REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: **.:** A 223/2010

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**

Neutral citation: *Air Liquide (Pty) Ltd v Oshimoko medical air & ogygen supplies cc* (A223/2010) [2012] NAHCMD 29 (16 October 2012)

Coram: MILLER AJ
Heard: **08 October 2012**
Delivered: **16 October 2012**

ORDER

JUDGMENT

MILLER AJ:

[1] This is an application for leave to appeal to the Supreme Court against a judgment delivered by me on 30 May 2012.

[2] In that judgment I granted leave to Air Liquide (Pty) Ltd, to which I shall refer as the applicant, to intervene as a further applicant, in certain review proceedings pending in this court.

[3] During the course of the judgment I stated the reasons for coming to the conclusion I had reached. I will not repeat these for purposes of this judgment save where it is necessary.

[4] Mr. Totemeyer, who moved this application on behalf of the fifth respondent now seeking leave to appeal, conceded during argument that in granting leave to intervene, I was required to and did exercise a discretion.

[5] He contends, however, that there is a reasonable prospect that another court may find that I did not exercise its discretion vested in me, in a judicial manner.

[6] In support of that submission he contends that I had failed to take proper account of the fact that there was an unreasonable delay on the part of the applicant to launch the joinder application. As far as that is concerned I had regard to the fact firstly that it is apparently accepted by all concerned that the applicant is an interested party, who should have joined the proceedings from the outset. Together with that I took into account the fact that the fifth respondents in the main application and who now seeks leave did not suffer any prejudice caused by the delay. It is executing the contract awarded to it in pursuance of the tender awarded to it unhindered. In those circumstances it appears to me proper to have permitted the applicant to join the proceedings.

[7] Secondly it was contended that I did not take proper account of the facts that the applicant did not establish a prima facie case and that I wrongly applied the test on that score by following the reasoning in *Bourgwells (Pty) Ltd v Shepavolov & Others* 1999 NR 410 (HC). I remain unpersuaded that another court will differ from me on the latter issue.

[8] In paragraph 9-12 of the judgment delivered on 30 May 2012 I advanced the reason for my finding that a prima facie case exists.

[9] The relevant passage reads as follows:

"[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.

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[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."*

[10] As I had indicated I was not required to express a final view. Suffice it to say that in my view there is no reasonable prospect that another court will come to a different conclusion.

[11] The application is dismissed with costs, which costs will include the costs of one instructing and one instructed counsel.

P J Miller

Acting Judge

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APPEARANCES

APPLICANT :	R TOTTEMEYER (with him D Obbes) Instructed by du Pisani Legal Practitioners
FIFTH RESPONDENTS:	T FRANK (with him S Akweenda) Instructed by Conradie & Damaseb