REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

MISCELLANEOUS APPLICATION NO. 122 OF 2018

IN THE MATTER OF AN APPLICATION FOR AN ORDER OF MANDAMUS BY BABS SECURITY SERVICES LIMITED

REPUBLIC.....APPLICANT

AND

THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD.....RESPONDENT

MOMBASA WATER SUPPLIES & SANITATION CO. LIMITED..1ST INTERESTED PARTY

DEAN SECURITY LIMITED.....2ND INTERESTED PARTY

***EX-PARTE* APPLICANT.....BABS SECURITY SERVICES LIMITED**

JUDGMENT

The ex parte applicant's case

1. By an application dated **23rd** March 2018, the ex parte applicant seeks the following orders:-

*a. An order of **Certiorari** to quash and or suspend the Ruling of the Respondent made on the **9th** March 2018 in respect of Tender No. MWSS/045/2017-2018 for the supply of Security Services to the first Interested Party (the tender) whereby it declined Request to Review No**. 29** of 2018 and consequently directed the first Interested Party to award and enter into a contract with the second Interested Party.*

*b. An order of **Mandamus** compelling the first Interested Party to award the Applicant Tender No. MWSS/045/2017-2018 for the supply of Security Services or order retendering of the entire process.*

c. Costs of the proceedings.

2. The core grounds cited in the statutory statement can be summarized as follows:-

*a. **That** the ex parte applicant was one of the participants in a tender floated by the first Interested Party. and that the Tender document consisted of three parts namely, the Preliminary, Technical stage and the Financial stage.*

*b. **That** at the preliminary stage, the procuring entity was to determine whether each tender was responsive to the requirements of the tender document. Further, all bidders had to meet all the preliminary and mandatory requirements to qualify to the technical evaluation.*

*c. **That** at the technical stage, a responsive tender was one which conformed to all the specifications of the tender document and marks were awarded at that stage. The ex parte applicant scored **63%** and was disqualified from proceeding to the financial evaluation.*

*d. **That** at the financial evaluation stage, the second Interested Party emerged the lowest bidder and the procuring entity*

*recommended the award on **6th** February 2018. However, the ex parte applicant moved to the Review Board seeking the review of the ruling dated **6th** March 2018, but the decision was upheld. Dissatisfied with the award, the ex parte applicant filed Request for Review No. **29** of 2018, but the award of the tender to the first Interested Party was upheld and the procuring entity was directed to award the tender to the first Interested Party.*

*e. That the Respondent disregarded the law, and made the orders that violated the express provisions of the law and exceeded the requirements set out in the tender document, hence, its acts are illegal, unlawful, and exceeded its jurisdiction, and it disregarded mandatory provisions of the Public Procurement and Disposal Act**[1]**(herein after referred to as the Act).*

3. The ex parte applicant's finance and administrative director, **Mr. Samuel Ngari Mureithi** in the verifying affidavit dated **16th** March 2018 avers that the tender opening committee opened the bids in the presence of the bidders designated representatives, and that that the bid prices of the respective bidders were read out loud and recoded. He averred that evaluation was done and marks awarded, but, the ex parte applicant's bid did not attain the required 70%. He also averred that on **6th** February 2018, the ex parte applicant received a Notification letter from the first Respondent that its bid was unsuccessful. He also averred that the ex parte applicant was informed that it failed to submit all the documents demonstrating clientele coverage, process used to hire guards, training curriculum, supervision, levels of education, integrity and security services offered to other water companies. Additionally, he averred that the ex parte applicant's bid met all the tender prerequisites and that the first Interested Party failed to address its mind on the possibility that its documents were altered.

4. **Mr. Mureithi** further averred that the Respondent failed to appreciate its complaint that the tender committee breached the law by allowing the second Interested Party to proceed from the first stage where it is mandatory for every tendering entity to comply with all the requirements. Also, he averred that the Respondent failed to properly exercise its jurisdiction, and that the decision offends section **2** of the act

First Interested Party's Replying Affidavit.

