



IN THE HIGH COURT OF BOTSWANA HELD AT MAUN

MAHMN-000062-21

IN THE MATTER BETWEEN

ODN INVESTMENTS (PTY) LTD

APPLICANT

AND

TSHEPISO DITSILE

1ST RESPONDENT

MOGATSAMABE NTHEBOLANG

2ND RESPONDENT

KOUSHA HYGIENE SERVICES

3RD RESPONDENT

PROPRIETARY) LIMITED

Attorney Mr. Gobhoza M. T for the Applicant

Attorney Ms. Masilo B. for the Respondent

JUDGMENT

NTHOMIWA NTHOMIWA J.

Introduction

1. In this matter, the Applicant approached the Court claiming various reliefs but most importantly review of the decision of

the 1st and 2nd Respondents disqualifying it at stage two of the tender it had floated. The Applicant therefore seeks the following Orders:

1. That the 1st and 2nd Respondent's decision made and issued through a letter dated 13th August 2021 and received by the Applicant on the 2nd August 2021 to disqualify the Applicant from stage 2 for technical evaluation of Tender No: KG/PH/EH/15/2021 be hereby reviewed and set aside on the grounds that such an adverse decision was illegal/unlawful, irrational, procedurally irregular and unreasonable and was contrary to the Applicant's legitimate expectation;
2. That the 1st and 2nd Respondent's decision made and issued through a letter dated 13th August 2021 and received by the Applicant on the 20th August 2021 to award Tender No: KG/PH/EH/15/2021 to the 3rd Respondent be hereby reviewed and set aside on the grounds that such decision was irrational and unreasonable;

3. That 1st and 2nd Respondents be ordered to dispatch within 14 court days of receipt of the notice of motion, to the Registrar of the High Court, either:
 - i. The record or any documentation related to such decision sought, be reviewed and set aside, together with such reasons as it is, by law, required or it desires to give or make; or
 - ii. Where no such record or documentation was kept or is available. a written explanation for lack of the record or documentation, together with such reasons as it is, by law, required or it desires to give or make; and to notify the Applicants that it has done so.
4. That the Court should make an order in favour of the Applicant on such further and alternative relief(s) as the Court may deem fit.
5. That the Respondents pay costs of this application either separately or jointly and severally, one paying and the other being absolved.

2. It is the Applicant's contention that the 1st and 2nd Applicants acted illegally/unlawfully in disqualifying it. In view of that it want the court to review and set aside tender award of Tender No: KG/PH/EH/15/2021 to the 3rd Respondent.

3. The 1st and 2nd Respondents' case on the other hand is that the decision to award Tender No: KG/PH/EH/15/2021 to the 3rd Respondent was lawful. They further submitted that:
 1. The 1st and 2nd Respondents acted within the ambits of the law.
 2. The Invitation To Tender (ITT) stipulated that the basis of the award could be a least cost selection method in which the evaluation was in three stages being;

Stage One- Preliminary Examination with respect to compliant requirements.

Stage Two- Technical Evaluation.

Stage Three- Cost Evaluation.

4. In the circumstances the basis of the award would be a technically compliant lowest bidder. It was therefore the 1st and

2nd Respondents case that the Applicant failed to make out a proper case for review given the circumstances as it failed to show any illegality or unlawfulness with regards to the above and to establish that it satisfied any of the conditions as set out in the ITT.

The Issues

5. The issues for determination are therefore as follows:
 1. Whether the 1st and 2nd Respondents acted unlawfully such that the decision to award Tender No: KG/PH/EH/15/2021 to the 3rd Respondent is reviewable.
 2. Whether the 1st and 2nd Respondents considered factors outside of the ITT such that it could render the decision to award Tender No: KG/PH/EH/15/2021 to the 3rd Respondent reviewable.
 3. Whether the alleged fraudulent misrepresentation by the 3rd Respondent was known to the 1st and 2nd Respondents at the time of making the award and whether the Applicant can rightfully claim it for the purposes of reviewing the decision of the 1st and 2nd Respondents.

