

HINGESTONE, HALLAMORE AND KOTCH
SAFARIS (PRIVATE) LIMITED t/a HHK SAFARIS ZIMBABWE
versus
NYAMINYAMI RURAL DISTRICT COUNCIL
and
AFROPRIDE SAFARIS (PRIVATE) LIMITED
and
PROCUREMENT REGULATORY AUTHORITY OF ZIMBABWE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE; 13 September 2024

Opposed Court Application

T. Zhuwarara, for the applicant
T. A Mashambanhaka, for the first respondent
E. Mubaiwa, for the second respondent
Third respondent in default

CHITAPI J: The applicant and the second respondent as named in the heading are duly registered companies in terms of the laws of Zimbabwe. The first and third respondents are statutory juristic entities created respectively under the Rural District Council Act [*Chapter 23:13*] and the Public Procurement and Disposal of Public Assets Act [*Chapter 22:23*]. The applicant did not seek any relief against the third respondent which was cited as an interested party that superintends public procurement by procuring authorities in Zimbabwe as defined in that legislation.

The dispute which has led to the applicant filing this review application as contended by the applicant arises from a disputed tender award made by the first respondent in favour of the applicant. The tender award reference NRDC/004/2022 was awarded on 25 April 2023. The background to the tender award was largely common cause.

The applicant flighted two tenders for the provision of sport hunting services in relation to safari areas under its jurisdiction and control called Omay North and Omay South. The applicant

and the second respondent submitted their bid documents in relation to the tenders. This application however concerns itself with the tender in relation to Omay South.

It is common cause that following the submissions of bids the Chief Executive Officer addressed the applicant in a letter dated 25 April 2023 as follows:

“The Managing Director
Hingestone Hallamore and Kotch Safaris
25 April 2023

Our Ref: CG.M/ak

Dear Sir

RE: TENDER NUMBER NRDC 004/2022: PROVISION OF SPORT HUNTING SERVICES

Reference is made to the above matter.

After deliberating and considering the above tender NRDC has in terms of the Public Procurement and Disposal of Public Assets Act awarded the above captioned tender to yourselves.

Accordingly, in terms of Public Procurement and Disposal of the Public Assets Act, I write to advise you that your tender relating to the above was successful.

We look forward to a long lasting relationship with yourselves.

Yours faithfully,

C.G. MATINGWINA
CHIEF EXECUTIVE OFFICER
Cc: Council Chairman
District Development Co-ordinator
Procurement Officer”

On the same date, 25 April 2023 the first respondent’s Chief Executive wrote another letter to the applicant addressed as follows:

“The Managing Director
Hingestone Hallamore and Kotch Safaris
25 April 2023

Our Ref: C.GM/ak

Dear Sir

RE: CORRECTIONAL LETTER: TENDER NUMBER NRDC 004/2022:
PROVISION OF SPORT HUNTING SERVICES

Reference is made to the above matter.

After deliberating and considering the above tender NRDC has in terms of the Public Procurement and Disposal of Assets Act, awarded the above captioned tender to yourselves provisionally on condition that the first bidder (Afropride (Pvt) Ltd) has not been cleared their pending legal issues within fourteen days. However if they fail to satisfy the requirement, the offer will be extended to yourselves.

We look forward to a long lasting relationship with yourselves.

Yours faithfully,

C.G Matingwina
Chief Executive Officer
Cc: Council Chairman
District Development Co-ordinator
Procurement Officer”

Upon becoming aware of the first letter that advised that its bid was successful, the applicant wasted little time in writing back on the same date 25 April 2023 acknowledging the letter of notification of its successful bid. It undertook to work with the local leadership and communities to enhance natural resources for the future. The applicant ended the letter as follows:

“Please advise when would it be a suitable day and time to sign the lease agreements and commence operations. The 2023 hunting season is upon us and we need to move quickly in order to market this year’s quota”

It is common cause that the applicant did not sign any lease agreement as it envisaged because of the second letter which purported to correct the first letter which was according to the first respondent issued in error. In relation to the confusion created by the two letters the first respondent in the opposing affidavit stated in paragraph 9 as follows:

