



CASE NO.: A 148/2012

REPORTABLE

IN THE HIGH COURT OF NAMIBIA

MAIN DIVISION, HELD AT WINDHOEK

In the matter between:

AMSWHOL & LGA CONSTRUCTION

JOINT VENTURE CLOSE CORPORATION

APPLICANT

VS

THE TOWN COUNCIL OF THE MUNICIPALITY OF WINDHOEK 1ST RESPONDENT

THE CHAIRPERSON OF THE LOCAL TENDER BOARD

OF THE CITY OF WINDHOEK

2ND RESPONDENT

NAMIBIA CONSTRUCTION PROPRIETARY LIMITED

3RD RESPONDENT

NAMIB BETON PROPRIETARY LIMITED

4TH RESPONDENT

DD'S & MAKETO CONSTRUCTION JOINT VENTURE

5TH RESPONDENT

CSV CONSTRUCTION NAMIBIA (PTY) LTD

6TH RESPONDENT

OMUSATI CONSTRUCTION CC

7TH RESPONDENT

THE PERMANENT SECRETARY OF THE

NATIONAL PLANNING COMMISSION

8TH RESPONDENT

THE MINISTER OF REGIONAL AND LOCAL

GOVERNMENT, HOUSING AND RURAL DEVELOPMENT

9TH RESPONDENT

CORAM: MILLER, AJ

Heard on: 23 July 2012

Delivered on: 03 August 2012

JUDGMENT

MILLER, AJ: [1] In this matter the applicant instituted proceedings by way of application against the respondent. The relief the applicant seeks is the following:

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PART A

1. Condoning the applicant's non-compliance with the requirements related to forms and service and directing this matter to be heard as that of urgency as contemplated in Rule 6(12) of the Rules of the Honourable Court.
2. That a *rule nisi* issue calling upon the Respondents to appear before the above Honourable Court on a date and time to be appointed by the Registrar of the above Honourable Court to show cause, if any, why the Court should not make a final order in the following terms:
 - 2.1 Interdicting and restraining the first, second and third respondents from further conducting or implementing tender number M67/2011, which was awarded by the second respondent to the third

respondent on 24 May 2012, pending the determination of the relief sought in Part B of the Notice of Motion;

2.2 That the relief in prayer 2.1 above shall have the effect of an interim interdict which shall have an immediate effect;

2.3 That the first and second respondents, and such other respondents who may choose to oppose this application be ordered to pay costs, jointly and severally, the one paying the others to be absolved;

2.4 Grant the applicant such further and/or alternative relief as the above Honourable Court may seem meet.

PART B

3. Reviewing and correcting or setting aside the decision of the Local Tender Board, taken on 24 May 2012, and communicated to the applicant by a letter dated 20 June 2012 to award tender number M 67/2011 to the third respondent. That tender appears to have been awarded to the third respondent.
4. Alternatively to prayer 1 above, declaring the decision taken by the third respondent on 24 May 2012, to be unlawful, null and void.
5. Reviewing and setting aside the whole of the tender process in respect of tender number M 67/2011, and ordering that a new tender be called.
6. The first and second respondents together with any of the other respondents who may choose to oppose this application be ordered to pay costs jointly and severally, the one paying, the others to be absolved.
7. Further and/or alternative relief.”

[2] The proceedings before me concern the relief claimed in Part A only.

[3] Mr. Narib appears for the applicant. Mr. Marcus appeared for the first and second respondent and Mr. Heathcote SC, together with Mr. Dicks appeared for the third respondent to oppose the matter. The other respondents did not take part in these proceedings. An applicant seeking an interim interdict bears the onus to satisfy the following requirement.

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1. He must establish a *prima facie* right.
2. A well-grounded apprehension of irreparable harm if the relief is not granted.
3. The balance of convenience favours the granting of interim relief.
4. The applicant has no other satisfactory remedy (*L.T. Boshoff Investments (Pty) Ltd v Cape Town Municipality 1969 (2) SA 256 (CPD) at 267 B.*)

This passage from the judgment was through a long line of cases, adopted as the standard formulation of the requirements. In *Stipp and Another v Shade Centre and Others 2007 (2) 627 (SC)* the Court confirmed that as a general rule, the applicant must make out his case on the founding affidavit. Only in exceptional cases will the Court have regard to the other affidavits.