6. The crux of the Applicant's submissions as advanced here is that the 1st and or 2nd Respondent's decision made and issued through a letter dated 13th August 2021 and received by the Applicant on 20th August 2021 disqualifying it at stage 2 for technical evaluator of Tender No: KG/ PH/ EH/ 15/2021 is reviewable and ought to be set aside on the grounds that such an adverse decision was illegal/unlawful, irrational, procedurally irregular and unreasonable and was contrary to the Applicant's legitimate expectation.

Factual background

7. On 5th April 2021, Kgatleng District Council floated a public tender under Tender No: KG/ PH/ EH/ 15/ 2021, for community based refuse collection service (refuse collection, transportation and disposal). Both the Applicant and the 3rd Respondent together with others participated in the tender by submitting their bidding documents.
8. The material terms and conditions of the said tender were as follows:

1. That the tender is strictly reserved for companies based in Boseja South, Oodi, Pilane and Ntshinoge only;
2. That companies are allowed to tender only at the ward they are based;
3. That a letter of confirmation from the Village Development Committee (VDC) that the company/owner is based in the respective ward shall be required;
4. That bidders shall attach an Affidavit from Botswana Police Service that the company is based in the council ward;
5. That the Local Authority's Standardized Conditions of tender apply to this service tender, for which all the applicable tender data is contained in the tender documents;
6. That the procurement method that applies for this tender is a technical compliance selection method as per Regulation 74 of the Local Authority Procurement and Asset Disposal Regulations, 2009; and
7. That the Kgatleng District Council shall hold all authorized signatories liable on behalf of the tenderer.

9. The Applicant submitted, among all other documents, a letter confirming that its Director (owner) resided at Ntshinoge Council ward, at Malotwana village. The letter was duly signed and stamped by the Village Development Committee (VDC).
10. The Applicant said among other documents that it submitted was an Affidavit which was commissioned at Botswana Police Service which stated that its Director (owner) resided at Ntshinoge Council ward, at Malotwana village.
11. The Applicant subsequently received a letter dated 24th June 2021 which disqualified it from the tender, and awarding it to 3rd Respondent, on grounds that:

"clause 1.83 (b) which says "A letter of confirmation from the village Development Committee that the company/owner is based in the council ward tendered for" and clause (c) which says that "Affidavit from Botswana Police Service that the company/ owner is based in the council ward tendered for" and both of your letters are for Malotwana instead of Ntshinoge"

12. Its internal appeal in terms of the prescribed format was dismissed by the Appeals Board chaired by the 1st Respondent through a letter dated 13th August 2021 signed

by 2nd Respondent. The said letter was only sent by postage and was collected by the Applicant on 20th August 2021.

Applicant's case

13. The Applicant's case is therefore that the 1st and or 2nd Respondent erred and misdirected themselves in disqualifying it on considerations that were neither stipulated in the tender documents nor were part of any tender regulations and or law. The specific requirement by the tender document was for one to submit a letter and Affidavit stating that either the company or the owner was based in the Council ward which was tendered for. The Applicant says it complied with this requirement. Council ward is not given a specific and distinct definition in the tender document or in any relevant statutory law. Therefore since Malotwana village is in terms of the Government Gazette Extra Ordinary Vol.LI. No.35 of 10th July 2013, situated within Ntshinoge Council Ward the Applicant was compliant with the tender requirements.

14. Further the 3rd Respondent's participation and wining of the award was based on misrepresentation that the 3rd

Respondent's Directors were based in the Council ward that was tendered for, being Ntshinoge when in actual fact, the 3rd Respondent was based at Plot 1054, Machailo Ward, Bokaa which is outside the Ntshinoge Council ward. Its directors being Ikaneng Boss Botshomanyane who resided at Plot 1054, Bokaa Ward, Oodi and Onalenna Katlego Balole who resided at Kgosing Ward, Ranaka/Mochudi which places are both out of Ntshinoge Council Ward.