“9 AD PARA 10 – 12

The said letter that purportedly awarded applicant tender number NRD/C004/2022 was erroneously written. Twenty minutes later another correctional letter was sent in an attempt to rectify and iron out the mistake. The correctional letter clearly stated that tender number NRD/C004/2022 had been awarded to second respondent. I attach hereto the correctional letter as annexure B.” (as already quoted *supra*)

The applicant protested and averred that the second letter was “manifestly unlawful”. The applicant however, acknowledged that it received the correctional or second letter on the same date on which it received the first letter albeit the second letter was received at “night”. Just in passing, the use of the word “night” hardly assists in determining the time of delivery of the letter. Generally speaking what is referred to as “night” is the period of sunset to sunrise. Without knowing the time when the sun set on that particular, one cannot even state whether or not the letter was delivered during business hours. No issue arises on this from the parties. The observation is made that when drafting documents for court specifics of events time and facts must be clearly stated.

There was further confusion in the trail of events in that on 27 April 2023 following the protest by the applicant on the second letter, a letter was written by the applicant and signed on behalf (pp) of the applicant’s Chief Executive. It was addressed to the applicant’s Managing Director and read as follows:

“27 April 2023

Dear Sir

May you kindly note that the first letter dated 15 April 2023 awarding the tender still stands since the second letter did not cancel the first.

Yours faithfully

pp (signed) 10.51

C.G. Matingwina

Chief Executive Officer

Cc: District Chairman
District Development Co-ordinator
Procurement Officer”

The letter aforesaid has no reference of the subject matter to which it related. The first respondent in the opposing affidavit disowned the letter of 27 April 2023. The first respondent stated in the deposition of the Chief Executive that the letter was written by the Procurement Officer without authority of either The Chief Executive or the first respondent. It was averred that the Chief Executive was in Bulawayo attending the Trade Fair on the date that the letter was

written. It was averred that the letter was unlawful as it did not manifest the position and decision of the first respondent.

The first respondent averred in paragraph 12 of the opposing affidavit that the applicant was awarded the tender for Omay North and was in consequence requested to pay USD\$150 000.00 as signing on fees. In relation to this tender the applicant averred that by letter of 25 April 2023 written by the second respondent, the applicant was advised that its bid on tender reference NRDC SH/01/2023 was unsuccessful. By another letter dated 16 May 2023. The applicant was then advised that the same tender NRDC SH/01/2023 had been awarded to the applicant and that the applicant should pay USD\$150 000.00 as signing off fee within seven (7) days of receipt of the letter failing which the tender would be granted to the next bidder. It is not really necessary to dwell on the confusion surrounding the award to the applicant of the tender relating to Omay North. It is not the focus of this application.

The applicant in substance of this application seeks a review of the decision of the first respondent to reverse or revise the tender award to it Ref NRDC/004/2022 by the second letter which purported to correct the first by awarding a conditional tender in that the award depended on whether the second respondent which was in effect the winning bidder would have cleared its undefined legal challenges. The applicant as already noted considered the conduct of the first respondent in this regard to be unlawful.

The applicant purported to file this application based upon the provisions of section 4 of the Administrative Justice Act [*Chapter 10:38*] as read with section 14 of the High Court Act [*Chapter 7:06*]. In essence, the applicant's application is for a declaration founded upon the alleged breach by the first respondent section 4 of the Administrative Justice Act [*Chapter 10:28*]. Section 4 of the Act provides for the power of the High Court to grant appropriate relief where an applicant petitions the Court alleging a failure by an administrative authority to comply with the duties reposed on an administrative authority by section 3 of the Act. The High Court upon such application being made, may grant any of the reliefs set out in section 4(2) and (3). The Act in section 5 sets out the factors which the court may take into consideration in determining an application brought in terms of section 4(2) and (3).

The applicant pleaded three grounds for seeking relief. These were stated in paragraph 26 of the founding affidavit as:

- a) “The first respondent conducted itself in an unlawful manner resulting in a decisions which is manifestly unlawful.
- b) The first respondent failed to act reasonably and acted in an irrational manner, and
- c) First respondent acted in a blatantly unfair manner thereby causing prejudice to the applicant.”

