



**IN THE HIGH COURT OF ESWATINI**  
**JUDGMENT**

Case No. 205/2018

In the matter between:

<b>SWAZILAND COMMUNICATIONS COMMISSION</b>	<b>Applicant</b>
<b>And</b>	
<b>SWAZILAND PUBLIC PROCUREMENT REGULATORY AGENCY</b>	<b>1<sup>st</sup> Respondent</b>
<b>INDEPENDENT REVIEW COMMITTEE</b>	<b>2<sup>nd</sup> Respondent</b>
<b>LUCKY HOWE N.O.</b>	<b>3<sup>rd</sup> Respondent</b>
<b>ELIJAH DINGANE N.O.</b>	<b>4<sup>th</sup> Respondent</b>
<b>MTHUNZI MASUKU N.O.</b>	<b>5<sup>th</sup> Respondent</b>
<b>ARCHITECTS INTERNATIONAL (PTY) LTD</b>	<b>6<sup>th</sup> Respondent</b>
<b>DESIGN ARCHITECTS (PTY) LIMITED</b>	<b>7<sup>th</sup> Respondent</b>
<b>BUILDING DESIGN GROUP (PTY) LTD</b>	<b>8<sup>th</sup> Respondent</b>

**Neutral citation:** *Swaziland Communications Commission v Swaziland Public Procurement Regulatory Agency N.O. & 7 Others (205/2018) [2018] SZHC 165 (24 July 2018)*

**Coram:** MAMBA J  
**Heard:** 06 July 2018  
**Delivered:** 24 July 2018

- [1] *Administrative Law – Statute Law – Application for review of an administrative decision in terms of Section 47 (2) of The Public Procurement Act 7 of 2011 – Application to be made within 10 working days from when the Applicant became aware of the circumstances giving rise to the Application or when such Applicant should have become aware of those circumstances.*
- [2] *Administrative Law – Statute Law – Application for review – What constitutes such Application – Section 46 & 47 of Act 7 of 2011. A letter of enquiry does not constitute application for review as such would in the normal course, not contain grounds or reasons for Review.*
- [3] *Statute law – Statutory body derive its powers from enabling Act – Independent Review Committee established under Section 50 (1) of Act 7 of 2011 empowered to deal with Review and Appeals against suspension and has no power to bring a contract into force, although it may substitute its own decision for that of the procuring entity.*
- [1] The Applicant is a Category A Public Enterprise and was established in terms of The Swaziland Communications Commission Act of 2013. It has its principal place of business in Mbabane. Its core function is to regulate communication related services within the Kingdom of Eswatini.
- [2] The First Respondent is a statutory body established in terms of Section 9 (1) of The Procurement Act No. 7 of 2011 and also has its principal place of business in Mbabane. Like the Applicant, it is a Category A Enterprise whose core function is to regulate Procurement and kindred or related services within Public Institutions within the Kingdom of Eswatini. Its functions, as stipulated in Section 10 (b) (i) of the Act are, *inter alia*, to:

‘10 (b) (i) formulate regulations governing the procurement of goods, works and services for the government and recommend these to the Minister;

(ii) issue public procurement manuals, circulars and instructions

to provide further guidance on the interpretation and application of this Act and public procurement regulations issued under this Act;

(iii) issue standard tender documents and other standard procurement documents whose use shall be mandatory in all procurement proceedings by procuring entities, unless otherwise specified by the Agency;

...

(v) Consider applications for deviations to public procurement processes, methods and rules in accordance with section 6 [and]

...

(c) (i) monitor compliance with this Act and procurement performance by procuring entities.’

[3] The Second Respondent is the Independent Review Commission, a statutory body or agency established in terms of Section 50 of The

Swaziland Public Procurement Agency Act of 2011. Its review committee is chaired by the Third Respondent who is a practising attorney of this Court. He is also a partner in the Law firm acting or representing the 7<sup>th</sup> Respondent herein.