15. According to the Applicant the award of the tender to 3rd Respondent was unlawfully influenced by misrepresentation of the 3rd Respondent's directorship status which fact was within 1st and 2nd Respondents' knowledge.
16. The Applicant says it was never afforded an opportunity to be heard or to adduce any evidence in respect of the concerns it had raised at all material stages of the evaluation, and specifically at appeals level before the Appeals Board. Further it says that the determination by the Appeals Board on the cost/ financial evaluation in their letter dated 13th August 2021 gave it a legitimate expectation that it was successful at the technical evaluation as no tenderer could proceed to

financial evaluation without succeeding on the technical evaluation.

1st and 2nd Respondents' case

17. The 1st and 2nd Respondents laid out their defence in their answering affidavit. They argued that the Applicant's tender documents were not compliant in that Malotwana is a village on its own, while Ntshenoge is a ward situated in Mochudi. Further the administrative wards for Kgatleng District have been demarcated by the Village Development Committee (VDC) in terms of the list attached to the 1st Respondent's answering Affidavit as KDCI which wards are admittedly different from those listed in KDC2. Thus although Ntshenoge and Malotwana are under the same polling ward/station they have separate VDCs for administrative purposes. Lastly the Applicant was never considered at the financial stage which was the last stage in the evaluation process.

The Law

18. It is trite that to succeed in a judicial review the Applicant must show that the decision complained of was either improper / irrational or unlawful/illegal. See **Landmark**

Projects (Pty) Ltd & others, Case No. CACGB 029-21 (Unreported). Further as stated by the Respondents in their heads of arguments all contracts must be performed honestly and that contracting parties must not deceive or otherwise knowingly mislead each other about matters directly linked to the performance of any contract they have concluded or entered into. See **Bhasin v Hrynew [2014] 3 SCR 494**.

19. It is trite that in review proceedings, the court will only interfere with the decision of a public authority if the decision was reached outside the empowering statute, that is to say illegally, or where the decision was reached without due regard to the rules of natural justice or without procedural fairness, that is procedural impropriety and where the decision reached is so irrational or unreasonable. See **Raphethela v Attorney General [2003] 1 BLR 591** *Mothusi v The Attorney General [1994] BLR 246 (CA)*.
20. In **Air Botswana V Thembo Lebang and Others CACGB-105-12** the court confirmed circumstances under which the court will interfere and review administrative decisions. It stated:

"It is now recognized that the courts will review and interfere with such action in three circumstances, i.e. first where the decision-maker acts illegally, contrary to the statute empowering him to act. There are many types of illegality that may be committed. The second ground for interference by the court is where the decision made is grossly unreasonable to the extent that a review court can only say that no person acting reasonably could ever have come to that decision. In other words, when the review court comes to the conclusion that the decision maker was irrational. Lastly, interference will occur where it is shown that the decision-maker acted procedural and the decision-making process is unfair. "

21. It is also trite that the central issues in review proceedings are not concerned with the substantive aspects of the decision sought to be reviewed but with the method used in arriving at that decision.

Statutory provision

22. Section 29 of the Local Authorities Procurement and Asset Disposal Act Cap 42:11 (herein referred to as the LAPAAD) further provides guidance to those who evaluate bids for tenders. It provides:

"In the evaluation of a bid no factor outside those explicitly stated in the bidding package

shall be taken into account by a committee in arriving at a recommendation or making an award unless there are reasons to use additionally or industry standard or best practice."

23. The 1st and 2nd Respondents in their Answering Affidavit, particularly at paragraphs 16.2 to 16.6 say that consideration of the award was done using information from the Village Development Committee ward demarcation document referred to as KDCI which the Applicant has benefited from in the past in Tenders of a similar nature awarded by the Kgatleng District Council. This indicated that the use of the ward descriptions as indicated above was information that the Applicant was aware of and fell within the exception as stated in Section 29 as being "industry standard or best practice."
24. Thus the decision making process of the wards was lawful it as in accordance with the requirement of Section 29 of the LAPAAD Act. I proceed to deal with the grounds raised for review of the Respondents 'decision.

