REPORTABLE

CASE NO: A 55/2011

IN THE HIGH COURT OF NAMIBIA

In the matter between:

AFS GROUP NAMIBIA (PTY) LTD	**APPLICANT**
and	
CHAIRPERSON OF THE TENDER BOARD OF NAMIBIA	**1st RESPONDENT**
MINISTER OF WORKS AND TRANSPORT	**2nd RESPONDENT**
PERMANENT SECRETARY, MINISTRY OF WORKS AND TRANSPORT	**3rd RESPONDENT**
DPF ENERGY AND MINERALS (PTY) LTD	**4th RESPONDENT**
PC CENTRE (PTY) LTD	**5th RESPONDENT**
NAVAYUGA INFOTECH AFRICA (PTY) LTD	**6th RESPONDENT**
NAM SECURE TECHNOLOGIES (PTY) LTD	**7th RESPONDENT**
NAMCOR PETROLEUM TRADING AND DISTRIBUTION (PTY) LTD	**8th RESPONDENT**
PETROTEK NAMIBIA (PTY) LTD	**9th RESPONDENT**
PETRO-LOGISTICS CC	**10th RESPONDENT**
NAMIBIA AUTOMATION SYSTEMS CC	**11th RESPONDENT**

435 DEVELOPMENT COMPANIES (PTY) LTD **12th RESPONDENT**

DIAL-A-STATIONERY CC **13th RESPONDENT**

CORAM: **SCHIMMING-CHASE, AJ**

Heard on: 6 June 2011

Order delivered on: 8 June 2011

Reasons delivered on: 1 July 2011

SUMMARY

Practice – Applications and motions – Urgent applications – The applicant applied on an urgent basis for an order suspending the implementation of a tender pending the outcome of a review application setting aside the tender– The varying degrees of urgency relating to commercial matters in relation to the invoking of Rule 6(12) discussed

Interdict – Interim interdict pending finalisation of review application – Applicant is still required to establish the requisites for an interim interdict pending the outcome of the review application, and not merely a *prima facie* infringement of the applicant's rights if on the facts, the relief sought is interdictory in nature

Applicant sought an order suspending the implementation of an agreement concluded pursuant to the award of a tender pending the finalisation of the main review application and a counter-application for review to be made by the applicant – Applicant proved the requisites for an interim interdict

Res judicata – Requirements for reiterated – Court having discretion to adopt flexible approach and relax strict compliance with requirements –Applicant was a respondent in a previous application for urgent interim relief pending the finalisation of the main review application – This application was struck from the roll for lack of urgency – Applicant thereupon brought a similar urgent application on different facts for substantially the same interim relief pending the outcome of the main application and a counter-application to be launched by it – Respondents raised the point that the matter is *res judicata vis a vis* the previous application for interim relief – The order in previous matter did not have a final or definite bearing on the rights of the parties – Being dismissed for lack of urgency , it was also an interlocutory order that was in any effect not appealable as of right, and not final relief – The basis of the relief sought in the current application contained common elements but was not exactly the same as the previous application – The *res judicata* point accordingly failed

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JUDGMENT

SCHIMMING-CHASE, AJ

Introduction

[1] This is an application launched on an urgent basis for interim relief, for the suspension of the implementation of an agreement concluded between the second respondent and the fourth respondent with a view to implement the award of tender number A10/2-35/2010 ("the tender") to the fourth respondent, pending the finalisation of a review application launched by the eleventh respondent on 17 March 2011 to *inter alia* set aside the tender award to the fourth respondent ("the main application"), and a counter-application to be launched by the applicant, also reviewing and setting aside the tender

award by the first respondent.

[2] After hearing argument, the urgent interim relief was granted, and the applicant was ordered to file its counter-application within 10 days of the order. The reasons now follow.

[3] In view of the various issues and points *in limine* raised by the first to fourth respondents, it is necessary to deal with some of the factual background leading to this application.

Background

[4] In the main application launched on 17 March 2011, the eleventh respondent applied for an order reviewing and setting aside the decision by the Tender Board, represented by its Chairman, the first respondent to award the tender for the supply and management of EFuel for the Government fleet to the fourth respondent ("the main application). The tender in essence involves the installation of radio frequency devices and other equipment to Government in-house petrol pumps and Government fuel vehicles, in order to streamline fuelling for Government fleet vehicles.

[5]

[6] The eleventh respondent also applied for an order directing that the tender should be awarded to it, alternatively that the matter be referred back to the Tender Board to properly reconsider the award of the tender and to apply the recommendations of the Ministerial Committee, which recommended that the tender be awarded to the eleventh respondent. The applicant in this application was cited as a respondent (coincidentally also as the eleventh respondent) in the main application.

[7] On 12 April 2011, the eleventh respondent applied on an urgent basis for an order interdicting the second, third and fourth respondents from taking any further step, including signing the agreement in furtherance of the award to the fourth respondent pending finalisation of the main application ("the first application for interim relief"). Incidentally, the agreement was signed by the third respondent on behalf of the second respondent and by the Chairman of the fourth respondent on 14 April 2011, after the first application for interim relief was served on them.

[8] The applicant also filed answering affidavits in the first application for interim relief. In those papers, the applicant supported the urgent interim relief sought by the eleventh respondent, and requested the Court to grant the interim relief on the grounds set out in the eleventh respondent's founding papers as well as on certain further grounds. It is important to mention at this stage, for reasons

which are dealt with below, that the applicant in its answering affidavit in the first application for interim relief, stated that the record of decision-making of the Tender Board was only made available on 14 April 2011 and could only be studied thereafter, and further that there was insufficient time for the applicant or its legal representatives to fully consider the review record at the time.

[9] On 19 April 2011, the first application for interim relief was struck from the roll for lack of urgency. The applicant was ordered to pay the costs of that application jointly and severally together with the eleventh respondent. The eleventh respondent immediately applied for leave to appeal, which was also supported by the applicant. This was refused. On 16 May 2011, the eleventh respondent petitioned the Chief Justice of the Supreme Court for leave to appeal against the order of court striking the application from the roll for lack of urgency. The applicant did not participate in the petition to the Chief Justice.

[10] On 27 May 2011, the applicant instead elected to launch this application on an urgent basis, seeking an order suspending the implementation of the agreement concluded between the second and fourth respondents, pending finalisation of the main application and the counter-application to be launched by it.

[11] The first, second, third and fourth respondents opposed this

application. Two points *in limine* are raised by them. The first point *in limine* is that this application is not urgent, alternatively if it is urgent, the urgency was entirely self-created. The second point raised is that in view of the fact that the first application for interim relief launched by the eleventh respondent was struck from the roll, the matter is *res judicata*, as the relief sought in this application is in fact and in substance the same relief involving the same parties and already decided upon. The first to third respondents also raise in the alternative, the point of *lis pendens* with regard to the eleventh respondent's petition to the Chief Justice. I shall deal with these points first.

Urgency

[12] With regard to the point of urgency, the first to fourth respondents allege that the applicant was aware in November 2010 already, that it had not been short-listed for consideration in the tender process, and had done nothing other than to reserve its rights to challenge the evaluation process in a letter dated 15 December 2010. Instead, the applicant only started its own case after the eleventh respondent failed in the previous application. It is also argued that the applicant has not yet filed its cross-application in the main review application. It is further argued that as of 15 April 2011, the applicant's legal practitioners came on record as having instructions to bring an urgent application against the award of the

tender, but instead it chose to support the eleventh respondent in the first application for interim relief. The applicant now brings its own application for interim relief, 1½ months later after not being successful. The first to fourth respondents submit that in light of the foregoing, the applicant has been lackadaisical in its approach and that the urgency, if any, has been self-created by the applicants through culpable remissness.