5. **Francis Kombe**, the first Interested Party's acting Managing Director in his Replying Affidavit dated **11th** April 2018 averred that on **9th** January 2018 the first interested party invited tenders from eligible firms for the provision of security services. He averred that **10** firms submitted their bids which were opened on **23rd** January 2018 and read out as required, after which the bids were evaluated to confirm compliance. He also averred that on **6th** February 2018 he wrote to all the bidders communicating the decision of the evaluation committee to award the tender to the second Interested Party.

6. He further averred that the tender document required that a bidder could only proceed to financial evaluation if it had succeeded in meeting the mandatory requirements and attained at least **70%** at the technical stage. Further, he averred that the ex parte applicant attained only **63%**, and had omitted to include some documents when making its submission. He also averred that the Request for Review was not filed to challenge the qualification of the second Interested Party's provision of mandatory documents, but the ex parte applicant sought to introduce new grounds through a Supplementary Affidavit stating that the second Interested Party was not a member of a national security professional body. However, he averred that the first Interested Party filed a further affidavit presenting a certificate confirming that the second Interested Party was a member of KSIA, and, that, the Board considered all the issues raised and dismissed the Request for Review.

7. He also averred that in compliance with the order, the first Interested Party entered into a contract with the second Interested Party on **23rd** March 2018 after the expiry of the statutory period provided to appeal and no appeal had been served upon the first Interested Party.

The Respondent and the Second Interested Party.

8. The Respondent and the Second Interested Party did not file any papers in these proceedings nor did they participate in the proceedings.

Issues for determination.

9. The core issue for determination is whether the ex parte applicant has established grounds to warrant this Court to grant the Judicial Review orders sought.

10. With regard to the contention that the ex parte applicant did not submit all the required documents, the **Ex parte** Applicant's Advocate argued that section **81** of the Act allows the procuring entity to seek any clarification on the tender from the tenderer on any matter regarding the tender documents. He argued that the Review Board did not consider this section, hence, the decision is unreasonable, irrational and made in bad faith.

11. In response to this argument, the first Interested Party's advocate argued that even if the alleged missing documents were present, the ex parte applicant would not have complied, hence, the review board acted within its powers.

12. Section **81 (1)** of the act cited by the ex parte applicant's counsel provides that a procuring entity may, in writing request a clarification of a tender from tenderer to assist in the evaluation and comparison of tenders. However, counsel carefully avoided referring to subsection **(2)** which reads that "a clarification shall not change the terms of the tender."

13. *First*, the use of the word "*may*" in the above provision is directory. It is not *mandatory*. *Second*, a proper construction of section **81** of the act would entail reading the two subsections but not selectively reading subsection **(1)** only. It is an accepted cannon of statutory interpretation that provisions of a statute ought to be construed in a holistic manner so as to get the real intention of the legislature. It is my view that sub-section **(1)** ought to be read together with sub-section **(2)** so as to get the real intention of the legislature.

14. The touchstone of interpretation is the intention of the legislature. The language of the text of the statute should serve as the starting point for any inquiry into its meaning.[2] Courts generally assume that the words of a statute mean what an “ordinary” or “reasonable” person would understand them to mean.[3] If the words of a statute are clear and unambiguous, the Court need not inquire any further into the meaning of the statute. One can confidently assume that Parliament intends its legislation to be interpreted in a meaningful and purposive way giving effect to the basic objectives of the legislation. In other words as was appreciated by the Court of Appeal in Kimutai vs. Lenyongopeta & 2 Others**[4]** citing Lord Denning:-[5]

> *“The grammatical meaning of the words alone, however is a strict construction which no longer finds favour with true construction of statutes. The literal method is now completely out of date and has been replaced by the approach described as the “purposive approach”. In all cases now in the interpretation of statutes such a construction as will “promote the general legislative purpose” underlying the provision is to be adopted. It is no longer necessary for the judges to wring their hands and say, “There is nothing we can do about it”. Whenever the strict interpretation of a statute gives rise to an absurd and unjust situation, the judges can and should use their good sense to remedy it – by reading words in, if necessary – so as to do what Parliament would have done, had they had the situation in mind.”(Emphasis added).*