Illegality/unlawful

25. The question is whether in making that decision the Respondents acted lawfully. That is in following the information from the village Development Committee ward demarcation document were the Respondents acting lawfully. The case of **Medical Rescue International Botswana Ltd v The Attorney General of Botswana [2008] All Bots 20 (HC)** discussed the 3 grounds that may result in a review of administrative conduct. The court stated:

"As I have noted, the three conventional grounds, on which administrative conduct may be subjected to judicial review, are said to be 'illegality', 'irrationality', and 'procedural irregularity'. According to the doctrine legality an administrative body, such as the Board, is constrained by the principle that it may exercise no power, or perform any function, beyond those bestowed on it by law. "

26. The question here is whether the Respondents were candid in assessing the Applicants tender and whether their decision fell under any of the grounds mentioned in the Medical Rescue International, Botswana Case. The Applicant argued that when the adjudication committee and eventually

the 1st and 2nd Respondents made a finding by relying on a document or consideration which was not part of the scope of the tender, they exceeded the powers that were bestowed upon them and therefore acted illegally.

27. As stated earlier critical to evaluation of bids is Section 29 of the Local Authorities Procurement and asset Disposal Act which enjoins the board in evaluating bids not to consider any factor outside those stated in the bidding package:

"unless there are reasons to use additionally, an industry standard or best practice."

28. In the case of **Landmark Projects (Pty) Ltd & Others v. Cul De Sac (Pty) Ltd Case No. CACGB 029-21** the Court of Appeal dealing with a similar provision in the PPADB Act stated that both the Act (Section 36) and the Regulations prohibited the determination or evaluation of any bid outside the criteria specified in the tender documents.

29. The Court opined that:

"According to De Smith Judicial Review, 6th Edition, by Woolf and Le Sueur at P225-6; "A decision is illegal if it: (a) contravenes or exceeds the terms of the power which authorizes the making of the decision; (b)

pursues an objective other than that for which the power to make the decision was conferred; (c) is not authorised by any power; (d) contravenes or fails to implement a public duty."

30. I agree with the observation made that as a general observation, an Invitation to Tender package once issued constitutes an offer to all potential bidders to enter into a bidding process. It is not a mere invitation to treat. This is so because as soon as bidders submit their tenders, a contract, known as a process contract, comes into existence, and the rights and the obligations of the parties (bidders and the procuring entity), crystalize.

31. Differently stated, a tendering process gives rise to the formation of two (2) separate contracts. The first is the "bid" or "process" contract which governs the manner in which the tendering process is to be conducted. The second contract is the "substantive" contract to perform the work that has been bid, which comes into existence once the bid has been accepted by the principal.

32. The tender package also establishes specific terms and conditions of the contract. Similarly, embedded in the tender package are the express and implied terms of good faith and fair dealing.

33. In **Johannesburg Consolidated Investment Co v Johannesburg Town Council 1903 T.S. 111 @ 115** the court held that:

"Whenever a public body has a duty imposed upon it by statute, and disregards important provisions of the statute. or is guilty of gross irregularity or clear illegality in the performance of the duty, this court may be asked to review the proceedings complained of and set aside or correct them. This is no special machinery created by the Legislature: it is a right inherent in the Court...The nonperformance or wrong performance of a statutory duty by which third persons are injured or aggrieved is such a cause as falls within the ordinary jurisdiction of the court."

34. In *casu*, what is common cause is that the sole tender document required a letter of confirmation from the Village Development Committee (VDC) that the company/owner was based in the respective ward and an Affidavit from

Botswana Police Service that the company/owner was based in the council ward.

35. It is on record that the Applicant submitted both the letter from Village Development Committee (VDC) and an Affidavit which confirmed that the Applicant's director (owner) resided at Malotwana village which in terms of the Government Gazette Extra Ordinary Vol.LI, No.35 of 10th July 2013 is situated within Ntshinoge Council Ward.
36. While the 1st and 2nd Respondents concede that Ntshenoge and Malotwana are under the same polling ward/ station their position seems to be that the same "have separate VDCs for administrative purposes." They further aver in their answering Affidavit that "the administrative wards for Kgatleng District have been demarcated by the Village Development Committee (VDC) in terms of the list" they attached.
37. In its submission the Applicant states that the tender documents required only establishment of council ward not administrative ward as now demanded by the Respondents. In any event, the adjudication committee and eventually 1st

and 2nd Respondents seem to have placed reliance, in coming to that conclusion, on the VDC list which was neither part of the tender package nor was any reference made to it in the tender package. The said list is not even a gazetted or legally binding demarcation.