[13] The fourth respondent states in amplification that if the applicant knew on 17 March 2011 (when the eleventh respondent instituted the main application) that the tender was awarded to the fourth respondent, the applicant could have approached Court at that juncture already. In addition, the fourth respondent submitted that the applicant abuses court process, as its allegations in support of urgency are substantially the same as the allegations contained in its answering affidavit in the first application for interim relief, supported by substantially the same annexures, and that the applicant did not pursue the matter with much vigour, because the record filed by the first to third respondents, comprising some 1,500 pages, which the applicant alleges it has been perusing since 14 April 2011, has taken unnecessarily long to finalise.

[14] In support of their submissions, the first to fourth respondents rely on the well known authorities of Salt and Another v Smith 1990 NR 87 (HC) and Bergmann v Commercial Bank of Namibia Ltd 2001

NR 48 at 49H.

[15]

[16] In the Salt case, the Court clarified the provisions of Rule 6(12) of the Rules of Court and at 88C stated the following:

> *"This Rule entails two requirements, namely the circumstances relating to urgency which have to be explicitly set out and, secondly, the reasons why the applicants in this matter could not be afforded substantial redress at a hearing in due course."*

[17] It was also held at 88H that *"mere lip service to the requirements of Rule 6(12)(b) will not do and an applicant must make out a case in the founding affidavit to justify the particular extent of the departure from the norm, which is involved in the time and day for which the matter be set down"*.

[18] In Bergmann *supra*, the Court held that its power to dispense with the forms and service provided for in the Rules of Court in urgent applications is a discretionary one, and that one of the circumstances under which a Court, in the exercise of its judicial discretion, may decline to condone non-compliance with the prescribed forms and service, notwithstanding the apparent urgency of the application, is when the applicant, who is seeking the indulgence, has created the urgency either *mala fide* or through his or her culpable remissness or inaction. (my emphasis)

[19]

[20] The applicant alleges *inter alia* that its grounds for urgency in this application are different from the grounds relied upon in the previous application where it in essence only supported the grounds advanced in support of urgency advanced by the eleventh respondent.

[21] The basis of the applicant's case for urgent relief in this application are in essence based on an agreement concluded between it and the second respondent in terms of which it was requested, after the first application for interim relief was launched, to continue rendering the service relating to the tender in the interim until
30 September 2011. This aspect is not in dispute. In this regard, it is common cause that the applicant has been providing the service relating to the tender in dispute since 2002 and that it has been extended a few times. It is also not in dispute that approximately 3,000 vehicles of the second respondent and some other Ministries have been fitted with equipment by the applicant at a cost of approximately N$250,000.00 per site, and that there are 43 retail sites.

[22] The applicant also states that certain information was provided by an unnamed official at Government Garage, to the effect that the fourth respondent will commence implementation of the agreement signed in pursuance of the tender award, by replacing those units

fitted by the applicant to the Government vehicles with the units of the fourth respondent on 6 June 2011. The applicant as owner of the equipment currently installed in the vehicles has not been informed of this process.

[23] It is also stated that this process could take between 3 to 6 months because there are about 3,000 vehicles spread all over the country, and the fourth respondent has commenced with Government in-house fuel site surveys but has not yet completed them. Once this process is complete, an amount of N$18,588,029.55 (or a portion thereof) will be paid to the fourth respondent. The fourth respondent will then purchase the technology from its supplier and the ball will be set in motion making it difficult if not even impossible to reverse. Once the vehicles and sites are fitted with the technology of the fourth respondent, the situation becomes irreversible as the tender sought to be set aside will be effectively well underway toward final implementation.

[24]

[25] The applicant states in addition that if the urgent relief is not granted, there will be more financial investment and resource deployment by both second and fourth respondents in pursuance of the tender sought to be set aside. If this happens and the main review and counter-application succeeds, it will be extremely costly to reverse. It is thus in the interest of all that the implementation of this process is stopped in the interim.

[26] It is also alleged that if interim relief is not granted, the applicant will suffer irreparable harm because it will not only be compelled to disassemble its current installations, but will also lose the income it currently earns and is to earn until 30 September 2011, and further that a claim for damages for loss of income suffered as a result of fourth respondent being *"illegally"* allowed to execute the tender in the interim has remote prospects of success. For these main reasons, the applicant states that it is unable to obtain substantial redress in due course.

[27] Since the applicant in the first application for interim relief supported the grounds for urgency advanced by the eleventh respondent. I perused the answering affidavit of the applicant as well as the founding affidavit of the eleventh respondent in that application. None of the allegations referred to above (apart from the second and third respondent approaching the applicant to continue the service it currently renders for 6 months) concerning the immediate implementation of the agreement by the fourth respondent and its impact on the applicant, especially the undisputed allegation that the units of the fourth respondent will replace the units fitted by the applicant on 6 June 2011, are contained in any of those papers. In my view, the above facts are new facts raised by the applicant in support of urgency in this application. I deal with this aspect in more detail when consideration is given to the *res judicata* and *lis pendens* arguments.

[28] It is to be noted, that the fourth respondent already during the first application for interim relief alleged that it is already in the process of implementing the tender since April 2011. But no further averments other than this vague allegation was made at that stage indicating what steps were being taken to implement the tender or in particular, when the process involving the replacement of the applicant's units with the fourth respondent's units were to take place. The first to fourth respondents were completely silent on this issue, which in my view is telling.

[29]

[30] More importantly, the agreement concluded on 14 April 2011 between the second and fourth respondents, which was annexed to the founding papers in this application and to the answering affidavit of first and second respondents in the first application for interim relief provides the following in clause 6:

> *"ARTICLE 6 – IMPLEMENTATION*
>
> 6.1 *The implementation process shall commence with a maximum 6 (six) months transitional period to provide for the gradual phasing in of easy fuel.*
>
> 6.2 *Within 30 days after the commencement date* (14 April 2011) *the parties through their duly authorised*

officials undertake to finalise a joint implementation plan over and above Appendix III if required and agreed upon by both parties subject to the provisions of clause 4."

(clause 4 is the standard non-variation clause)

[31]

[32] Appendix III has not been provided.

[33] It is clear from this clause that the implementation process will have a maximum 6 month transitional period, and that only 30 calendar days after 14 April 2011 will the parties undertake to finalise a joint implementation plan. No joint implementation plan has been provided or referred to.

[34] With regard to the argument raised by the respondents that the applicant was lackadaisical, or lacked sufficient vigour in pursuing its remedies in terms of Rule 53 and that it took too long to properly study the review record in the circumstances, the applicant states that until recently, it laboured under the belief that the second respondent would not continue with the implementation of the tender until such time as the review is finalised, considering the extent of the alleged irregularities already pointed out in the first application for interim relief. While under this belief, the parties still continued to work flat out for the past 4 weeks after the first application for interim relief was struck from the roll, to scrutinise and analyse the record and other documents to prepare for the review and the urgent application.

[35]

[36] It is also stated that it was important for the applicant to study these documents in detail to understand why the eleventh respondent was initially recommended as the successful tenderer, as well as the process and reasoning behind the ultimate decision to award the tender to the fourth respondent, and why the applicant was not even short listed in the tender process. The applicant states that it was always its intention to bring an application for the review of the decision of the first respondent to award the tender to the fourth respondent as soon as it had all necessary documentation.

[37]

[38] The allegation by the respondents to the effect that the applicant already knew since November 2010 that it had not been short listed was met with a response by the applicant to the effect that it was clear from correspondence addressed to it, that at the time the tender had not been awarded as yet, and furthermore that to date, the applicant has still not received any reasons from the first respondent why it was not short listed in the tender process.