Holistically considered, the three grounds in fact boil down to one ground which can be indexed to the ground provided for in section 3(i)(a) of the Administrative Justice Act which reads as follows:

“3 Duty of administrative authority

An administrative authority which has the responsibility or power to take any administrative action which may affect the rights, interests or legitimate expectations of any person shall –

- a) act lawfully, reasonably and in a fair manner; and
 - b) act within the relevant period specified by law or if there is no such specified period within a reasonable period after being requested to take action by the person concerned; and
 - c) where it has taken the action, supply written reasons therefor within the relevant period specified by law, or if there is no such specified period written a reasonable period after being requested to supply reasons by the person concerned.
- (2) In order for an administrative action to be taken in a fair manner as required by paragraph (a) of subsection (1) an administrative authority shall give a person referred to in subsection (1).
- (a) adequate notice of the nature and purpose of the proposed action; and
 - (b) a reasonable opportunity to make adequate representations; and
 - (c) adequate notice of any right of review or appeal where applicable.
- (3) -----”

Subsection 3 which has not been quoted provides exceptions of circumstances which may excuse the administrative authority from acting in accordance with subsection (1) (*supra*). The grounds in subsection (1) are therefore limited. A consideration of the grounds relied upon by the applicant shows that they essentially attack the legality, reasonableness and alleged unfairness of the first respondent’s decision to and the issuance of a correctional letter of the tender award after the issue of the first one albeit both were done on the same day.

In relation to illegality, the applicant averred that once the award had been made to it, the award was binding unless the successful bidder fails to sign the contract when required to do so. The applicant supported its allegations of the irregularity of the first respondent’s conduct on the basis of a violation of section 55 of the Public Procurement and Disposal of Public Assets Act [*Chapter 22:23*]. It reads as follows:

“55 Contract award

- (1) Having evaluated the bids, a procuring entity shall award the procurement contract to the bidder that
 - (a) Submitted the lowest bid which meets the price and non-price criteria specified in the bidding documents; or
 - (b) offers the most economically advantageous tender.
- (2) Before the expiry of the period of bid validity the procuring entity shall notify:
 - (a) The successful bidder of the proposed award and of the time within which the contract must be signed, subject to any intervening challenge filed in accordance with Part X; and
 - (b) The other bidders of the name and address of the proposed successful bidder and price of the contract; andThe contract shall not be signed until at least fourteen days have passed following the giving of that notice.
- (3) If the successful bidder fails to sign a written contract when required to do so or fails to provide when required, any performance security before the time stated in the bidding documents for the signing of the contract; the procuring entity shall accept the next ranked bidder from among the remaining bids that have not been rejected; and shall thereupon comply with subsection (2) in relation to that bid.

Provided that the procedure set out in this subsection may be applied only to the extent two ranked bidders after the original successful bidder; and only to the extent that the bids can be economically justified.
- (4) Procurement contracts shall be signed by the procurement entity's accounting officer or a person delegated by him or her."

The applicant ran through the above provisions explaining them in paragraphs 28 – 31 of the founding affidavit. Such extrapolation of the law is not necessary in a founding affidavit and must be reserved and dealt with in heads of argument. A founding affidavit as clearly implied in rule 58(4) of the High Court Rules, 2021 must set out the facts on which the cause of action is based as opposed to pleading a run down of the law on which the applicant relies for relief.

The applicant averred that after it was awarded the tender, there was no challenge offered or filed by any of the participating bidder (s). The applicant averred also that the first respondent had awarded the same tender to the second respondent in the absence of any objection having been filed and after the expiry of the objection period. The applicant averred that the first respondent acted illegally when it sought to qualify the award by the second letter it wrote after the first letter in which it had notified the applicant of the success of its bid. It was the applicant's contention that the second letter was unlawful because it was written after the tender process had been completed.

On alleged irrationality the applicant averred that the purported conduct of the first respondent to seek to amend the first letter using the second letter was irrational as was the first respondent's letter written two days later purporting that the second letter did not cancel the first. The applicant averred that the alleged condition as espoused in the second letter whereby the award

was made conditional to the clearance by the second respondent of its legal problems was irrational. It was the applicant's further contention that the award of the tender was irrevocable in the absence of objections having been made within the fourteen day period by losing bidders in terms of section 73 of the Act or unless the applicant had failed to sign the contract or to provide security within the specified period.