38. Thus, as far as the Respondents considered factors outside bidding packages in the evaluation and adjudication of the bid and relied on factors outside those explicitly stated in the bidding package in disqualifying the Applicant in my view, such amounted to an illegality.

Irrationality/unreasonableness

39. Irrationality was described by Shreiner JA in **Attorney General and Another & Kgalagadi Resources Development Company (Pty) Ltd [1995] BLR 234 (CA)**.

The court stated:

*"It seems to me that in the present case we are dealing with a possible case of irrationality" or, in the terminology of Lord Greene in **Associated Provincial Picture Houses (Pty) Ltd v***

**Wednesbury Corporation [1947] 2 ALL ER at
680 at 682** “unreasonableness”

*“In South Africa, dealing with common law review
in relation to the Stock Exchange, Corbett J.A.’s
exposition as he then was said at page 152 A-Cin
that:*

*Broadly in order to establish review grounds it
must be shown that the decision maker failed to
apply his mind to the relevant issues in
accordance with the 'behest of the statute and the
tenets of natural justice'. Such failure may be
shown by proof, inter alia, that the decision was
arrived at arbitrarily or capriciously or mala fide
or as a result of unwarranted adherence to a fixed
principle or in order to further an ulterior or
improper motive; or that the decision maker
misconceived the nature of the discretion
conferred upon him and took into account
irrelevant considerations or not relevant ones; or
that the decision of the decision maker was so
grossly unreasonable as to warrant the inference
that he failed to apply his mind to the matter in
the manner aforesaid. " **Johannesburg Stock
Exchange and Another v. Witwatersrand
Nigel Ltd and Another 1988 (3) SA 132 (AD)
at 152-C***

41. The Board plays a critical role in the evaluation of bids in tenders that falls within its mandate. It has to be guided by certain principles known to that industry and ultimately

ensures a fair outcome of the assessment or adjudication it makes. The court of Appeal in **PPADB v Researched Solutions Integrators [2006] 1 BLR 319 CA** quoted the following passages with approval from Marumo J. **Researched Solutions Integrators (Pty) Ltd (formerly known as AST Botswana (Pty) Ltd) v The Public Procurement and Asset Disposal Board and Others [2005] 2 BLR 493**), as presenting a proper emphasis on the importance of the Board's function;

"The key principles demanded by the Act are fairness, equity, accountability and transparency. An attitude on the part of either the [Board/ or the procurement entities under its supervision which debases these basic and rudimentary principles, so readily apparent even upon a precursory, elementary consideration of the Act must meet with the Cement disapproval of the courts. The [Board] is constituted to be a fair and principled adjudicator. It must not only be fair and principled, it must be seen to be so. "

42. The question here is whether in assessing the bids and subsequently rejecting the Plaintiff the, the Respondents were guided by the principles laid down above. The Applicant submits that the 1st and 2nd Respondents' decision to disqualify it on the basis of considerations of factors and

list which were never expressed in the tender document was a clear demonstration of lack of fairness, accountability and transparency. Their decision was ultimately irrational and a grossly unreasonable.

43. Thus in the case of **Southern District Council v Kelesitse 2014 ALL Bots 449 (CA)** a case which concerned a District Council, such as the present the court held that the appellant as a local authority established under the Local Government (District Councils) Act (Cap 40:01), now repealed and replaced by the Local Government Act, 2012 was subject to the provisions of the Local Authorities Procurement and Asset Disposal Act (Cap 42: 1 1) ("the LAPAD"), including Section 34 which enjoins a local authority to conduct its procurement activities in a manner which promotes transparency, accountability and fairness.
44. What is disturbing in this matter is the fact that the tender was awarded to 3rd Respondent whose status at the time of tendering was equally not compliant consideration being given to the factors which it used to disqualify the Applicant. It has not been proved that the VDC had

authority to re-demarcate wards which had already been demarcated by the government gazette. If not, then relying on wards which had not been gazetted as prescribed would be wrong and unlawful. It does not matter whether the Applicant benefitted from the error in the past, what is critical at this point is the lawfulness of the decision which was based on wrong wards.