15. Adopting the construction advanced by the ex parte applicant's counsel not only goes against the clear meaning of the section as explained above but also leads to an absurdity. It could not have been the intention of the legislature to create a situation whereby a bidder will be called upon to give a clarification which can alter the terms of the tender or give the bidder an undue advantage. Such an interpretation would make nonsense the established principles of fairness in procurement. A tenderer cannot be asked to provide a clarification that may have the effect of changing the terms of the tender or confer an undue advantage to the tenderer. The dictionary meaning of the word 'clear" is easy to perceive or understand, leaving or feeling no doubt.[6] To clarify is to provide "an explanation or more details that makes something clear or easier to understand."[7] Differently explained, to clarify is the act of clarifying, the act or process of making clear. In procurement, it is a requirement that the bid must conform to tender requirements. One of the key tender requirements is submission of all required documents. An omission to submit required documents is a failure to conform with the requirements and can lead to disqualification. It cannot be cured by a clarification. In fact, no amount of explanation can cure such an omission. My position is fortified by the requirements for a responsive tender under Section **79 (1)** of the Act discussed below.

16. Further, the ex parte applicant's counsel argued that when the Review Board ignores express provisions of a tender document, it crosses its statutory boundaries.[8] He argued that the applicant had legitimate expectation that the criteria contained in the tender document would be applied. Also, he argued that the successful bidder did not meet the requirements.

17. Section **80** of the Act on evaluation of Tenders provides:-

> *80. Evaluation of tenders*
>
> *(1) The evaluation committee appointed by the accounting officer pursuant to section 46 of this Act, shall evaluate and compare the responsive tenders other than tenders rejected under section 82(3).*
>
> *(2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, in the tender for professional services, shall have regard to the provisions of this Act and statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered.*
>
> *(3) The following requirements shall apply with respect to the procedures and criteria referred to in subsection (2)—*
>
> > *(a) the criteria shall, to the extent possible, be objective and quantifiable;*
> >
> > *(b) each criterion shall be expressed so that it is applied, in accordance with the procedures, taking into consideration price, quality, time and service for the purpose of evaluation; and*
>
> *(4) The evaluation committee shall prepare an evaluation report containing a summary of the evaluation and comparison of tenders and shall submit the report to the person responsible for procurement for his or her review and recommendation.*
>
> *(5) The person responsible for procurement shall, upon receipt of the evaluation report prepared under subsection (4), submit such report to the accounting officer for approval as may be prescribed in regulations*
>
> *(6) The evaluation shall be carried out within a maximum period of thirty days.*
>
> *(7) The evaluation report shall be signed by each member of evaluation committee.*

18. Section **79 (1)** of the Act defines Responsiveness of tenders. It reads that "*A tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender documents."*

19. It is a universally accepted principle of public procurement that bids which do not meet the minimum requirements as stipulated in a bid document are to be regarded as non-responsive and rejected without further consideration.[9] Briefly, the requirement of responsiveness operates in the following manner:- a bid only qualifies as a responsive bid if it meets with all requirements as set out in the bid document. Bid requirements usually relate to compliance with regulatory prescripts, bid formalities, or functionality/technical, pricing and empowerment requirements.[10] Bid formalities usually require timeous submission of formal bid documents such as tax clearance certificates, audited financial statements, accreditation with standard setting bodies, membership of professional bodies, proof of company registration, certified copies of identification documents and the like. Indeed, public procurement practically bristles with formalities which

bidders often overlook at their peril.[11] Such formalities are usually listed in bid documents as mandatory requirements – in other words they are a *sine qua non* for further consideration in the evaluation process.[12] The standard practice in the public sector is that bids are first evaluated for compliance with responsiveness criteria before being evaluated for compliance with other criteria, such as functionality, pricing or empowerment. Bidders found to be non-responsive are excluded from the bid process regardless of the merits of their bids. Responsiveness thus serves as an important first hurdle for bidders to overcome.