[4] It is generally not permissible for an applicant to make out a skeleton case in the founding affidavit which is then fleshed out in a replying affidavit. *Titty's Bar*

and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd and Others 1974 (4) SA 362 (T)._

[5] It is with these principles in mind that I deal with the matter.

[6] Tender M67/2011 which the Local Tender Board (LTB) awarded to the third respondent, forms part of a national initiative by the Government of Namibia styled the “Targeted Intervention Program for Employment and Economic Growth” (TIPEEG). As its name suggests it seeks to address the unemployment rate and to stimulate economic growth.

[7] Both in scope and financial input the project forming the basis of the tender is huge. It comprises of the provision of basic service infrastructure to 1130 residential erven in an informal settlement in Windhoek. Following the completion of the infrastructure it is envisaged that low cost housing will be built on the serviced erven. Financial outlay comes to about N\$9 million per month. Completion is envisaged over a period of nine months.

[8] There was no dispute before me that the matter is one of public important and interest.

[9] The applicant is dissatisfied with the fact that the tender was not awarded to it.

[10] It bases its case on several grounds being:

- 1) It was not afforded the opportunity to adjust its tender price, which opportunity was given to the third respondent.
- 2) It was, unlike the third respondent, not afforded a hearing when the latter was afforded the opportunity to submit a lower price.
- 3) The second respondent's decision to award the tender to the third respondent was dictated to it.
- 4) The constitution of the technical committee who evaluated the tenders submitted was changed to accommodate the third respondent.
- 5) The third respondent's price, if not reduced would have exceeded the budgeted amount by 15% which was irregular.

[11] The grounds set out in 1 and 2 above were effectively abandoned on the papers.

[12] For the remainder the grounds relied upon rest on shaky foundations. There is virtually no if any primary facts which support the conclusions the applicant seeks to draw from them.

[13] The secondary conclusions do not constitute evidence unless supported by the primary facts which warrant the conclusions.

[14] ***Die Dros (Pty) Ltd and Another v Telefan Beverages CC and Others 2003 (4) SA 207 (C).***

[15] Faced with the paucity of facts on its papers the applicants counsel advised me at the hearing that it had subpoenaed several employees of the first respondent and he applied for leave to tender their evidence *viva voce*. He contended that when questioned during the course of their evidence some facts may, and not will, come to light to support his claims.

[16] I declined the application, which was in any event an informal one, moved from the Bar during argument. It was in my view a last and desperate attempt to bolster a case not made out in the founding affidavit.

[17] Mr. Narib submitted that the applicant is entitled to supplement its founding papers once the record is made available and may thus supplement the facts it relies upon. In that he is correct as far as it goes. The argument ignores the fact however that I am asked to grant interim relief which must be based on the facts disclosed to me. I cannot grant such relief on the basis that some facts may or may not come to light at some future stage.

[18] I accordingly conclude that the applicant fails at the first hurdle in that a *prima facie* right has not been established.

[19] The balance of convenience also does not favour the applicant. The nature and scope of the work, the national interest and importance of the work, and the time span for the completion thereof are overriding considerations.

[20] In the result Part “A” of the application is dismissed with costs, such costs to include as far as the third respondent is concerned the costs of one instructing and two instructed counsel.

MILLER AJ

ON BEHALF OF THE APPLICANT:

Instructed by:

Mr. Narib

Sisa Namandje & Co. Inc.

ON BEHALF OF THE 1ST & 2ND RESPONDENTS:

Instructed by:

Mr. Marcus

Nixon Marcus Public Law
Office

ON BEHALF OF THE 3RD RESPONDENT:

Instructed by:

Mr. Heathcote SC, assisted
by Mr. Dicks

Koep & Partners