45. It has been demonstrated that the 3rd Respondent is itself based at Plot 1054, Machailo Ward, Bokaa which is outside the Ntshinoge Council ward. Its directors being Ikaneng Boss Botshomanyane resides at Plot 1054, Bokaa Ward, Oodi whilst Onalenna Katlego Balole resides at Kgosing Ward, Ranaka/Mochudi which places are both out of Ntshinoge Council Ward. There is therefore no justification how the 3rd Respondent passed a hurdle which hindered the Applicant from progressing.
46. The Applicant has also demonstrated in his Founding papers, that the award of the tender to 3rd Respondent was unlawfully influenced by misrepresentation of the 3rd Respondent's directorship status which fact is within 1st and

2nd Respondents' knowledge. The Applicant relies on the Affidavit of evidence of Onalenna Katlego Balole which affidavit has remained unchallenged. In that affidavit the deponent said:

- “4. I aver that sometime on or around 21st April 2021 I was approached by Mr. Pako Charles Balole who is related to me, for purposes of being appointed a Director of a certain company registered as Kousha Hygiene Services (Proprietary) Limited.*
- 5. I aver further that Mr. Pako Charles Balole explained to me that the said appointment was for purposes of the said company participating and bidding for the tender that was issued by Kgatleng District Council under tender number KG/PH/EH/ 15/2021 -23, particularly for community based refuse collection service (refuse collection, transportation and disposal).*
- 6. Particularly, Mr. Pako Charles Balole told me that it was a requirement for the said tender that the bidder, if a company, should either have its physical place of business within the area which they bid for or one of its Directors should be resident within the area which they bid for. As such, since neither the said company nor Mr. Pako Charles Balole was resident in the area intended to be bid for, my appointment as a Director of the company would satisfy that requirement as I reside in Ntshinoge ward, which was the intended bidding area.*
- 7. I state further that for his part, Mr. Pako Charles Balole assured me that he is certain that the tender would be awarded to Kousha Hygiene Services (Proprietary Limited) as he had people within the tender committee of Kgatleng*

District Council that were going to make sure that the Lender is so awarded to the company.

8. *I further aver that indeed T agreed to be so appointed and indeed Kousha Hygiene Services (Proprietary) Limited was awarded the tender.*
9. *I aver that I am aware that the subject tender was only awarded to Kousha Hygiene Services (Proprietary) Limited on the strength of meeting [he requirement of my residence within Ntshinoge ward, which factor, later learnt that was used to disqualify other bidders, particularly ODN Investment (Pty) Ltd.*
10. *It is therefore out my conscience that I have caused this Affidavit to be prepared, in order to tell the truth under oath of what transpired and further to clear my name from any of the unlawful and or wrongful doings which were done as regards the award of the said tender. I voluntarily disclosed this information to a certain Mr. Odirile Mampane who is the Director of ODN Investment (Pty) Ltd which was disqualified from the tender."*

47. The Applicant, in making his submission is fortified by the case of **Bergstan Pty Ltd v Botswana Development Corporation Limited and Others 2012 1 BLR 858 (CA)** where it was stated that what is clear, though, is that the BDC Board Tender Committee reached its decision as to the weight, if any, to be attached to the citizen ownership component in the tender on the strength of misleading information furnished to it by the Tender Committee. It was misinformed that the appellant was a 100% foreign owned

company, which was untrue. It was misinformed that the appellant's bid was only PI 50,000 less than that of the 6th respondent, which was untrue; and the information that the appellant was offering a 16% discount on the ECSA fee scale as against the 6th respondent's 12% discount was withheld from it. These were matters of significance, which could have influenced the award, and have led to a different result. The Board Committee thus acted on misleading and incorrect information in the exercise of its discretion. It took into account matters which it should not have taken into account, in the exercise of its discretion. That is sufficient in terms of the grounds laid down in **Attorney General vs Kgalagadi Resources Development Company (Pty) Ltd (1995) BLR 234 CA at 241**, to ground a review of the decision complained of. There were other flaws in the 1st respondent's handling of the tender as well, such as its lack of transparency, and its apparent belief that the PPADB Act and Regulations did not apply to this tender, but it is unnecessary to go into those for the purposes of this appeal.