The applicant averred that the first respondent acted in an arbitrary and whimsical manner and threw the "rule book out of the window" by its conduct. The applicant averred that the first respondent in an act of appeasement purported to offer to award the applicant a tender for Omay North yet the same had already been awarded to Martin Pieters Safaris. It was averred that such conduct was unlawful. I must at once state that the issue of the validity or invalidity of the proceedings of the tender process for Omay North is not subject of this application. It is improper for the court to make judicial pronouncement on that tender as to do so may compromise positions which parties involved in the tender may wish to assert in the court should the matter be taken to court and indeed should the matter be adjudicated upon by other competent authority.

On alleged unfairness the applicant averred that no explanation was given for the shift in position in the first respondent's part when it wrote the second letter. The applicant averred that the second letter did not state whether or not the award as communicated in the first letter had been withdrawn or cancelled. It was the applicant submission that the awarding of the tender to the second respondent in circumstances where an award had already been made to the applicant was unfair inasmuch as the decision was made without reference to the applicant. The applicant in conclusion averred that the first respondent's conduct violated section 3 of the Administrative Justice Act. The applicant prayed for the setting aside of the first respondent's decision on account of "irrationality, illegality and unfairness".

The first respondent's position has already been captured. It reiterated as follows in paragraph 14 of the opposing affidavit by the deponent:

"I reiterate that the decision to award second respondent the Omay South and applicant (sec) was made by Council as evidenced by the minutes and accordingly the council minutes are binding."

The first respondent in paragraph 15, 19, 20, 21 and 22 of the opposing affidavit reiterated that the first letter was written in error and the second letter was intended to correct the error. The deponent to the affidavit averred that the decision to award the tender to the second respondent

was a decision of council which was however erroneously communicated to the applicant purporting that it is the one which had won the tender yet it was the second respondent. The first respondent further averred that the applicant was informed of the reason for the second letter which letter corrected the error that the tender had been awarded to the applicant contrary to the council's decision. The first respondent averred that the applicant's application should be dismissed because to award the tender to the applicant would violate the decision of council which is the one with power to award the tender. I do not find it necessary to deal with the issues of the tender relating to Omay North for the same reasons I gave when interrogating the founding affidavit.

The second respondent in seeking the dismissal of the application filed an opposing affidavit sworn to by its managing director duly authorized. The affidavit is somewhat lengthy as may expected of a party seeking to hold on to the tender win. In reality however, the issues which arise for determination target the conduct of the first respondent as opposed to the second respondent. A reading of the founding affidavit shows that no allegation of any impropriety or illegal conduct was made against the second respondent. No attack was made either of its tender bid.

Significantly, the second respondent averred that it was the winner of the tender. It attached to its opposing affidavit, minutes of the deliberations of the special meeting of the first respondent held on 25 April 2023. The minutes show that there was debatement of the tender bids submitted by the applicant, by the second respondent and by a third bidder called Oldways Safaris. It is important to capture the full minutes relating to deliberations on the disputed tender. The minutes state:

“(b) OMAI SOUTH CONCESSION (Tender No NRDC004/2022)

The bidders were Hingstone Hallamore and Koch Safaris, Afropride Safaris and Oldways Safaris. Compliancy check was done and the committee confirmed that bidders had submitted required documents.

On Trophy fees, Concession fees, permit fees and Camp hire fees the evaluation committee noted the following:

1. The committee found out that Hingstone Hallamore and Koch Safaris had the highest bid on trophy fees. The committee mainly focused on the big species. Afropride Safaris was second highest on trophy fees, followed by Oldways Safaris who was the lowest bidder.
2. Afropride was the highest bidder, followed by Oldways whose payment was based on the offtake of Hunts, Hingston Hallamore and Koch did not mention his offer on concession fees.

3. Oldways was the highest bidder on camp hire fees and payment was on the bases only if he hunts. Afropride was the second highest, whilst the lowest bidder was Hingeston Hallamore and Koch Safaris.