[4] The pertinent facts in this review application are common cause or not in dispute. These facts are as follows; and I quote from the Applicant's Founding Affidavit:

19. On 25<sup>th</sup> July 2017, the Applicant issued an invitation to a select number of architectural firms for the provision of architectural and general design services of the Applicant's head office at Ezulwini. A copy of the invitation is annexed hereto marked "MD 1". A Tender Board was set up by the Applicant for purposes of receiving and evaluating the bids. As part of the tender process, the prospective tenderers were required to attend a mandatory site inspection which was scheduled for 2<sup>nd</sup> August 2017.

20. The Sixth Respondent was one of the architectural firms that responded to the invitation. They were however not considered at the time of evaluating the tenders, primarily because their bid was non-compliant. In the letter of

invitation, the Applicant had stipulated certain mandatory requirements including documents that has to accompany the tender submission.

21. The tender was eventually awarded to the Eighth Respondent and a Notice of Intention to Award issued on 6<sup>th</sup> October 2017. A copy of the notice which was duly published in the daily newspapers, the Applicant's and First Responent's websites in accordance with Section 45 (3) (b) of The Procurement Act is annexed hereto marked "**MD 2**". The Sixth Respondent was dissatisfied with the notice of intention to award of the tender and on the 5<sup>th</sup> December 2017 submitted an application for administrative review. A copy of the application is annexed hereto marked "**MD 3**".
22. The basis for the complaint by Sixth Respondent was in essence two fold. First, they contended that they had been irregularly excluded from the tender process, because as far as they were concerned, the supporting documents were not mandatory. Second, they contended that the successful candidate, the Seventh Respondent also ought to have been disqualified because they did not attend the mandatory site inspection.

23. I pause at this stage to mention the fact that prior to submitting the application for administrative review, Sixth Respondent did send an email to a Professional Assistant at the Applicant's undertaking. In this email, the Sixth Respondent sought an explanation as to why it was not considered for the bid. It will be noted that in terms of annexure "MD 2", the Sixth Respondent's name does not appear amongst those that were considered for the bid. In response, the Applicant advised that its tender was non-compliant and hence the exclusion. Annexed hereto marked "MD 4" and "MD 5" respectively are the emails that were exchanged between the parties.
24. There was then a further exchange of correspondence on 8<sup>th</sup> and 9<sup>th</sup> November 2017 between the Applicant and the Sixth Respondent, culminating in the Applicant receiving notification on 29<sup>th</sup> November 2017 from the First Respondent indicating that the Sixth Respondent was taking the matter for administrative review.
25. On 1<sup>st</sup> December 2017, the First Respondent summoned the parties (the Applicant and the Sixth Respondent and

Architects International) to its offices wherein the following directives were issued:

25.1 Sixth Respondent was directed by the Second Respondent to launch an application and direct to the First Respondent and served same upon the Applicant, containing all issues to be heard and considered by the Second Respondent.

25.2 Further, the Second Respondent directed the Applicant to respond to the application by noon on 7<sup>th</sup> December 2017.

...

27. The matter then came before the Second Respondent wherein the Applicant raised a number of preliminary points of law relating to the propriety of the application for administrative review. The Second Respondent correctly upheld these points on the irregularities in procedure and time-bar in the manner the matter was brought before the first and second Respondents. However, inexplicably the Second Respondent. However, inexplicably the Second Respondent proceeded to issue a ruling wherein it set aside the decision to award the tender to the eighth and substituted

that decision to an award to the Seventh Respondent. A copy of the ruling is annexed hereto marked “**MD 6**”.

- [5] It is common cause further that the Applicant objected to the review application that was filed by the 6<sup>th</sup> Respondent. The crux of that objection was that the application was irregular inasmuch as it was filed way out of time, contrary to the dictates of Section 47 (2) of The Procurement Act. This subsection, states in mandatory terms that ‘---the procuring entity shall not entertain an application for review, unless it is submitted within 10 working days --- or when the tenderer submitting it became aware of the circumstances giving rise to the application for review.’ The 6<sup>th</sup> Respondent became aware of the decision or intention to award the tender to the 8<sup>th</sup> Respondent not later than the 10<sup>th</sup> day of October 2017. On that date, the 6<sup>th</sup> Respondent sent a query to one Pretty Dlamini, an officer of the Applicant, enquiring the bases or reasons why its tender was rejected for being non-compliant. The 6<sup>th</sup> Respondent also registered its ‘concern that the fee values are so disparate.’
- [6] The formal ‘application for the Administrative Review by the 6<sup>th</sup> Respondent is MD3 and was filed on or is dated the 05<sup>th</sup> day of December 2017. The Second Respondent, correctly in my view, held that:



‘14.