48. The above cases apply with equal force to this instant case. The information tendered by the 2nd Respondent was clearly

misleading and that is the information that influenced the decision that was taken in relation to the Applicant.

Procedural impropriety

49. The common law principle of 'procedural irregularity' finds recognition in section 29 of the Act, which mandates the Board to ensure that procuring entities, in making their decisions, operate within a system which is equitable, accountable, transparent, competitive and efficient, and which instils public confidence in the procurement process. Fairness will be determined according to the particular circumstances of a given case, and whatever is done must not cause the process to lose that essential quality. See **Metro Projects CC v. KZerksdorp Local Municipality 2004 [1] SA 16 ISCA), para.13 t p. 21.**
50. In view of the fact that at all material times, before an adverse decision was reached, no hearing was afforded to the Applicant either before the adjudication committee or before the Appeals Board one can only conclude that there was procedural impropriety.

51. I need not go further than this ground as I consider the two grounds considered above adequate to dispose of this matter.
52. As stated above the 1st and 2nd Respondents submitted that the procedure that was taken in awarding the tender in *casu* was a fair and just procedure as indicated in that the requirements as stipulated in the ITT. That procedure was followed to the letter in awarding the tender. The "deviation from the conditions of the ITT as alleged by the Application is a false narrative that the Applicant seeks to perpetuate whilst it has benefited from the same "deviation" before. This is an indication that this was an industry practice or best practice as contemplated by Section 29 which has benefitted the Applicant before. The concept of legitimate expectation therefore does not arise.
53. There was therefore no deviation to the ITT that was specific to effect that the tender was reserved for companies based in "Boseja, South Oodi, Pilane and Ntshinoge." The Applicant instead produced information that disqualified it

from consideration as it did not abide to the requirement as stated in the ITT.

54. They were here guided by the ward demarcations by the village development committee (VDC) and the 1st and 2nd Respondents were in with section 29 of the LAPAD Act in that it is evident that from practice (that the Applicant has benefitted from before.

55. That argument in my view seem to justify a wrong that has been in place which the Applicant also benefitted from. I do not think it could be considered an industry standard when in fact that standard was based on a variation of a statutory provision by a body which has not been demonstrated to have powers of doing so. Wards in my view should be read to mean wards as defined in the statutory instrument demarcating the village wards.

56. In my view the Respondent's decision is subject to review in that it was based on the wrong interpretation of wards.

The 1st and 2nd Respondents decision to disqualify the Applicant is hereby reviewed and set aside. The application therefore succeeds with costs.

57. It is therefore ordered as follows:

1. The 1st and 2nd Respondent's decision made and issued through a letter dated 13th August 2021 and received by the Applicant on the 2nd August 2021 disqualifying the Applicant from stage 2 for technical evaluation of Tender No: KG/PH/EH/15/2021 is hereby reviewed and set aside on the grounds that such an adverse decision was illegal/unlawful, irrational, procedurally irregular and unreasonable and was contrary to the Applicant's legitimate expectation.

2. The 1st and 2nd Respondent's decision made and issued through a letter dated 2nd August 2021 and received by the Applicant on the 2^d August 2021 to award Tender No: KG/PH/EH/15/2021 to the 3rd Respondent is hereby reviewed and set aside on the grounds that such decision was irrational and unreasonable;

3. The Respondents pay costs of this application separately or jointly and severally, one paying and the other being absolved.

**DELIVERED IN OPEN COURT THIS 29th DAY OF SEPTEMBER
2022.**

A handwritten signature in black ink, appearing to read 'Nthomiwa Nthomiwa', written over a horizontal dotted line. The signature is highly stylized and cursive.

NTHOMIWA NTHOMIWA

[JUDGE]