20. In public procurement regulation it is a general rule that procuring entities should consider only conforming, compliant or responsive tenders. Tenders should comply with all aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender documents. Bidders should, in other words, comply with tender conditions; a failure to do so would defeat the underlying purpose of supplying information to bidders for the preparation of tenders and amount to unfairness if some bidders were allowed to circumvent tender conditions. It is important for bidders to compete on an equal footing. Moreover, they have a legitimate expectation that the procuring entity will comply with its own tender conditions. Requiring bidders to submit responsive, conforming or compliant tenders also promotes objectivity and encourages wide competition in that all bidders are required to tender on the same work and to the same terms and conditions.

21. No illegality, irrationality or procedural impropriety has been established in the manner in which the Board approached and determined the question of the manner in which the evaluation was done or the responsiveness of the ex parte applicants bid. In particular, I find and hold that the Respondent properly identified the issues and rendered its determination of the issues correctly applying the law and acted within the confines of the law.

22. The ex parte applicants counsel also argued that that the procuring entity breached section **87** (1) **(3)** by awarding the contract to the company without disclosing it to the applicant. Also, he argued that where a body takes into account irrelevant considerations, its decision is unlawful.[13] Further, the board rubber stamped a wrong procedure adopted by the procuring entity, hence it ignored relevant considerations and took into account irrelevant considerations. Lastly, he argued that section **135** was not complied with.

23. The first Interested Party's Advocate Counsel submitted that Judicial Review is concerned with the process a statutory body employs to reach its decision[14]and that review proceedings as opposed to an appeal, and that the Court is not entitled to re-evaluate the evidence presented with a view to arriving at its own decision.[15] Further, he argued that in order to succeed in a Judicial Review application, an applicant must show that the decision complained of is tainted with illegality, irrationality and procedural impropriety.[16] Also, he submitted that the question whether the second Respondent was a member of a national security professional body was not in the request for review and that all the issues raised in the Request for Review were considered.

24. The ex parte applicants submission that section **87** of the act was not complied with differs with the ex parte applicants averments in paragraph **10** of his affidavit in which he avers that on **6th** February 2018, the applicant received a notification letter from the first interested party. The details of the letter are clearly captured in the determination of the Review Board. The Board went on to find that the procuring entity notified the applicant that its tender was unsuccessful giving reasons why the tender was unsuccessful. It follows that the argument by the ex parte applicant's counsel on this point lacks basis.

25. Alternatively, the invitation by the ex parte applicants counsel to find otherwise is in my view a merit review which falls outside the function of Judicial Review proceedings. Similarly, the other arguments by the ex parte applicant's counsel highlighted above in my view touch on the merits of the decision.

26. Judicial intervention in Judicial Review matters is limited to cases where the decision was arrived at arbitrarily, capriciously or mala fide or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose, or where the functionary misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or where the decision of the functionary was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter.

27. Section **173** of the Act provides for the powers of the Review Board. It provides that upon completing a review, the Review Board may do any of the following- ***(a)*** *annul anything the accounting officer of a procuring entity has done in the procurement proceedings, including annulling the procurement or disposal proceedings in their entirety;* ***(b)*** *give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings;* ***(c)*** *substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings;* ***(d)*** *order the payment of costs as between parties to the review in accordance with the scale as prescribed; and* ***(d)*** *order termination of the procurement process and commencement of a new procurement process.*

28. The above section has been the subject of determination in numerous case in this Country. Discussing a similar provisions in The Public Procurement and Disposal Act,[17] which was repealed by the current act, the Court of Appeal in Kenya Pipeline Ltd vs. Hyosung Ebara Company Ltd.[18]