[39] Furthermore, according to the applicant, it realised, after having perused the record in more detail that there were even more irregularities than what it had picked up the first time round, when it did not have sufficient time to peruse and study the record in detail. The applicant apparently also realised that the prospects of a successful review were in fact much better than what appears from

the answering affidavit it filed in the first application for interim relief. The applicant further states that the exercise of studying the documents and compiling this affidavit was extremely time consuming. It is further alleged that subsequent to properly studying the record, it would now appear that the eleventh respondent who the applicant initially supported should not have been awarded the tender in the first place. It is noted, that the applicant specifically stated in its answering affidavit in the first application for interim relief, that there was insufficient time within which it or its legal representatives could fully consider the review record at that stage.

[40] The applicant states that in order to formulate the affidavit in this application an extensive process of preparation was required which included the copying of voluminous documents and a despatch of same to the applicant's officials based in Windhoek and South Africa, the exchange of comments and input from the different officials of the applicant, meeting with the applicant's legal representatives and various other persons and finally drafting and finalising the founding papers in this application. The applicant alleges that it was prevented from obtaining sight of important material, not disclosed by the first respondent, however there is a dispute between the parties as to whether this documentation should have been made available in terms of Rule 53, which I do not propose to deal with for reasons appearing below.

[41] In support of its urgent relief the applicant submitted that the Court must assume that the applicant's case is a good one and that it has a right to the relief which it seeks. It cited the authority of Bandle Investments (Pty) Ltd v Registrar of Deeds and Others 2001 (2) SA 203 (SECLD) at 213E-I and 20th Century Fox Film Corporation and Another v Anthony Black Film (Pty) Ltd 1982 (3) SA 582 (W) at 586G.

[42]

[43] I was also referred to the recent and as yet unreported judgment of this Court in the matter of Petroneft International and Another v Ministry of Mines and Energy delivered on 28 April 2011 where Smuts J clarified the law on urgency after extensively reviewing numerous Namibian and South African authorities.

[44]

[45] In paragraph 26 of that judgment it was held that it is a well established principle that, as expressed by Coetzee J in Luna Meubel Vervaardigers (Edms) Bpk v Makin and Another 1977 (4) SA 135 (W) there are varying degrees of urgency.

[46]

[47] In paragraphs 27 and 28 of the Petroneft judgment of Smuts J, the Court reconfirmed the principle that urgency of a commercial interest justifies the application of Rule 6(12) no less than any other interest. Further, that in commercial matters, there would thus be degrees of urgency, and it would be incumbent upon the applicant to demonstrate with reference to the facts of a specific matter that they are unable to receive redress in the normal course and that the facts

justify the urgency with which the application had been brought.

[48] In exercising its discretion on urgency and in condoning non-compliance with the Rules of Court, the Court in Petroneft relied on numerous factual issues, which the applicant submits also present themselves in this case and which it further submits are weighty considerations which favour the applicant in the exercise of discretion by the Court to hear this matter as one of urgency. These include the following:

a. the fact that it may become difficult to sustain a claim for the recovery of damages;

b. that in assessing urgency the Court should have regard to factors enumerated in Radebe v The Republic of South Africa and Others 1995 (3) SA 787 (N) at 799B-F (which were employed in considering whether there had been an unreasonable delay in bringing a review application) such as, for instance:

- the time taken to take all reasonable steps preceding an application including considering and taking advice;

- the time required to obtain copies of the relevant

documents, consult with witnesses and the obtaining and preparing affidavits;

- in considering the time taken to prepare the necessary papers, allowance should not be made for the fact that a party cannot be expected to act over hastily, particularly in complex matters;
- the fact that the relevant parties may be stationed at different locations some distance from the Court;

- generally speaking reasonable time should be allowed to applicants to marshal their forces;

- if there was no culpable delay on the part of the applicant in taking all the aforementioned steps to properly launch the application, this is a matter which favours the applicant in the exercise of this discretion.

See: Paragraphs 31 to 33

[49]

[50] It was also submitted on behalf of the applicant that whether or not the applicant has forewarned the decision-maker of a possible application is, according to Radebe's case also a factor which weighs in the applicant's favour. The same applies with steps taken to solicit

reasons for particular decisions and to ascertain the terms of that decision.

[51] I was also referred to another recent unreported judgment of the Full Court in case number A61/2011, delivered on the same day as the Petroneft case, namely the matter of Walmart Stores Incoporated v The Chairperson of the Namibian Competition Commission. The legal principles applicable to urgency referred to in the Petroneft case, in particular relating to commercial urgency were reconfirmed when the Court found that commercial urgency justifies the use of urgent proceedings, and that the reasonable time taken by the applicant to prepare the application and to take necessary and preceding steps should not be held against an applicant as constituting an undue delay.

See: Paragraphs 23, 26 and 28 of that judgment

[52]

[53] Counsel for the first to fourth respondents submit that these cases are now on appeal, and should therefore not be considered. Apart from the fact that the authorities referred to in the above two judgements have been applicable in our Courts for decades, I see no reason why I should not consider them, even if an appeal has been noted, as they remain law until set aside by the Supreme Court. In any event, I am in respectful agreement with those judgments.

[54] Having studied the above authorities, and considered the facts in support of urgency, I am of the view that this Court should hear this matter as one of urgency, and I exercise my discretion accordingly. The applicant has explicitly set forth the reasons why it will not obtain substantial redress in due course as required by Rule 6(12).

[55]

[56] I say so for the following reasons. It is not disputed that the applicant's services are to be provided until 30 September 2011. It is also not disputed that on 6 June 2011, the applicant's equipment currently fitted into some 3,000 Government vehicles will be removed and fitted with the equipment of the fourth respondent. Thus, it is evident that the applicant will no longer be able to render the agreed service until 30 September 2011, if the fourth respondent fits the vehicles with its own equipment. The applicant accordingly stands to lose the income that it would earn from providing the service in terms of that agreement, and may very well not be able to recoup the financial loss as a result of its equipment being removed. This is indeed, in my view, the type of commercial urgency which warrants the Court looking into this matter and hearing it on an urgent basis.

[57] The convenience of the Court is also an important consideration. The parties have dealt with all the relevant issues in their papers and the Court has had the benefit of well prepared heads of argument by counsel for the applicant and the fourth respondent.

[58] I am of the view that the applicant could have acted with more haste in finalising this application, especially after the first application for interim relief was struck from the roll. However does this mean that there was culpable remissness or *mala fide* on the part of the applicant? In my view there is no culpable remissness or *mala fide*s, and the urgency is not self-created. The applicant did need to study the record, consult and prepare founding papers together with its legal representatives, as well as to consider legal advice. The allegations made in support of urgency in the founding papers are not the same as those contained in the applicant's answering affidavit in the first application for interim relief. In fact, in this application the applicant raises quite a number of further grounds in support of urgency that only affect it, and its business, as well as additional allegations on the merits (to be dealt with below). In the first application for the interim relief, there were only some 20 annexures annexed to the answering papers of the applicant whereas in this application there are some 31 annexures. The answering affidavit in the first application is 17 pages whereas the founding affidavit in this application is 47 pages.

[59] I am also of the view that the applicant's argument that the first respondent has not made all documentation available in terms of Rule 53, and that this non-compliance should first be corrected before the counter-review application is launched, does not prevent the

applicant from launching its counter-application and compelling discovery of this additional documentation. Thus I directed the parties to file the counter-review application within 10 days.

Res judicata

[60] I now propose to deal with the point of *res judicata*, alternatively *lis pendens*. It is submitted by counsel for first to third and fourth respondents that the order granted by the Court dismissing the first application for interim relief for lack of urgency is final with respect to the issue of urgency. The applicant apparently did not produce new admissible evidence as a result of which the matter is *res judicata*. It is submitted further that this application relates to the same subject matter between the same parties, and that the case of the applicant is based on the same grounds, the applicant having relied on the same attachments as those relied on by the eleventh respondent when the first application for interim relief was heard and dismissed on 19 April 2011. There are accordingly no changed circumstances as alleged by the applicant.

