likely to be circular in that it would further delay the procurement process.

### Evaluation

[40] It is evident from the pleadings that at the core of the respondent's complaint before the Review Panel was the Board's decision to disqualify its bid on the basis of conflict of interest. The respondent did not appeal against the Review Panel's decision setting aside the Board's decision. Instead, its complaint in this respect is that the Review Panel considered materials and information outside of the pleadings in the statutory review before the Review Panel; unilaterally given to it by the Board.

[41] Stream Two also pleaded that the Review Panel made findings outside the ambit of the review before it, given the grounds of review raised by the respondent and the purpose for which the Review Panel was appointed. The respondent pertinently questioned the legality of the instruction by the Review Panel for the Board to carefully consider the bid documents and discern if there was a conflict of interest. It regarded this direction as an imposition, nay instigation, by the Board.

[42] As seen from the consideration of the legislative context above, the Review Panel has the power to set aside a decision of the Board and to remit the matter to the Board for reconsideration with specific instructions. That a matter may be referred back to an administrative body with instructions to consider past and later events that may have occurred is also a settled principle at common law.<sup>17</sup> The respondent does not take issue with this position. Its submission is rather that the Review Panel could issue instructions only in a manner that is consistent with the scheme of the PPA, more specifically the grounds of review and allegations made in the review application that necessitated the appointment of the Review Panel.

[43] The pivotal question on appeal is whether the instruction by the Review Panel for the Board to consider the bid documents in totality and ascertain whether there was evidence of a conflict of interest is unfair or unreasonable or could be impugned on any of the other multiple grounds of review advanced by the respondent in the court a quo.

[44] The respondent is entirely correct in the proposition that an administrative body is bound by the reasons provided for its decision and may not rely on new reasons raised for the first time in review proceedings in which its decision is being challenged. A reading of the papers makes it clear that the underlying reason for the disqualification of the respondent's bid was conflict of interest. The characteristics of such conflict given in the executive summary of the bid evaluation report were similarities of surname and residential address.

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<sup>17</sup> *Mouse Properties Ninety Eight CC v Minister of Urban & Rural Development & others 2022 (2) NR 426 (SC)*.

[45] The details about similarities of the surname and physical address are but manifestations of the alleged conflict. It cannot be an accurate statement that the allegation of a conflict of interest was raised for the first time in reply. What was raised for the first time in reply were other indicia of a possible conflict of interest, namely laboratory results, stamps and the lease agreement. These were highlighted by the Review Panel in its ruling. The Review Panel instructed the Board to pay particular attention to them in the overall consideration of the bidding documents.

[46] A careful reading of the language used in the Review Panel's ruling establishes that its finding on conflict of interest was tentative. It did not find as a fact that a conflict of interest existed. To recap, the Review Panel first considered the bidding documents, especially the instructions to bidders and noted that conflict of interest was one of the vices prohibited therein. It found further that a finding of conflict of interest could result in disqualification. The Review Panel then made a tentative observation. It said: 'the strongest *possible* evidence *to suggest* a conflict of interest *could* be found in the laboratory reports, the stamps used and the lease agreement between . . .'. (Emphasis added).

[47] It then issued the much-maligned instruction; directing the Board to consider all the documents provided by the applicants in the review to determine if there was a conflict of interest. Was this an unfair or unreasonable direction? I am not persuaded that it was. The instruction to carefully consider the documents to determine whether a conflict of interest prohibited in the instructions to bidders

existed or not is lawful as it sought to preserve the integrity of the procurement process.

[48] The Review Panel was empanelled to consider the complaint regarding dissatisfaction with the finding of conflict of interest and Stream Two's disqualification upfront from consideration through the six evaluation stages. The respondent's bid could not conceivably be evaluated if there was evidence of a conflict of interest. This is because the bid was statutorily required to be tested first against qualification criteria specified in the Instructions to Bidders, including ITB 5.2, before it could be eligible for further consideration through the remaining evaluation stages. This is a legal requirement. As noted above, the relevant part of s 55(1) provides that the Board must award a procurement contract to the bidder who submitted the lowest evaluated substantially responsive bid, *which meets the qualification criteria specified in the pre-qualification or bidding documents*. (Emphasis added).

[49] As noted earlier, the principles of integrity and competitiveness are some of the fundamentals that go to the heart of a procurement process. A fair and competitive procurement process is essential for several reasons. First, it ensures transparency and accountability, as all participants have an equal opportunity to bid for the contract. This promotes confidence and trust in the system, as it minimises the chances of favouritism or corruption. Secondly, a competitive process encourages innovation and quality. When multiple bidders compete, they strive to provide the best value for money, delivering innovative solutions and high-quality products or services.

[50] Additionally, a fair procurement process promotes cost-effectiveness by encouraging bidders to offer competitive prices. This helps the Board or public entities achieve value for money and obtain the best possible outcome and safeguard public interests by maintaining public trust in the system. Overall, a fair and competitive procurement process protects the interests of both the Board or public entity and the bidder, fostering a healthy and efficient marketplace. It is in that context that an allegation or reasonable suspicion of appearance of a conflict of interest – a matter that could conceivably taint the procurement process – could and should not be ignored due to their potential detrimental consequences. It was thus open to the Review Panel to instruct the Board to look into the matter so as to ensure that all the bids meet the criteria set in the bidding documents and are above board.

[51] As to whether the respondent and the affected other bidders were in the type of conflict of interest prohibited under ITB 5.2, it is for the Board to make that call and a court should not second guess their decision in that regard.

[52] To conclude on this aspect, it was not unlawful for the Review Panel to have directed that the bids be disqualified if they are found unresponsive on the basis of a conflict of interest. This was not only a legal requirement, but it would be the logical thing to do. Although it was not necessary for the Review Panel to say so, stating the obvious does not make the direction unlawful.

[53] As to the argument based on the circularity of the process, the answer lies in the timelines set within which the bid evaluation committee must complete the process of examination and evaluation of bids. Regulation 7(3) provides that such process must be completed 'within 14 days after the opening of the bids or such other period as a public entity may extend, but not exceeding 30 days'. The process is therefore unlikely to be inordinately delayed by the remittal of the matter to the Board for its consideration. The appeal should therefore succeed and an order will be made to that effect. It remains to make the appropriate order.

#### Order

[54] In the result, the following order is made:

- (a) The appeal succeeds with costs, such costs to include the costs of one instructed and one instructing legal practitioner.
  
- (b) The order of the High Court is set aside and the following order is substituted therefor:

'The application is dismissed with costs, such costs to include the costs of one instructed and one instructing legal practitioner.'

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**MAINGA JA**

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**HOFF JA**



APPEARANCES

APPELLANTS:

G Narib (with him J Ludwig)

Instructed by Government Attorney

RESPONDENT:

S Namandje (with him K Gaeb)

Of Sisa Namandje & Co Inc