A close examination of the email indicates that this letter was not an appeal or a review to the CEO, but is a letter making an enquiry to the CEO. --- we agree with the [Applicant] that no review was lodged with the CEO or the Controlling Officer and therefore the matter cannot come before us as the IRC in that regard. The [6<sup>th</sup> Respondent] should have in our view proceeded to then review the matter before the CEO, after the clarity which he sought from him. Had that been done it would have been acceptable and he would have a right to come before the IRC.’ (Reference was then made to the decision of this Court in *Universe (Pty) Ltd v Bongani J. Motsa N.O. and 3 Others* [1574/2014] SZHC 399 (21 November 2014). The Second Respondent, again correctly in my judgment, came to the conclusion that:

‘the matter in respect of the relief sought by the [6<sup>th</sup> Respondent] must be dismissed due to the fact that he is barred by the Act [from applying for the review]. One in law must exhaust his domestic remedies before [he] may proceed to a Court or to the IRC, which the [6<sup>th</sup> Respondent] has not.’

[7] From the above summation by the Second Respondent’s ruling that the review application was bad in law inasmuch as it was filed contrary to the

law and therefore dismissed, that would have been the end of the matter but no, the Second Respondent immediately stated as follows:

‘17

The next question is the balance of the complaint before us which is one which the [6<sup>th</sup> Respondent] has felt it was his obligation as a citizen to report to the [Second Respondent]. The issue is, the fee structure as he believes that the public will not be best served if the structure remains the way it is now. The question is further in his address combined with the scores and the client’s instruction. According to him, the client was after the services of an architect and a team, so it was confusing as to what they were looking for. He nonetheless submitted for both and as mentioned above, is not interested in the tender and or being awarded for the same. He used the like for like as the main basis for his contention and said it brings the integrity of the assessment into question.’

- [8] The Second Respondent then went ahead and evaluated all the tenders or bids and came to the conclusion that the scoring thereof had been flawed or incorrect. It held that it was going through the evaluation of the bids or the actual merits of the tender based on the complaint filed or lodged before it by the 6<sup>th</sup> Respondent; not as a failed tenderer but as a “concerned citizen” of Eswatini whose aim was to safeguard the integrity

of the procurement process and ultimately, the public purse or fiscus. The Second Respondent then called in aid Section 3 of the Act which empowers it to “ensure transparency and accountability in public procurement, --- value for money in the use of public funds --- [and] non-discrimination’. It then concluded that

‘25

The public must not be afraid to come forward as has the [6<sup>th</sup> Respondent] to defend the public expenditure. In terms of Section 51, the [Second Respondent] can investigate a matter and on doing so it must give a written ruling within 15 days of the said application. Our investigations show that the process was not in accordance with the Act and that it was not fair and transparent. Applicant has been an exemplary citizen and come forward to expose the wrongdoing by the entity and we are grateful for same. To say the section would require that the matter be before the [Second Respondent] as per Section 49, would be unjust. The mischief here is the wrongdoing by the [Applicant].’

The Second Respondent then ordered that the tender be awarded and did award it to the 7<sup>th</sup> Respondent.

[9] In awarding the tender to the 7<sup>th</sup> Respondent, the Second Respondent held that it was acting on the powers contained in Section 52 (1) (b) of the Act which grants it the power or jurisdiction to review, annul or set aside a decision of the Applicant and substitute it with its own. I shall examine this holding presently.