The Evaluation Committee recommended that, tender number NRDC/004/2022 for the leasing of Omay South Area 2 be awarded to Afropride Safaris who was the highest bidder overall. Although Afropride was not the highest on Trophy Fees, regardless of Hunt Offtake the Operator was committed to pay Trophy fees as on awarded and approved Hunting Quota. That's assurance to the Local Authority that in case of a Local, National or International outbreak of a disease or any other scenario that may prohibit the movement of Tourists, Investors etc., the Operator will pay what is due to the local authority as on approved Hunting Quota. The committee also agreed that if Afropride Safaris fails to take up the offer, it will be awarded to Hingeston Hallamore and Koch Safaris.

CONFIRMATION SIGNATURE: DATE:

NYAMINYAMI RURAL DISTRICT COUNCIL	MINUTES	PAGE
SPECIAL FULL COUNCIL MEETING	DATE OF MEETING	5(6)
NUMBER 91/2023	25 APRIL 2023	

The Chief Executive Officer informed the house that the Council had received a letter from the Supreme Court that implicated Afropride Directors. The letter was circulated to the house and finally concluded that it was not possible for Council to award the concession to a company with pending court issues.

However, it was highlighted that there was an opportunity for Afropride to be awarded if they prove their innocence within a period of 14 days. If they can challenge the court order and succeed, they can submit to council written proof and take up the offer.

After thorough deliberations the house recommended that,

- i) the Omay South Concession be provisionally awarded to Hingeston Hallamore and Koch Safaris (HHK) while Afropride Safaris be given 14 working days to clear themselves.
- ii) After 14 days the Accounting Officer shall make final adjudication.

Proposed by: P. Zivengwa
Seconded by: T. Busumani

The quoted minutes show that the first respondent awarded the tender for Omay South to the second respondent. From the minutes, the Evaluation Committee recommended the awarding of the tender to the second respondent. When the full special council meeting considered that recommendations it expressed the view that it could not award the concession to a company with pending cases. The first respondent's Chief Executive who is the deponent to the first respondent opposing affidavit is the one who circulated what was described as a letter from the Supreme Court which implicated the Directors of the first respondent. Neither the letter nor its contents were

disclosed to the court. The council decided to give the second respondent fourteen days to clear the issue of the Supreme Court letter and once the second respondent had done so and upon providing proof of such clearance within the stipulated period, the second respondent was to be awarded the tender.

The meeting then made a recommendation that a provisional ward of the tender be made to the applicant pending the lapse of fourteen days to allow the second respondent to clear the Supreme Court issue. The meeting then left it to the accounting officer, that is the Chief Executive to make the final adjudication after fourteen days.

It seems to me that the matter may be determined on the basis of the regularity or otherwise of the awarding of the tender. I should in this respect note the response of the applicant in regard to the minutes of the council as attached by the second respondent. The applicant averred that the minutes are not stamped nor are they on letter head of the first respondent. The applicant also averred that the pagination of the minutes lacked chronology. The applicant also averred that minutes on the first respondent's letter head appeared to differ from the minutes produced by the second respondent. The applicant disputed what it called the extract of minutes of the first respondent. In fact the so called minutes are recommendations made by the Evaluation Committee of Council. Significantly the Committee recommended that the tender in issue be awarded to the second respondent as the "highest bidder overall". There was nothing placed before the court to indicate that the Evaluation Committee recommended the applicant for the award nor that the first respondent sitting to award the tender adjudged the applicant to be the highest bidder. The applicant has sought to rely on the first letter as evidence that it is the applicant company which was awarded the tender. The applicant has sought to impugn the first respondent's evaluation committee recommendations as well as that of the first respondent sitting for purposes of the tender Award. The applicant has not however provided any supporting documents or minutes per contra.

It is evident therefore that the communication by the first letter was not supported by available evidence that the applicant was awarded the tender proof thereof must be furnished. If the argument is accepted that the applicant was the highest bidder, and was in turn properly awarded the tender. If a person says provide proof that the applicant was the highest bidder what does the applicant provide as such proof in the light of the evaluation committee report? The applicant did not provide any such evidence. The second letter evidently was supported by

available minutes produced by the second respondent but doubted by the applicant however without producing contra minutes.