> *"The Review Board is a specialized statutory tribunal established to deal with all complains of breach of duty by the procuring entity. By Reg. 89, it has power to engage an expert to assist in the proceedings in which it feels that it lacks the necessary experience. S. 98 of the Act confers very wide powers on the Review Board. It is clear from the nature of powers given to the Review Board including annulling, anything done by the procurement entity and substituting its decision for that of the procuring entity that the administrative review envisaged by the Act is indeed an appeal. From its nature the Review Board is obviously better equipped than the High Court to handle disputes relating to breach of duty by procurement entity. It follows that its decision in matters within its jurisdiction should not be lightly interfered with."*

29. **Lord Reid** in **Animistic -vs- Foreign Compensation Commission[19]** where it was held that:-

"It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word 'jurisdiction' has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in questions. But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly."

30. An administrative decision can only be challenged for **illegality, irrationality** and **procedural impropriety.** A close look at the material presented before me does not demonstrate any of the above. The decision has not been shown to be illegal or ultra vires and outside the functions of the Respondent. A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

31. Certiorari is a discretionary remedy, which a Court may refuse to grant even when the requisite grounds for it exist. The Court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the court being a judicial one must be exercised on the basis of evidence and sound legal principles. In the present case, I find no basis to grant the order of *Certiorari* sought.

32. The applicant also seeks an order of *Mandamus. Mandamus* is employed to compel the performance, when refused, of a Ministerial duty, this being its chief use. It is also employed to compel action, when refused, in matters involving judgment and discretion, **but not to direct** the exercise of judgment or discretion in a particular way, nor to **direct the retraction or reversal of action already taken in the exercise of either**.[20]

33. *Mandamus* is a discretionary remedy, which a Court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the court being a judicial one must be exercised on the basis of evidence and sound legal principles.

34. *Mandamus* is an equitable remedy that serves to compel a public authority to perform its public legal duty and it is a remedy that controls procedural delays. The test for mandamus is set out in Apotex Inc. vs. Canada (Attorney General),[21] and, was also discussed in Dragan vs. Canada (Minister of Citizenship and Immigration).[22] The eight factors that must be present for the writ to issue are:-

(i) There must be a public legal duty to act;

(ii) The duty must be owed to the Applicants;

(iii) There must be a clear right to the performance of that duty, meaning that:

a. The Applicants have satisfied all conditions precedent; and

b. There must have been:

I. A prior demand for performance;

II. A reasonable time to comply with the demand, unless there was outright refusal; and

III. An express refusal, or an implied refusal through unreasonable delay;

(iv) No other adequate remedy is available to the Applicants;

(v) The Order sought must be of some practical value or effect;

(vi) There is no equitable bar to the relief sought;

(vii) On a balance of convenience, mandamus should lie.

35. Applying the above tests to the facts and circumstances of this case, I find and hold that the applicant has not satisfied the above conditions. It follows that there is no basis at all for the Court to grant the Judicial Review orders of Certiorari and Mandamus. As stated above, the illegality of the impugned decision has not been established.

36. Section **175 (2)** of the Act provides that "The application for a judicial review shall be accepted only after the aggrieved party pays a percentage of the contract value as security fee as shall be prescribed in Regulations. There is no evidence that the ex parte applicant complied with subsection **(2)** above. On this ground, I find that the applicant is not entitled to the exercise of this Courts discretion.

37. I find useful guidance in Court of Appeal decision in *Kenya Pipeline Ltd vs. Hyosung Ebara Company Ltd**[23]** that "The Review Board is a specialized statutory tribunal established to deal with all complains of breach of duty by the procuring entity. From the nature of powers given to the Review Board including annulling, anything done by the procurement entity and substituting its decision for that of the procuring entity that the administrative review envisaged by the Act is indeed an appeal. From its nature the Review Board is obviously better equipped than the High Court to handle disputes relating to breach of duty by procurement entity. It follows that its decision in matters within its jurisdiction should not be lightly interfered with."*

38. An administrative functionary that is vested by statute with the power to consider and make a decision is generally best equipped by the variety of its composition, by experience, and its access to sources of relevant information and expertise to make the right decision. The Court is slow to assume a discretion which has by statute been entrusted to another tribunal or functionary.