[10] It is noted that all the Respondents, bar the 7<sup>th</sup> Respondent, have not opposed this application wherein the Applicant prays for an order:

- ‘1. Reviewing and setting aside the decision by the First Respondent to accept and refer for administrative review the complaint by the 6<sup>th</sup> Respondent.
2. Reviewing and setting aside the ruling by the [Second Respondent] dated 12<sup>th</sup> December 2017, to substitute the award of the tender to the 8<sup>th</sup> Respondent.
3. Ordering the first to eighth Respondents and (only in the event of opposition) --- to pay the costs of this application, jointly and severally.’

On 02 March 2018, the application was granted against the Respondents who did not oppose it.

[11] From the above facts, which are common cause, what originally came before the Second Respondent as a review, which was fatally defective and consequently dismissed, was, without notice to the Applicant, turned or converted into an investigation by the Second Respondent. It was that investigation that revealed that the award to the 8<sup>th</sup> Respondent was irregular and an award of the tender to the 7<sup>th</sup> Respondent was proper and just. The order by implication, means that the award to the 7<sup>th</sup> Respondent was in accordance with the spirit of the relevant law. It was transparent and in the public interest or public purse and fair, so said the Second Respondent.

[12] The immediate question that arises from the above is this: Was it proper for the Second Respondent to convert the ill-fated administrative review application into an investigation and in the manner described above? On first principles of law and fairness, I answer this question in the negative. I examine this in the next segment of this judgment.

[13] It was plainly disingenuous for the Second Respondent to treat the 6<sup>th</sup> Respondent as a “concerned citizen”. The 6<sup>th</sup> Respondent had not approached the 2<sup>nd</sup> Respondent as such or in such capacity. It did so as a failed tenderer that sought to have the decision of the Applicant reviewed

and set aside. Paragraph 9.3 of its application for review amply captures this fact in the following terms:

‘Architects International motivate strongly that the entire tender process be re-structured and be carried out again’. But more fundamentally, the case that the Applicant was called upon to meet before the Second Respondent was that pleaded in the review application. Thus the Applicant geared or fashioned its defence to meet that case and not an investigation by a concerned citizen. It was on this basis that the crux of the defence by the Applicant was based on the objection that the 6<sup>th</sup> Respondent had failed to apply for review within the prescribed period and had not applied for and been granted Condonation to bring the application outside the prescribed period. It was therefore clearly prejudicial to the Applicant to have the application for review converted into an investigation by the Second Respondent. (See *Muzi Mnisi v The Chairperson, Limkokwing University of Creative Technology Disciplinary Committee and Another (443/2016) [2016] SZHC 61 (24 March 2016) Transnet Ltd V Rubenstein 2006 (1) SA 591*).

[14] This Court also observes that the 7<sup>th</sup> Respondent also did not comply with the tender process inasmuch as it, inter alia, did not attend the site inspection. It is therefore disturbing to say the least, that the Second

Respondent found it fit and proper to award the tender to the 7<sup>th</sup> Respondent. Clouding or compounding this issue further is the fact that the 7<sup>th</sup> Respondent is herein represented by the firm of attorney Howe Masuku Nsibande Attorneys in which the 3<sup>rd</sup> Respondent is a Partner. He is also the Chairman of the Second Respondent. Whilst there is no evidence before me that the said law firm already had instructions from the 7<sup>th</sup> Respondent when the 2<sup>nd</sup> Respondent made its decision herein, common sense and ethical considerations would seem to dictate that the said law firm ought to have declined the instructions to represent the 7<sup>th</sup> Respondent in these proceedings, on account of the involvement of the 3<sup>rd</sup> Respondent in the making of the decision. As matters stand, the whole decision and representation appears dodgy and smacks of undue favouritism. This is the very antithesis of the avowed transparency and accountability fervently advocated and espoused by the Second Respondent in its ruling.

- [15] The Second Respondent is constituted or established in terms of Section 50 (1) of the Act and its functions are to hear Applications for Administrative Review and Appeals against Suspension. Where there is neither appeal nor administrative review, the Independent Review Committee has no work to do or undertake. It remains dormant or non-functional or at least it has no work to do or perform in terms of the Act.

In the instant case, there was, legally, no application for review as the complaint by the 6<sup>th</sup> Respondent was filed way out of time.