[61] The first to third respondents, supported by the fourth respondent also argue with regard to the eleventh respondent's petition to the Supreme Court that should the eleventh respondent obtain leave to appeal, the matter is *lis pendens*.

[62] The general principle is that a matter adjudged upon is *res judicata* and the decision is accepted as the truth (*res judicata pro veritate accipitur*). The consequence is that in any future legal proceedings, the judgment is binding on the parties to the original case and their successors in title provided:

(a) that it was final judgment;

(b) the new case concerns the same subject matter; and

(c) is based on the same ground of action.

See: Wille's, Principles of South African Law, 9th Ed, Juta 2007 at page 856 and the authorities collected there

[63] The requirements for a successful defence of *res judicata* were recently restated in an unreported judgment of Muller J after extensively reviewing the relevant authorities in Erastus Tjiundikua and Another v Ovambanderu Traditional Authority and 5 Others, delivered on 26 November 2010, case number 336/2010, as follows: the essentials for the *exceptio res judicata* are three fold, namely that the previous judgment was given in an action or application by a competent Court (1) between the same parties (2) based on the same cause of action (3) with respect to the same subject matter, or thing.

Requirements (2) and (3) are not immutable requirements of *res judicata*.

See: Paragraph 11 of that judgment and the authorities collected there

[64] In the same paragraph, Justice Muller further quoted with approval the dictum of Steyn CJ in African Farmers and Townships v Cape Town Municipality 1963 (2) SA 555 (A) at 562D:

> *"The Rule appears to be that where a court has come to a decision on the merits of a question in issue, that question, at any rate as a causa petendi of the same parties cannot be resuscitated in subsequent pleadings.*

[65] The issue I am called upon to determine is whether the decision of the Court to strike the matter from the roll for lack of urgency in the first application for interdictory relief, amounts to a final decision on the merits in respect of the same subject matter and based on the same ground of action between the same parties.

[66] I agree that all the parties in the main application, the first application for interim relief, as well as this application are the same, even though the applicant is the eleventh respondent in the previous applications. I also agree that the relief sought in the previous application for interim relief and the relief sought in this application, though phrased differently is in substance the same, namely to prevent the implementation of the contract concluded between the second and fourth respondent pending finalisation of the review application. However, the basis for the applicant's relief is not exactly the same, although there are common elements. I also do not agree that the order granted in the previous application is final, or that it disposed of the merits.

[67]

[68]

[69] The previous application was struck from the roll for lack of urgency. The Court did not make a finding on the merits of that application.

[70] In Aussenkehr Farms (Pty) Ltd and Another v Minister of Mines and Energy and Another 2005 NR 21 (SC), Strydom CJ (as he then was) stated the following at 33A-F:

> *"A dismissal of an application on the grounds of lack of urgency cannot close the doors of the Court to a litigant. A litigant is entitled to bring his case before the Court and to have it adjudicated by a Judge. If the arguments, raised by Mr Barnard and Mr Rossouw, are taken to their full consequence, it would mean that, at this preliminary stage of the proceedings, a Court would be able to effectively close its doors to a litigant and leave the latter with only a possibility to appeal. To do so would not only incur unnecessary costs but would, in my opinion, also be in conflict with art 12(1)(a) of the Constitution, which guarantees to all persons, in the determination of their civil rights and obligations, the right to a fair and public hearing before a Court established by law.*
>
> *I want to make it clear, however, that there may be instances where the finding of a Court that a matter was not urgent, might have a final or definitive bearing on a right which an*

applicant wanted to protect and where redress at a later stage might not afford such protection. See Moch's case (supra) at 10F--G. In such an instance no leave to appeal would be necessary. However, the present case is not such an instance and there was no reason why the appellants could not seek redress in the ordinary way, by setting the matter down again or, if they wanted to appeal, to comply with the provisions of Act 16 of 1990. A refusal to hear a matter on the basis of urgency may, in the Namibian context, be regarded as what was termed a 'simple interlocutory order' for which leave to appeal would be necessary in terms of s 18(3) of Act 16 of 1990. (See South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd 1977 (3) SA 534 (A) at 549G-551A.)"

[71] According to the dictum in Aussenkehr, a refusal to hear a matter on the basis of urgency, may, in the Namibian context, be regarded as a simple interlocutory order for which leave to appeal may be necessary.

[72] Insofar as counsel for the first to third respondents submits that the matter is final insofar as urgency is concerned, it was held in Knouwds v Josea 2010 (2) NR 754 (SC) at 759 at paragraph 10 that generally speaking, the attributes to constitute an appealable judgment are three fold, namely, the decision must be final, be

definitive of the rights of parties or must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceeding.

[73]

[74] Leave to appeal against the order granted in the first application for interim relief was applied for, and I hold the view, in any event that leave was required because the effect of the order does not have a final and definitive bearing on the right sought to be protected. It simply means that, according to the previous Court, the eleventh respondent, supported by the applicant, did not make out a case for urgency. The merits were not heard and it did not have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.

[75] Even if it could be argued that the order striking the first application for interim relief because of lack of urgency was final in effect because this Court cannot change it, the requisites of *res judicata* are still not met because the applicant's grounds for urgency in this application are different from the grounds relied on in the previous application for interim relief. These have been dealt with above. Accordingly, even if the same thing is being demanded, namely urgent relief, it is not based on the same ground or cause.

[76] Furthermore, the mere fact that there may have been common elements between some of the applicant's allegations in support of urgency in its answering affidavit in the first application for interim relief, does not justify the *exceptio*, as one has to look at the claim in its entirety. In the present case the differences are apparent.

See: National Sorghum Breweries Ltd *supra* at paragraph 5

[77] In light of all the circumstances, I find that the *res judicata* point accordingly fails. The *lis pendens* point fails for the same reasons. In any event the applicant was not involved in the petition to the Chief Justice which is essentially an appeal against the finding of lack of urgency only.

[78] I now proceed to deal with the merits. The applicant seeks interim relief in order to protect its interests pending the finalisation of the main review application and a counter-application to be launched by it, for the review and setting aside of the tender awarded to the fourth respondent.

[79] With regard to the requirements the applicant has to satisfy for urgent interim relief in review applications, it was held in Safcor Forwarding (Johannesburg) (Pty) Ltd v National Transport Commission 1982 (3) SA 654 (AD), that urgent interim relief pending the finalisation of an application for judicial review can be applied for. At page 674H-675A of that judgment, Corbett JA (as he than was) stated the following:

> *"The procedure of a rule nisi is usually resorted to in matters of urgency and where the applicant seeks interim relief in order adequately to protect his immediate interests. It is a useful procedure and one to be*

encouraged rather than disparaged in circumstances where the applicant can show, prima facie, that his rights have been infringed and that he will suffer real loss or disadvantage if he is compelled to rely solely on the normal procedures for bringing disputes to Court by way of notice of motion or summons. The rule nisi procedure must be considered in conjunction with the provisions of Rule 6 (12) which, in the case of urgent applications, permits the Court to:

> *'dispense with the forms and service provided for in these Rules and (to) dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these Rules) as to it seems meet'."*

[80] He further stated at 675C-D that:

> *"The decisions of public bodies or officialdom sometimes bear hard on the individual. The impact thereof may be sudden and devastating. Therefore, as in the case of other types of litigation, applications for the review of such decisions may require urgent handling and, in proper circumstances, the grant of interim relief. In my*

opinion, it would be unfortunate if our review procedures did not admit of this. Happily I think they do."