39. In view of my analysis and conclusions herein above, I find that the ex parte applicant has not satisfied the threshold for this court to grant the orders sought. Accordingly, I dismiss the *ex parte* Applicant's Application dated **23rd** March 2018 with costs to the Interested Party.

Orders accordingly.

Signed, Delivered and Dated at Nairobi this 24th day of September, 2018

John M. Mativo

Judge

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[1] Act No. 33 of 2015

[2]Katharine Clark and Matthew Connolly, Senior Writing Fellows, April 2006, "A guide to reading, interpreting and applying statutes" https://www.law.georgetown.edu/academics/academic-programs/legal-writing-scholarship/writing-center/upload/statutoryinterpretation.pdf.

[3] Plain meaning should not be confused with the "literal meaning" of a statute or the "strict construction" of a statute both of which imply a "narrow" understanding of the words used as opposed to their common, everyday meaning. Supra note 1.

[4] Civil Appeal No. 273 of 2003 {2005} 2 KLR 317; {2008} 3 KLR (EP) 72

[5] Lord Denning, The Discipline of Law ,1979 London Butterworth, at page 12.

[6] Concise Oxford English Dictionary, Oxford, University Press, Twelfth Edition.

[7] https://dictionary.cambridge.org/us/dictionary/english/clarification.

[8] Citing JGH Marine A/S Western Marine Services Ltd CNPC Northeast Refining & Chemical Engineering Co. Ltd/ Pride Enterprises vs Public Procurement Administrative Review Board & 2 Others {2015} eKLR and Republic vs Public Procurement Review Board & 2 Others ex parte Akamai Limited {2016}eKLR.

[9] Peter Volmink, Legal Consequences of Non Compliance with BID Requirements, (2014) 1 APPLJ 41.

[10] The concept of bid responsiveness is used most often in relation to compliance with bid formalities.

[11] Hoexter 2012: 295.

[12] Xantium Trading 42 (Pty) Ltd v South African Diamond and Precious Metals Regulator and another [2013] JOL 30148 (GSJ) para 25

[13] Citing Republic vs Public Procurement Administrative and Review Board & 2 Others ex parte Coast Water Services Board & Another citing Zakaria Wagunza & Another vs Office of the Registrar Academic, Kenyatta University & 2 Others {2013}3KLR.

[14] Citing Republic vs Kenya Revenue Authority & Another ex parte Bear Africa (K) Ltd citing Republic vs Commissioner of Custom Services ex parte Africa K-Link International Ltd, NBI HC Misc. JR. No 157 of 2012 {2012]eKLR.

[15] Citing Republi vs Ministry of Interior and Coordination of National Government ex parte ZTE Corporation & Another {2014}eKLR.

[16] Citing Republic vs Public Procurement Administrative Review Board & 2 Others ex parte MIG International Ltd & Another {2016}eKLR citing Pastoli vs Kabale District Local Government Council & Others {2008}2EA 300.

[17] Act No. 3 of 2005.

[18]{2012} eKLR.

[19] **{1969} 1 All ER 20.**

[20] Wilbur vs. United States ex rel. Kadrie, 281 U.S. 206, 218 (1930). See also Jacoby, The Effect of Recent Changes in the Law of "Non-statutory" Judicial Review, 53 GEO. IJ. 19, 25-26 (1964).

[21] 1993 Can LII 3004 (F.C.A.), [1994] 1 F.C. 742 (C.A.), aff'd 1994 CanLII 47 (S.C.C.), [1994] 3 S.C.R. 1100.

[22] 2003 FCT 211 (CanLII), [2003] 4 F.C. 189 (T.D.), aff'd 2003 FCA 233 (CanLII), 2003 FCA 233).

[23] Supra.