CASE NO.: A 223/2010

NOT REPORTABLE

IN THE HIGH COURT OF NAMIBIA

In the matter between:

AIR LIQUIDE (PTY) LTD	**APPLICANT**
and	
OSHIMOKO MEDICAL AIR & OGYGEN SUPPLIES CC	**1ST RESPONDENT**
AIR LIQUIDE HEALTH CARE NAMIBIA (PTY) LTD	**2ND RESPONDENT**
THE MINISTER OF HEALTH & SOCIAL SERVICES	**3RD RESPONDENT**
THE CHAIRPERSON OF THE TENDER BOARD OF NAMIBIA	**4TH RESPONDENT**
INTAKA TECHNOLOGY (NAMIBIA) (PTY) LTD	**5TH RESPONDENT**

In re the matter between:

OSHIMOKO MEDICAL AIR & OGYGEN SUPPLIES CC	**1ST APPLICANT**
AIR LIQUIDE HEALTH CARE NAMIBIA (PTY) LTD	**2ND APPLICANT**
and	
THE MINISTER OF HEALTH & SOCIAL SERVICES	**1ST RESPONDENT**
THE CHAIRPERSON OF THE TENDER BOARD OF NAMIBIA	**2ND RESPONDENT**
INTAKA TECHNOLOGY (NAMIBIA) (PTY) LTD	**3RD RESPONDENT**

CORAM: MILLER, AJ

Heard on: 30th May 2011

Delivered on: 30th May 2012

JUDGMENT

MILLER, AJ: [1] The applicant approaches this Court for leave to intervene as an applicant in certain review proceedings presently pending; before me and to which I shall refer as the main application.

[2] The main application seeks a review of a decision taken by the second respondent in that application to award a tender for the supply of bulk medical oxygen to the third respondent. The main application features the first and second respondents in this application as applicants.

[3] The applicant contends, and this is not disputed that it will become the main shareholder in the first respondent should the first respondent be successful in having the disputed tender awarded to it.

[4] There is merit in the argument of the 5th respondent who opposed the application that the applicant should have joined the proceedings from their inception, but in my view that in itself does not constitute a insurmountable obstacle to the application to intervene: ***Sudurhavid (Pty) Ltd: In Re Namibia Marine Resources (Pty) Ltd v Ferina (Pty) Ltd 1991 (1) SA 637 (NmHC).***

[5] Apart from the common law, Rule 12 of the Rules of this Court provides as follows:

> "Any person entitled to join as a plaintiff or liable to be joined as a defendant in any action may, on notice to all parties, at any stage of the proceedings apply for leave to intervene as a plaintiff or defendant, and the Court may upon such application make such order, including any order as to costs, and give such directions as to further procedure in the action as to it may deem fit."

[6] The requisites for intervention were conveniently summarized in ***Minister of Local Government and Land Tenure & Another v Sizwee Development & another v Flagstaff Municipality 1991 (1) SA 677 (Tk GD)*** referred to by counsel for the applicant. The relevant passage reads as follow:

> "(a) The applicant must satisfy the Court that:
>
> (i) he has a direct and substantial interest in the subject matter of the litigation, which could be prejudiced by the judgment of the Court (Henri Vijoen (Pty) Ltd v Awerbuch Brothers 1953 (2) SA 151 (O) at 167; United Watch and Diamond Co (Pty) Ltd Others v Disa Hotels & Another 1972 (4) SA 409 (C) at 415 – 16; Aquatur (Pty) Ltd v Sacks & Others 1989 (1) SA 56 (A) at 62C);
>
> (ii) the application is made seriously and is not frivolous, and that the allegations made by the applicant constitute a *prima facie* case or defence – it is not necessary for the applicant to satisfy the Court that he will succeed in his case or defence (Mgobozi and Others v The Administrator of Natal 1963 (3) SA 757 (D) at 760G; Ex parte Moosa: In re Hassim v Harrop Allin 1974 (4) SA412 (T) at 414B)."

[7] I am persuaded that the applicant has a substantial interest in the outcome of the main application. It is potentially a shareholder in the first respondent and

as such any decision in favour of or against the first respondent, as applicant in the main application, will affect the interests of the applicant one way or another.

[8] As far as the requirement of a *prima facie* case is concerned, it is sufficient if the applicants sets out averments, which if established at the hearing would entitle him to some relief. ***Bourgwells (Pty) Ltd v Shepavolov & Others 1999 NR 410 (HC).***

[9] The applicant relies on two instances which it contends will result in the relief asked for in the main application being granted.

[10] Firstly it points to the fact that the tender submitted by the fifth respondent contained instances where correction fluid had been used on the documents. This is not permissible and renders the tender non-compliant with the relevant rules of the fourth respondent.

[11] Secondly the applicant states that the fifth respondent and Rakia Consultancy, which also submitted a tender, were afforded a hearing, whilst the applicant and first and second respondents were not. What is in dispute is not whether or not the fifth respondent was afforded a hearing, but instead what the purpose of the hearing was.

[12] There is a dispute on that score, which may ultimately have to be resolved by the Court hearing the main application. Suffice it to say for the purpose of this application that *prima facie* the applicant's complaint is established *prima facie.*

[13] As far as costs are concerned, the applicant was remiss in not joining the application from the outset and is now seeking an indulgement.

[14] In my view the fifth respondents opposition was not unreasonable.

[15] I therefore make the following orders:

1) I grant prayers 1 and 2 of the Notice of Motion.
2) The applicant is ordered to pay the costs of the fifth respondent such costs to include the costs of one instructing and two instructed counsel.

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MILLER, AJ

ON BEHALF OF THE APPLICANT:	Adv. Frank SC assisted by Adv. Akweenda
Instructed by:	Conradie & Damaseb
ON BEHALF OF THE 3RD & 4TH RESPONDENTS:	Mr. Ncube
Instructed by:	The Government Attorney
ON BEHALF OF THE 5TH RESPONDENTS:	Adv. Tottemeyer SC assisted by Adv. Obbes
Instructed by:	Du Pisani Legal Practitioners