See also: Kaulinge v The Minister of Health and Social Services 2006 (1) NR 377 (HC) at 387D-H

Esterhuizen v The Chief Registrar of the High and Supreme Court of Namibia, unreported judgment of the High Court delivered on 21 July 2010 under case number A196/2010 at paragraph 19

[81] Counsel for the applicant submits that based on the decision in Safcor, Kaulinge and Esterhuizen *supra* all that is required in order to succeed in obtaining urgent relief of this nature (apart from proving urgency, which has already been decided above) is a *prima facie* infringement of the applicant's rights.

[82] Reliance was also placed on Contract Support Services (Pty) Ltd v Commissioner SARS 1999 (3) SA 1133 (WLD) at 1142C-01144D.

[83] Although I need not decide this issue, for the reasons below, I do not, with respect, agree with this submission.

[84] I do not understand Corbett JA in Safcor to suggest, in what I believe to be an *obiter* statement, that in all cases, the requisites for an interim interdict are not to be applied in applications for interim relief pending finalisation of review applications. The facts in the Contract Support Services case involved objections lodged with the Receiver of Revenue to certain assessments made in terms of which

the applicants had to pay certain amounts allegedly due in terms of the South African Value-Added Tax Act. Pending a resolution of that issue, the applicants applied for interim orders reviewing and setting aside the decision to issue notices in terms of the VAT Act. The Court then considered whether a *prima facie* case had been made out relying on the above dictum in Safcor, after having decided that the interim relief sought in that case was not interdictory but declaratory in nature.

[85]

[86] On the facts of this case the applicant applies to interdict the implementation of the agreement concluded between the second and fourth respondents on an interim basis pending finalisation of the main application and the cross-application. In my view, this is interdictory in nature, and the necessary requisites must be met for this type of relief to be granted.

[87] In my view, I am supported in this approach by the case of Zulu v Minister of Defence and Others 2005 (6) SA 446 where Mojapelo J, in a matter involving an interim application to stay the execution of a decision of a Military Court pending a review of that decision, only considered whether a *prima facie* right had been made out because the parties agreed that the other requisites for interim interdictory relief had been made out.

[88]

See: Paragraph 43 of that judgment

[89] In light of the foregoing I will now consider whether the requisites for an interim interdict have been met.

[90] The requirements for an interim interdict have authoritatively been laid down and developed over the years. They are succinctly set out in LAWSA, 2nd Ed, Vol 11 at para 402. These are:

(a) A *prima facie* right;

(b) A well grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted;

(c) That the balance of convenience favours the granting of an interim interdict; and

(d) That the applicant has no other satisfactory remedy.

See: Alpine Caterers Namibia (Pty) Ltd v Owen and Others 1991 NR 310 (HC) at 313E-I

Clear Channel Independent Advertising and Another v Transnamib Holdings Ltd and Others 2006 (1) NR 121 (HC) at para 15-16

[91]

[92] The learned authors in LAWSA also point out that in view of the discretionary nature of the interim interdict these requisites are not judged in isolation since they interact. The stronger the right is that an applicant proves of lesser importance the other matters become.

See: Alphine Caterers Namibia (Pty) Ltd *supra* at 313H

[93] I now proceed to deal with each of these requisites, bearing in mind that they interact.

Prima facie right

[94] The Court has to consider whether the applicant has in its founding papers furnished proof which, if uncontradicted and believed at the trial, would establish its right. More is required than merely to look at the allegations of the applicant, although something short of a weighing up of the probabilities of conflicting versions is required.

See: Webster v Mitchell 1948 (1) SA 1186 (W) at 1189

[95] The proper approach is to consider the facts as set out by the applicant together with the facts set out by the respondent which the applicant cannot dispute, and to decide whether, with regard to the inherent probabilities and ultimate onus, the applicant should on those facts obtain final relief at the trial. The facts set up in

contradiction by the respondent should then be considered, and if they throw serious doubt on the applicant's case he cannot succeed (my emphasis).

See: LAWSA *supra* para 404

Webster v Mitchell *supra* at 1189

Mudge v Ulrich N.O. and Others 2006 (2) NR 616 (HC) at 619C-E

[96] It is accordingly necessary for the Court to consider the grounds for review and the facts alleged in support of those grounds by the applicant, together with the facts set up in contradiction by the respondent which the applicant cannot dispute, and if disputed to establish whether the respondent's allegations throw serious doubt on the applicant's case.

[97] The main grounds for review raised by the applicant are that the Tender Board:

- Unlawfully abdicated its decision-making power and discretion to the Ministerial Tender Committee and the subcommittee established from amongst its members. It would appear from the facts as well as the documentation annexed that the Ministerial Tender Committee was a committee headed by the third

respondent which on its own, along with unnamed evaluators went through the tenders and recommended to the Tender Board which tenders should be included;

- Allowed a State House official to illegally dictate to it the outcome of the tender;

- Acted *ultra vires* by failing to comply with the Tender Board of Namibia Act, 16 of 1996 ("the Tender Board Act") and Regulations, not only in relation to the decision-making process but also by bowing to outside interference, failing to maintain secrecy and confidentiality of the evaluation and decision-making process required by Regulation 4(4) of the Regulations made under GN 236 and 237 of 1996 under section 20 of the Tender Board Act, and resorted to a transgression of section 15(3) of the Tender Board Act in terms of which the Tender Board should have rejected the fourth respondent's tender;

- Was biased in favour of certain tenderers, notably the eleventh respondent and later the fourth respondent, to the prejudice of competing tenderers including the applicant;

- Failed to properly apply its mind or to give reasons for rejecting the applicant's tender; and

- Failed to properly apply the *audi alteram partem* rule with regard to any consideration which gave rise to the applicant's tender being disqualified.

[98] It is also alleged that there was a general absence of reasonable and fair administrative justice required by Article 18 of the Namibian Constitution.

[99] The first to fourth respondents deny the above grounds for review. In order to give context to their denials as well as the facts in support of the applicant's grounds for review, some background information on the tender process from inception must be dealt with.

[100] As previously mentioned, the tender concerns the provision of a fuel management system (EFuel) for the Government's vehicle fleet. It involves amongst other things the installation of radio frequency identification devices and other equipment to Government in-house petrol pumps and Government fleet vehicles, so that when a vehicle arrives at the pump and the nozzle is inserted in the fuel tank inlet of the vehicle, there is an automatic recognition of the vehicle as a Government fleet vehicle. The transaction is then authorised and the pump releases fuel. This technology also facilitates the payment to

the service station for the fuel transaction by the appointed bank. No cash, fuel card, voucher or other token is required in order to pay for the petrol dispensed into the vehicle. The purpose of the system is to avoid fraud and enhance the controls of fuel procurement of Government vehicles.

[101] The applicant relies on the following facts in support of its grounds for review.

[102] During or about 27 April 2010 the Tender Board invited companies / bidders for an expression of interest for the development, supply and management of EFuel for the Government vehicle fleet for a period of 10 years (my emphasis). The applicant together with 10 other bidders made submissions in response to this advertisement. It is clear *ex facie* the invitation for expression of interest that the invitation was for purposes of prequalification and only those who met the requirements of the prequalification round would be asked to submit a tender.

[103] On 21 August 2010, the third respondent forwarded a letter to the Secretary of the Tender Board requesting the Tender Board to invite the companies who had submitted an expression of interest to provide their technical and financial proposals.

[104] The Tender Board then invited the companies that had submitted an expression of interest to tender. The tender was never

advertised. However, in this regard, the applicant submits that it was not prejudiced by this non-compliance with the Tender Board Act as it had submitted a tender.

[105] The tender documents required tenderers to submit 2 separate sealed envelopes, one dealing with the technical proposal and the other dealing with the financial proposal. It was stated that only the technical proposal envelopes would be opened after the closing date, and that only the financial proposals of those tenderers whose technical proposals met the tender requirements / specifications would be evaluated against each other.