The law applicable to the exercise of powers of review are well traversed under the Administrative Justice Act in terms of which this application purports to be brought and in particular in terms of section 4 thereof the court exercises wide powers. Section 4 provides as follows:

“4. Relief against administrative authorities

- (1) Subject to this Act and any other law, any person who is aggrieved by the failure of an administrative authority to comply with section three may apply to the High Court for relief.
- (2) Upon an application being made to it in terms of subsection (1), the High Court may, as may be appropriate –
 - (a) confirm or set aside the decision concerned;
 - (b) refer the matter back to the administrative authority concerned for consideration or reconsideration;
 - (c) direct the administrative authority to take administrative action within the relevant period specified by law or, if no such period is specified, within a period fixed by the High Court;
 - (d) direct the administrative authority to supply reasons for its administrative action within the relevant period specified by law or, if no such period is specified, within a period fixed by the High Court;
 - (e) give such directions as the High Court may consider necessary or desirable to achieve compliance by the administrative authority with section three.
- (3) Directions given in terms of subsection (2) may include directions as to the manner or procedure which the administrative authority should adopt in arriving at its decision and directions to ensure compliance by the administrative authority with the relevant law or empowering provision.
- (4) The High Court may at any time vary or revoke any order or direction given in terms of subsection (2).”

It is necessary to note that going by the minutes of the first respondent which I must accept in the absence of contrary minutes or other evidential document to support the applicant’s contention that it was awarded the tender, save for the producing the letter of notification, there is no evidence that the applicant was awarded the tender. The position which the first respondent adopted when dealing with the awarding of the tender was that it accepted that the first respondent had offered the highest or best bid. The first respondent considered some letter which appears to have been produced for the first time by the first respondent’s Chief Executive at the adjudication meeting. The first respondent being unsure or unclear on the letter decided that a clearance was required to be produced by the directors of the first regarding the Supreme Court letter. The making

of the award was arrested for the period of fourteen days during which period the first respondent was to clear the Supreme Court issues raised by the letter.

The first respondent then resolved that the award of the tender be made to the applicant as the next highest bidder but suspended the effective date of the award to a date falling after the fourteen days. Effectively the applicant was not awarded the tender going by the minutes. There is just no supporting evidence of the award of the tender to it. In the case of *Upset Investments (Pvt) Ltd v Chitungwiza Municipality* SC 110/21, it was observed that where a decision of a municipal council is to be made by council then council must pass a resolution of the decision. It was further observed that an employee of council cannot make a decision of council and in that case a letter by the Town Clerk written contrary to the council resolution was set aside. In *casu*, the first letter by the Chief Executive or accounting officer purporting that council had awarded the tender to the applicant was at variance with the resolution of the first respondent which was to the effect that the tender be awarded to the second respondent subject to the second respondent having cleared undisclosed issues raised in the Supreme Court letter. This was the resolution which the first respondent's Chief Executive should have communicated to the applicant however a correctional letter was written to the applicant noting the error and issuing the corrected communication.

The applicant's argument that the second letter was unlawful even if accepted does not resolve the matter in applicant's favour because the award as communicated to the applicant did not reflect the first respondent's resolution. The law is clear that a tender cannot be won on a technicality but on merit. That is the purport of section 55 referred to by the applicant as part of its arguments. I must hold that the applicant did not establish the grounds of review which it advanced because there was nothing demonstrated by the applicant which can be said to be irrational or unfair to the applicant.

The first respondent was by law required to adjudicate on the tender in question following the evaluation committee's recommendation. The first respondent set in full special council meeting for the purpose of awarding the tender. The applicant's bid was not the highest. The highest bid was the second respondent's bid. As I have already observed, the applicant did not apart from questioning the minutes of the first respondent and the recommendations of the first respondent's evaluation committee place anything contra to show that its bid had been

recommended for award ahead of that of the applicant. It is not sufficient for a party as in the case to impugn in the air documents placed on oath before the court purporting to be evidence of a factual position without the impugning party then placing a contra position. It is as unacceptable as a situation whereby a party simply says of another's testimony, "it is all lies" without the impugning party pleading what it holds to be the truth. The court accordingly accepted the authenticity and reliability of the available evidence pertaining to the recommendation and award of the tender as provided by the first and second respondents.

It cannot be gainsaid that the first letter written by the applicant's Chief Executive Officer and which the applicant seeks to cling to as evidencing the award of the tender to it did not convey the decision or resolution of the first respondent. The letter aforesaid was clearly incorrect, hence the generation of the second letter which captured the position of the first respondent albeit it could have been written in better language. However not everyone is imbued with proficiency in communication. It was surprising that the applicant was critical that the second letter did not expressly cancel the first letter. However the first letter whether withdrawn or not did not mirror the position of the first respondent regarding the tender award.