[16] Having ruled, and correctly so, in my judgment, that the application for review was fatally defective or irregular and therefore dismissed or more appropriately struck off the roll, the Second Respondent had no further mandate or jurisdiction to enquire or in any way deal with the procurement exercise under consideration. This Court has gone through the relevant pieces of legislation and has not been able to find any provision authorising the Second Respondent to receive or entertain any complaint from a Concerned Citizen or busy body, as the 6<sup>th</sup> Respondent's representative called himself. Whilst his complaint may have been honourable and made in good faith and within the general spirit and letter of the law, it was, however, presented and dealt with by an entity that lacked the requisite mandate or jurisdiction to do so. The Second Respondent, being a creature of the Act, derives its mandate or power from that Act. In the instant matter, it plainly acted outside of its powers or mandate. It acted *ultra vires*. Its decision was therefore incompetent and unlawful.

[17] In acting as it did, the Second Respondent claimed that it was acting in terms of Section 52 (1) (b) of the Act, which empowers it to '--- annul in



whole or in part or revise an unlawful act or decision of the procuring entity or substitute its own decision for such decision, other than any act or decision bringing a contract into force’.

The Act describes a ‘contract’ as ‘--- an agreement between a procuring entity and a supplier for the provision of goods, works or services’. And, “Services” as any object of procurement other than goods or works, which involves the furnishing of labour, time and effort.’ In awarding the tender to the 7<sup>th</sup> Respondent, the Second Respondent clearly brought into force a contract between the 7<sup>th</sup> Respondent and the Applicant. That contract was obviously to render or provide the required architectural services to Applicant. That, again, was beyond the powers of the Second Respondent. This, it is emphasised, was the case even if the jurisdictional fact of there being an application for review, existed.

- [18] The Second Respondent is empowered to carry out or conduct an investigation where the application has not been dismissed. Where there is no application, because or on account of it having been dismissed, for whatever reason, the Second Respondent has no jurisdiction or power to conduct any investigation. Section 51 (1) and (3) (a) makes this case abundantly clear. The logic is not very difficult to see or understand in this regard. The investigation is carried out or conducted in order to equip the Second Respondent with the necessary facts or material to

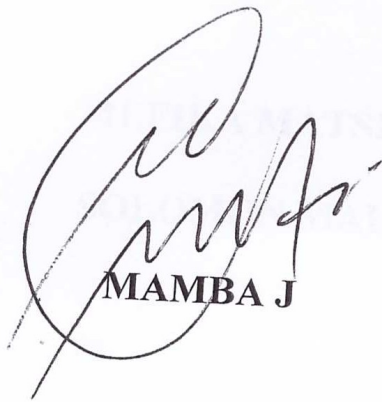
make an informed decision on the application. To qualify to file an application for an administrative review, one has to be a tenderer. A concerned citizen is, however, not without a remedy. That remedy though lies elsewhere and not with or before the Second Respondent.

[19] The Second Respondent seems to have laboured under the mistaken view that it had the jurisdiction, mandate or responsibility for the enforcement of the provisions of the Act. As a general proposition of the law, every person or entity is expected to abide by the law. Enforcement is, however, a matter entirely different. The powers for the enforcement of the provisions of the Act are in terms of Section 11 (1) of the Act entrusted to the Regulatory Agency, i.e. First Respondent and not the Second Respondent.

[20] For the above reasons the application is hereby granted against the 7<sup>th</sup> Respondent and I make the following order:

- (a) The decision of the First Respondent to accept and refer for administrative review the complaint by the 6<sup>th</sup> Respondent is hereby reviewed and set aside.
- (b) The ruling by the Second Respondent dated 12 December 2017 awarding the tender to the 8<sup>th</sup> Respondent is hereby reviewed and set aside.

(c) The 7<sup>th</sup> Respondent is ordered to bear the costs of this application.



MAMBA J

**FOR THE APPLICANT:**  
**FOR THE 7<sup>th</sup> RESPONDENT:**

**MR. Z.D. JELE**  
**MR. S. MASUKU**