[106] On 13 September 2010 the third respondent wrote a letter to the Tender Board in which he indicated that the *"evaluators"* met on 10 September 2010 and concluded that 4 tenderers, including the fourth and eleventh respondents (and not the applicant) should be afforded an opportunity to go to the second round. The third respondent then indicated that the second respondent had selected a certain date for opening the financial proposals of the recommended companies.

[107] It is alleged by the applicant that the Tender Board did not consider this letter, or the recommendation, as no minutes of a meeting where the Tender Board considered this letter and/or itself decided which tenders should be considered in the second round have been made available. It is further alleged that the first set of minutes

of a Tender Board meeting relating to this tender provided in the record, took place on 3 December 2010, where the Tender Board was requested to consider a recommendation by the Ministerial Tender Committee that the tender be awarded to the eleventh respondent.

[108] In this regard, the following was stated in the minutes of the meeting of 3 December 2010:

> *"The Board went through the submission and could not get explanation on the following:*
>
> (1) *The weighting of the technical scores is not clear as to give indication on how the total score allocated to each tenderer was arrived at.*
>
> (2) *The comparison between the technical and financial proposal and the basis of out motivation. Which one of the two parts was evaluated first.*
>
> (3) *The Board also wanted to know how the prices were compared.*
>
> *The member from the Ministry of Works and Transport explained that the technical proposal was opened first and tenderers have to score 45 points to proceed to the financial evaluation. Those who fell out in the first round*

did not qualify to proceed to the second stage of opening the financial proposal. It was also explained that previous prices were used to compare prices. The member however informed the Board that the spreadsheet containing the total points does not form part of the submission. The Board noted that the additional information provided by the member does not form part of the submission and it can therefore not pronounce its position. More questions arose as to the length of this tender which was perceived to be very long. It was explained that the nature of services required necessitates the lengthy period. The Board also cautioned the ministry against quoting statements in the newspaper pertaining to the tender.

Resolved: Referred back for the ministry to provide clarity on the weighting of the scores."

[109]

[110] The applicant submitted that it is not clear on the papers nor from the documents annexed to the papers in the application on what basis this decision was taken to disqualify tenderers, and further that its exclusion from the second round was not only irregular but *ultra vires* as the Ministerial Tender Committee does not have the power to decide which tenderer should be disqualified in a tender, only to evaluate and make recommendations to the first respondent. This,

according to the applicant, is most probably the first irregularity which occurred in respect of this tender. In this regard applicant referred to sections 2, 3, 7, 8, 11, 12, 15, 16 and 21 of the Tender Board Act read together with Regulations made thereunder, which vests decision-making of tenders of this nature in the Tender Board.

[111] The applicant also pointed out that even though tenderers were informed that the technical evaluation would count 60 out of 100 points, none of the tenderers were ever informed how these points were to be allocated. It was thus impossible for any tenderer to comply with the tender document not knowing where the emphasis was placed by the second respondent. By creating a specific scoring threshold not provided for in the tender conditions the Ministerial Tender Committee, according to the applicant, effectively changed the tender conditions. It is submitted that the Ministerial Tender Committee does not have the power to amend tender conditions especially after tenders had been already submitted, and that the Ministerial Tender Committee thus acted *ultra vires* in doing so. It is further submitted that it is clear that the Ministerial Tender Committee and not the Tender Board took the decision to select these 4 companies as being the only ones whose technical proposals should be accepted, and that there is accordingly no evidence that the first respondent ever itself decided on all of the technical proposals. For this reason alone, it is submitted the tender should not have been awarded to any of the tenderers.

[112]

[113] It is necessary to point out at this stage that the purpose of the Tender Board Act contained in its long title, is to *"regulate the procurement of goods and services for, the letting or hiring or anything or the acquisition or granting of such rights for and on behalf of and the disposal of property of the Government to establish the Tender Board of Namibia and to define its functions …"*.

[114] The first to third respondents admit that the Ministerial Tender Committee does not have the power to disqualify any tenderer and that their role is to consider using their needs, technical experience and tender specifications, which tenders they feel best serve them and to make recommendations. It was on that basis they sent their views to the Tender Board which has an obligation to consider these recommendations and make a decision.

[115] The applicant further alleges that the Tender Board never formally informed the applicant or any of the other tenderers that had been disqualified as it is required to do in terms of section 16 of the Tender Board Act. Only during November 2010, when the applicant became aware that it had not been short listed, did it write a letter requesting reasons why the applicant was not short listed for the second round of evaluations. In a response to this letter the applicant was advised that the tender had not been submitted to the Tender Board for award and as a result the Tender Board was not required to, nor could it provide the reasons as yet. The applicant alleges that this letter confirms that the Tender Board was not even aware of the

decision to disqualify the applicant and the other tenderers at that stage.

[116]

[117] The first respondent in this regard stated that the Tender Board did not specifically publish the specific tenders that did not qualify, but that the 4 tenderers that qualified for the financial stage were published in the newspapers, and subsequently the award of the tender itself was published in *The New Era*. The first respondent submits that the only question that arises is whether or not this was sufficient in terms of section 16 of the Tender Board Act.

[118]

[119] Section 16(1) of the Tender Board Act provides that the Board shall in every case notify the tenderers concerned in writing of the acceptance or rejection of their tenders, as the case may be, and the name of the tenderer whose tender has been accepted by the Board shall be made known to all the other tenderers. It also provides that on the written request of a tenderer, the Tender Board shall give reasons for the acceptance or rejection of his or her tender.

[120] Subsequent to a further letter from the applicant's legal representative, the Tender Board's attention was drawn to the fact that only 4 tenderers would be considered by the Tender Board for determination despite the fact that it had not had an opportunity to consider any of the tenders. It was pointed out that this tainted the evaluation process of the tender with irregularity. It would appear

that in response, the Acting Secretary of the Tender Board informed the applicant's legal representative that the tender was discussed by the Tender Board at its meeting held on 3 December 2010, that no award was made and that the tender was referred back to the Ministry of Works for clarity. It was indicated that the Tender Board could not pronounce itself on a tender which had not been awarded.

[121] The applicant states that by this time, the Tender Board knew that the applicant had effectively been disqualified from the tender by the Ministerial Tender Committee and was therefore in a position to inform it of this fact and to provide reasons for its disqualification. In fact, *ex facie* the minutes of the meeting of 3 December 2010, the Tender Board knew of a letter containing allegations of irregularity pertaining to the tender.

[122]

[123] It is submitted by the applicant that the Tender Board's refusal to provide reasons is unreasonable and an infringement of the applicant's right to fair and reasonable administrative action as protected in Article 18 of the Namibian Constitution. The first respondent in opposition submits that the refusal to furnish reasons at the time was predicated on the basis that the entire tender process was not complete, but that perhaps on an individual basis the applicant ought to have received its reasons then and that this is a matter for legal interpretation. In this regard, there appears to be no real denial of the allegation by the applicant that by this time the Tender Board already knew that the applicant had been disqualified

by the Ministerial Tender Committee, and an admission that the applicant should have been provided with reasons.

[124] In the meantime, the Ministerial Tender Committee had considered and evaluated the financial proposals of the 4 companies which proceeded to the second round. By letter dated 15 November 2010 addressed to the Secretary of the Tender Board, the Ministerial Tender Committee recommended that the tender be awarded to the eleventh respondent. This recommendation was signed by the third respondent in his capacity as Permanent Secretary of the Ministry as well as in his capacity as Chairperson of the Ministerial Tender Committee. This allegation is admitted by the first respondent. In this regard it is noteworthy that on page 2 of the recommendation the fourth and sixth respondents were eliminated as they apparently did not comply with the financial terms of the tender.