It is however disconcerting to the court that the resolution of the first respondent in awarding the tender was provisional. The award was made in favour of the second respondent subject to the first respondent clearing its name within fourteen days. The award upon the lapse of the fourteen days and in default of the second respondent clearing itself of a letter which was not produced to the court, would be made to the applicant. The Chief Executive was also granted the power to then "make final adjudication". This was patently illegal. The first respondent could not lawfully delegate the adjudication to the Chief Executive as to do so would simply result in the award of the tender being made by the Chief Executive or Accounting Officer instead of by Council.

Thus there is an element of irregularity in the decision of the first respondent. It was open to it to delay the making of the award pending clarity on the Supreme Court letter as it was produced at the adjudication meeting for the first time. Since the first respondent was concerned about the letter, it should have had the issue cleared first instead of confusing itself and the bidders by making a provisional award which was ingenious and novel of the first respondent.

In all the circumstances of this case and after careful consideration of the papers and argument by counsel, this application in my view called for the court to interrogate the paper trail relating to the disputed tender. The paper trail has been dealt with. The first respondent's resolution is what carries the day as opposed to the false position conveyed in the first letter. The first respondent purported to make a "provisional" award. If a decision is provisional then it must be followed up with its confirmation or otherwise. The making of a provisional award is not proper as it does not resonate with the provisions of section 55 of the Procurement and Disposal Act which requires that the first respondent should make an award using the criteria set out therein. There is no provision for the making of a provisional award. The first respondent's resolution needs revisiting to avoid uncertainty and unnecessary confusion. This is a matter in which in accordance with the provisions of section 4(2)(a) and 4(e) the matter should be referred back to the second respondent for consideration or reconsideration of its resolution which should be final and not provisional. Further the first respondent itself should resolve the award and not delegate the adjudication to the Chief Executive. It follows that the first and second letters written by the first respondent's Chief Executive are set aside. The resolution to provisionally award the tender is set aside as being irregular and therefore unlawful.

The application therefore succeeds in part in that the court has made a finding that the first respondent acted irregularly in making a "provisional award" of the tender as per its minutes and resolution passed. The first respondent also abdicated the obligation to make a further final adjudication to its Chief Executive Officer. This was irregular and a violation of the law as there is no provision in law for the first respondent to delegate tender adjudication and decision on a tender to its Chief Executive or accounting officer. The issue of the second respondent having to clear itself within fourteen days remained an issue for the second respondent to deal with because effectively what the second respondent did was to find that the second respondent was the highest bidder. The first respondent instead of waiting for the fourteen days to lapse before making a final decision then made a bizarre resolution to make a provisional award. As observed by the applicant, a temporary award is not provided for by law.

The first respondent must be given a chance to revisit its faulty resolution and deal with the issue of the clearance of the second respondent as it resolved to and thereafter make a final award of the tender this being its function and not the function of the Chief Executive.

The last issue pertains to costs. As is trite, costs are in the discretion of the court. I have resolved to order that each party pays its own costs because there has not been a winner or loser. The court has referred the matter back to the first respondent to correct a process which the first respondent otherwise did well save for the granting of a provisional award and the reference of the finalization of the adjudication to the Chief Executive.

Accordingly the following order ensues.

IT IS ORDERED THAT:

1. The second respondent's resolution to make a provisional award of the tender to the applicant is set aside.
2. The resolution of the first respondent to delegate to its Chief Executive the duty to finalize the adjudication is set aside.
3. The matter is referred back to the first respondent to properly finalize the award of the tender and in particular to deal with the issue of the clearance of the second respondent as the first respondent had resolved and make its tender award accordingly.
4. The second respondent shall comply with this order and finalize the awarding of the tender and notify the successful bidder within twenty one days of the date of this order.
5. Each party shall bear its own costs.

CHITAPI J:

Wintertons, applicant's legal practitioners

Mangwana & Partners, first respondent's legal practitioners

Mbidzo, Muchadehema & Makoni, second respondent's legal practitioners