[125] The Tender Board met again on 4 February 2011 to consider the submissions made by the Ministerial Tender Committee. It appears from the minutes of that meeting that the Chairperson informed the other members of the Tender Board that the Anti Corruption Commission was investigating the tender and that she was shown a video clip regarding the tender. Doubts were also expressed about the independence of the Ministerial Tender Committee at this meeting.

[126] It is on this date that the Tender Board decided to appoint a subcommittee in terms of section 8 of the Tender Board Act, to carry out the evaluation. The terms of reference for the subcommittee were to investigate or establish a scoring system and also to clarify benchmarking.

[127]

[128] Despite a number of other irregularities having been raised in the minutes, the applicant submits that it is clear that the Ministerial Tender Committee engaged in the first evaluation process on its own and that not even all the documents that it relied on in making the decision in this first evaluation process were even provided.

[129] It was further submitted that the power of delegation of the Tender Board, which is responsible for the procurement of goods and services for the Government of Namibia, is limited to a delegation of its functions to a committee consisting of persons appointed from its members in terms of section 8 of the Tender Board Act. The applicant in this regard points out that even the subcommittee did not consider and evaluate all tenders. Only the Ministerial Tender Committee's submissions were considered and evaluated.

[130] The Tender Board appears, according to the applicant, not to have - apart from identifying an arithmetical error committed by the Ministerial Tender Committee during the technical evaluation which led to a disqualification of the eleventh respondent – evaluated, assessed or reviewed the decision taken by the Ministerial Tender Committee at all with regards to the tender evaluation process. The record of the Tender Board's decision-making reveals numerous complaints by its own members that it was, due to the absence of vital information, unable to engage in such an exercise. It nevertheless, save for disqualifying eleventh respondent on an

arithmetical error, accepted the decision of the Ministerial Tender Committee on the technical evaluation. What is also noteworthy according to the applicant, is that the Tender Board did not out rightly make a pronouncement on the decision of the Ministerial Tender Committee to disqualify 7 out of 11 tenderers, but simply took those nominations without indicating its agreement. The first respondent in this regard admitted that it *"ought to have collectively considered the recommendations and taken a decision clearly setting out what we agreed with and what we did not"*.

[131] With regard to the allegation that the other 7 tenderers did not make it past the first stage of the tender process, it is alleged that it cannot be said that the Ministry disqualified them but rather that *"there was an omission by the Board to pronounce itself regarding their bid rejection out rightly"*. In response, the applicant submits that considering this was the Tender Board's direct statutory responsibility, this allegation only serves to underscore the seriousness of the statutory non-compliance.

[132] The first to third respondents merely note and do not at all dispute the allegation that the Ministerial Tender Committee recommended the fourth respondent, despite it not having complied with tender requirements and that ultimately, the fourth respondent's tender was accepted despite the fact that it was in conflict with very important tender conditions. For example, the fourth respondent's

tender contained a price escalation of approximately 10% when the tender conditions required the price to be firm. Furthermore the fourth respondent's bid apparently did not even contain a letter of support from the financial institution, another tender requirement. The absence of any proper denial by the first to third respondents is telling.

[133] The applicant states in addition that the duly appointed subcommittee of the Tender Board eliminated the first respondent on the basis that it required an advance payment by the Government, whereas the fourth respondent's bid was accepted despite the fact that – in terms of the agreement between second and fourth respondents – the fourth respondent will also be receiving a large advance payment. This aspect is also not challenged by the second and third respondents.

[134] It is also alleged that numerous further irregularities arose in the recommendation and award to the fourth respondent, namely, that the actual price to be charged by the fourth respondent is much higher than what was understood by the subcommittee of the Tender Board and that the fourth respondent's bid generally was never properly evaluated. Yet the tender was still, for some inexplicable reason, awarded to the fourth respondent. The respondents, in denying this allegation, simply state that *"the minutes are clear and show that the fourth respondent was evaluated and considered*

against three other bidders who made the technical grade. Whether or not the applicant is correct in its allegations or challenged to how the fourth respondent was awarded the tender is an issue for argument on the main application …". The first to third respondents also concede that the Tender Board *"overlooked the price escalations as it appears on the record which ought to have countered against the fourth respondent"*.

[135] On 15 February 2011, the subcommittee met again, after receiving further documents from the Ministry and resolved to make a final recommendation to the Tender Board that the tender be awarded to the fourth respondent.

[136]

[137] It is alleged by the applicant that the subcommittee did not understand its mandate. It is also alleged that the subcommittee failed to apply its mind properly to its mandate, because it did not even realise that the Ministerial Tender Committee disqualified tenderers incorrectly. Furthermore, it is alleged that the subcommittee did not have the technical competence to evaluate the tenderers, and even if it did, it did not in fact evaluate the technical proposals of all bidders, as it was required to do according to its mandate. The denials by the first respondent on the papers are vague and unfortunately do not shed any light on the issues raised.

[138] Most disturbingly, the applicant alleges that despite the clear

condition of the tender that the Namibian Government will not pay for fitments and hardware, but only for fuel, transaction fees and bureau fees, the fourth respondent's fitment and hardware fees proposed in its bid amounted to some N$18,585,029.55. This was a breach for which the fourth respondent and at least one other bidder were initially eliminated from further consideration by the Ministerial Tender Committee. Notwithstanding this, the subcommittee still made the finding in relation to the fourth respondent, that no where in this company's financial proposal could it be established that Government must pay fitments and equipment. Yet, the applicant in referring to the fourth respondent's tender documents pointed out that the fourth respondent in its tender provided for fees for the purchase of equipment and installation thereof. This allegation, in its entirety, is simply noted, by the entity required by law to have considered and evaluated the tender, and to have been involved as the major decision-maker in the entire tender process.

[139]

[140] A number of further irregularities and statutory non-compliance on the part of the first respondent are raised by the applicant in its founding papers. I do not find it necessary to deal with all of them at this stage, as I hold the view, based on the allegations contained in the papers, detailed above, that the applicant has on the facts mentioned above shown, *prima facie*, that the Tender Board abdicated its powers to the Ministerial Tender Committee and that the Ministerial Tender Committee acted *ultra vires* its functions.

[141]

[142] In public law, the perpetrator of an act in question must be legally empowered to perform the act. It is for the administration to justify its acts by reference to the authority of a statute whenever the existence of its powers or the validity of their exercise is in question. In the absence of such power, the act in question would be *ultra vires* and void.

See: RBH Construction v Windhoek Municipal Council and Another 2002 NR 443 (HC) at 449H-J

Oudekraal Estates (Pty) Ltd v City of Cape Town 2010 (1) SA 333 (SCA) at 354 para 81 and the authorities they collected

Vereeniging City Council v Rema Bible Church Walkerville and Others 1989 (2) SA 142 (T) at 149E

[143]

[144] I also hold the view that the decision to disqualify the applicant from the tender process, was not taken by the Tender Board nor by the subcommittee but by the Ministerial Tender Committee, which would constitute an unlawful abdication by the Tender Board of its powers, and render the decision taken by the Ministerial Tender Committee void.

See: Oppermann v Die Kommittee van Teenwoordiging Deorverheid 1991 (1) SA 372 (SWA) at 380D-E

Waterberg Big Game Hunting Lodges v Minister of Environment 2010 (1) NR 1 (SC) at 16A-B and footnote 7

Matador Enterprises (Pty) Ltd v Chairman of the Namibian Agronomic Board 2010 (1) NR 212 (HC) at 281E-F

[145]

[146] To date, the Tender Board has still not given the reasons why the applicant was rejected. *Ex facie* the papers, it would appear to be doubtful whether considered reasons can even be provided in the circumstances, considering that the Tender Board, despite protestations to the contrary, appears never to have evaluated the tenders or taken a decision itself, because all bids were never submitted to it for consideration.

[147] The failure of the Tender Board to give reasons to the applicant based on what it terms to be a legal interpretation of section 16 of the Tender Board also in my view constitutes *prima facie* an unfair and administrative action and an infringement of the applicant's rights under Article 18 of the Constitution. The giving of reasons is fundamental to fair and administrative decision-making. In Kersten t/a Witvlei Transport v National Transport Commission and Another 1991 NR 234 (HC), the Court at 239H held – with reference to Article 18 – that a body which is required to act fairly and reasonably can in most instances only do so if those affected by its decisions are apprised in a rational manner as to why that body made the decision in question. The giving of reasons is implicit in the requirements of

Article 18 of the Constitution and the failure would militate against the principle of transparency embodied in the Constitution.

See: Aonin Fishing v Minister of Fisheries and Mariner Resources 1998 NR 147 (HC) at n151D-F
Sikunda v The Government of Namibia (3) 2001 (1) NR 181 (HC) at 192D-H

[148] I also hold the view that in light of the foregoing it has been shown *prima facie* that the Tender Board failed to apply its mind, which would result in the decision being *ultra vires* and reviewable.

See: Johannesburg Stock Exchange v Witwatersrand Nigel 1988 (3) SA 132 (A) at 152A-E

[149]

Irreparable harm

[150] The second requisite for an interim interdict is a reasonable apprehension that the continuance of the alleged wrong will cause irreparable harm to the applicant. The test is objective and the question is whether a reasonable person, confronted by the facts, would apprehend the probability of harm; actual harm need not be established on a balance of probabilities. If the applicant can establish a clear right this apprehension of irreparable harm need not be established. This requisite is also closely related to the question of

balance of convenience.

[151] I have dealt in detail with this aspect above, and do not propose to further expand on this issue as a result. In my opinion, the applicant has shown that if the implementation of this tender is not suspended, it will suffer irreparable harm. I also hold the view that should the tender be implemented, payments of over N$18 million will be paid over the next 2 months to the fourth respondent, an entity that appears on the papers not even to have qualified for the tender.

[152] I am also in respectful agreement with the decision of the Supreme Court in The Minister of Mines and Energy and Another v Black Range Mining (Pty) Ltd, an unreported judgment, delivered under case number SA18/2009, and in particular paragraphs 34 and 40 thereof where it was held that once illegalities are proved, prejudice is presumed and no proof of special damages are required. I have opined that *prima facie* the tender process from evaluation to award has been fraught irregularities.

[153]

[154] Another aspect of the applicant's irreparable harm, is that a claim for damages for loss of income for the nature of losses to be sustained by the applicant would be very difficult if not impossible to maintain in law. The same applies to any loss of income the applicant or any other successful tenderer other than the applicant will stand to

suffer by not having been awarded the tender from the onset, and for the loss suffered during the interim period until the tender is ultimately set aside. During that period, the fourth respondent will effectively be earning an income that it would appear, it is not entitled to.

See: Olitzki Property Holdings v State Tender Board and Another 2001 (3) SA 1247 (SCA) at 1262 para 30 to 1267 para 42

Steenkamp N.O. v Provincial Tender Board, Eastern Cape 2006 (3) SA 151 (SCA) at 166 para 37 to 168 para 44

[155] I accordingly hold the view that the applicant was proved *prima facie* this particular requisite for the interdictory relief sought.

Balance of convenience

[156] The balance of convenience must favour the grant of the order. The Court must weigh the prejudice the applicant will suffer if the interim interdict is not granted against the prejudice the respondents will suffer if it is. The exercise of this discretion usually results in a consideration of the prospects of success and the balance of convenience: the stronger the prospects of success, the less the need for such balance to favour the applicant; the weaker the prospects of success the greater the need for it to favour him.

See: LAWSA Vol 11 para 406 and the authorities collected there

[157] In my view, the prospects of success in the main application favour the applicant, and that the balance of convenience favours the

applicant.

[158] It is apparent the applicant stand to lose substantial amounts of money should it not be able to complete its contract and by the immediate removal of its equipment from the vehicles. The applicant has already disbursed N$25 million and the fourth respondent has already dispensed N$6 million. I am more mindful of the first respondent's allegations to the effect that the EFuel management system is complicated with faults that must be addressed. The current system has loop holes that are open to fraud, abuse and human errors, hence the need for a fully electronic system. It was submitted by the first respondent should not be forced to continue with a system that it believes has so many pitfalls, and that should the Court grant the interdict Government suffers far more prejudice than the applicant could ever suffer.

[159]

[160] The applicant contends that it would be able to continue with the service it has in the meantime, and that there will be no disruption of that service should the tender be suspended. However should it not be suspended and the ultimate review later succeeds it will result in substantial costs and losses being incurred by all parties. The duration of the contract between the second and fourth respondents is for a period of 10 years.

[161] It is understood that the EFuel system needs to be overhauled

in order to prevent fraud, and that this is whole reason why this tender has been advertised on numerous occasions. However, it is not alleged that the current system being managed by the applicant is impossible to maintain in the interim despite difficulties being experienced at this stage. The fourth respondent in incurring the amounts that it did would obviously be doing so at its own peril considering that *ex facie* the minutes of the Tender Board, the fourth respondent appears not to have qualified to be awarded the tender.

[162] Should the Court overlook a tender process that *prima facie* falls foul of legislation as well as the Constitution, in order to prevent abuse being perpetrated on an EFuel system, when this abuse could have been avoided if decision-makers complied with the law in the first place? Or should this less than perfect EFuel system continue, until the Tender Board has got its house in order? I cannot see that it would be in the public interest to permit a *prima facie* blatant disregard for the law to continue unabated. Surely illegality cannot be overlooked in the public interest, and in my view, I should at this stage, decline to do so.

[163] The absence of an adequate alternative remedy has already been addressed above. In my view, it is apparent that there is no alternative remedy to grant similar protection other than to suspend in the interim the implementation of this agreement pending the finalisation of the review application.

Costs

[164] The applicant sought to obtain costs for this application on the basis that the respondents should not have opposed this application in view of their own admissions concerning the irregularities. The fourth respondent seeks a punitive costs order. The first to third respondents allege that should the Court find against them that costs should be in the cause.

[165] Indeed, the respondents have made some telling admissions, however, I still see no reason at this interim stage to award costs outside the general rule that in applications for interim relief, costs should be determined at the final hearing of the matter.

[166] In light of the foregoing, I made the following order on 9 June 2011:

1. That the applicant's non-compliance with the forms and service provided for in the Rules of this Court is condoned, and this matter is heard as one of urgency, pursuant to the provisions of Rule 6(12) of the Rules of Court.

2. The implementation of the agreement entered into between

the second and fourth respondents on 14 April 2011 with the view to implement Tender No: A10/2-35/2010 is suspended, and the first, second, third and fourth respondents are interdicted from taking any further steps in implementing the award of Tender No: A10/2-35/2010 to the fourth respondent, pending finalisation of the main review application instituted by the eleventh respondent under case number A 55/2011 and the counter-application to be made by the applicant in the main review application.

3. The applicant is directed to file its counter-application in the main review application within 10 days.

4. The costs of this application shall be costs in the cause.

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SCHIMMING-CHASE, AJ

ON BEHALF OF THE APPLICANTS	Mr Tötemeyer
Assisted by:	Ms Bassingthwaighte
Instructed by:	Koep & Partners

ON BEHALF OF 1st, 2nd AND 3rd RESPONDENTS

	Mr Ndlovo
Instructed by:	Government Attorney

ON BEHALF OF 4th RESPONDENT	Dr Akweenda
Instructed by:	Diedericks Incorporated