NOT REPORTABLE

CASE NO: A 17/2012

IN THE HIGH COURT OF NAMIBIA

HELD AT WINDHOEK

In the matter between:

CENTANI INVESTMENTS CC **APPLICANT**

and

ANTI-CORRUPTION COMMISSION (ACC) **1ST RESPONDENT**

NAMIBIAN PORTS AUTHORITY (NAMPORT) **2ND RESPONDENT**

CORAM: **HOFF, J**

Heard on: 24 February 2012

Delivered on: 09 March 2012

JUDGMENT
Urgent Application

HOFF, J: [1] The applicant approached this Court for an order in the following terms:

1. Directing the First Respondent to make available to the Applicant's Attorney of Record, within three days of the grant of this Order, a file of documents labeled as File No.: 2 that were seized from the Second

Respondent offices, employees, and/or any director of its Board, in the process of the First Respondent's investigations of the complaint laid by the Applicant about a possible violation of the Anti-Corruption Act in the award of Namport Tender No 079/2011.

2. Directing the First Respondent to make available, for the purposes of copying, Statements taken by members of the Anti-Corruption Commission (ACC) in connection with the aforestated investigations from the following persons:

2.1 Mr Raymond Visagie;
2.2 Mr Patrick Nawatiseb;
2.3 Mr Alfeus Kathindi;
2.4 Mr Mike van der Merwe;
2.5 Mr Gerson Adolf Uirab;
2.6 Mr Jerry Muadinohamba;
2.7 Mr Koot van der Merwe;
2.8 Mr Elias Mwenyo;
2.9 Captain Mussa Mandia;
2.10 Mr Anton van Rhyn;
2.11 Mr Jackson Kapuka; and
2.12 Mr Immanuel T !Hanabeb

3. Directing the Registrar to permit the Applicant's Attorney of Record to make copies of the documents identified in paragraphs 1 and 2 above.

4. Directing the Applicant to pay the costs of this Application, save in the case of one or more of the Respondents opposing this Application, in which event the Respondent who opposes is directed to pay the costs and if both oppose they are directed to pay the costs jointly and severally, the one paying the other to be absolved.

5. Granting to the Applicant further and/or alternative relief.

Background

[2] The applicant was one of the entities that had tendered to supply the second respondent a tugboat in terms of a tender issued by the second respondent in tender

079/2011. The second respondent awarded the tender to Damen Shipyards Cape Town (Pty) Ltd. Thereafter the applicant has applied to this Court to review and set aside the decision of second respondent's Board to award the tender to Damen.

[3] The second respondent is opposing the review application. Second respondent has as required by Rule 53 of this Court dispatched a record of the proceedings sought to be set aside together with affidavits in support of its opposition to the review application.

[4] In addition to launching review proceedings the applicant also requested the first respondent to investigate the award of the tender since applicant believed that the provisions of the Anti-Corruption Act, Act 8 of 2003 might have been contravened in awarding the tender to Damen.

First respondent subsequently seized certain documents connected to the award of the impugned tender and also took statements from a number of second respondent's officers, employees, Board members and consultants.

[5] In his founding affidavit in this application, Mr Julius April, the Chief Executive Officer of the applicant, stated that he had regular contact with Mr Phelem Masule, one of the investigating officers of first respondent, regarding the progress of the investigations and in this way became aware that a number of documents that were seized by first respondent do not form part of the Rule 53 record dispatched on behalf of second respondent. In addition he also discovered that there are material discrepancies between what has been said in the affidavits in opposing the review application and sworn statements made to the first respondent.

Applicant requested first respondent to make available the said sworn statements to applicant in order to be used in applicant's replying papers in the review application. These statements were refused by the first respondent, hence this present application.

This application is opposed by the first respondent. The second respondent has withdrawn its initial opposition to this application.

[6] In this answering affidavit Mr Paulus Noa, the Director of the first respondent raised two points *in limine*.

The first point is that the first respondent was established in terms of the provisions of section 2 of Act 8 of 2003 and is not clothed with legal personality capable of suing or being sued in its own name. The applicant has instituted proceedings against the first respondent in its own name.

[7] The second point is that the applicant has no *locus standi* to bring this application in terms of the provisions of section 3(d)(ii) of Act 8 of 2003 (the Act).

It appears from correspondence attached to the answering affidavit that the applicant relied on the provisions of section 3(d)(ii) of the Act in requesting the relevant information from the first respondent.

[8] Section 3(d) reads as follows:

> "3
> (d) The functions of the Commission are-
> (i) to assemble evidence obtained in the course of its functions and to furnish to any appropriate authority contemplated in paragraph (c); or
> (ii) to the prosecuting authority or any other suitable authority of another country, upon a formal request,
> evidence which may be admissible in the prosecuting of a person for a criminal offence or which may otherwise be relevant to the functions of that authority;"

Section 3(c) reads as follows (with reference to the functions of the Commission):

> "to consult, co-operate and exchange information with appropriate bodies or authorities, including authorities or bodies of other countries that are authorised to conduct enquiries or investigations in relation to corrupt practices;"

[9] The applicant in its founding affidavit avers that section 3(d)(ii) of the Act permits the Director of the first respondent to furnish to an appropriate authority statements obtained by the first respondent in the course of its investigations and submitted that this Court is such an appropriate authority.

Furthermore, applicant contended that since the first respondent is authorised by its enabling Act to do anything necessary to prevent corruption, the thing the applicant can and should do is to furnish the requested statements to the Court to enable the Court to arrive at a correct decision in the review application. This contention is based on the premise that if the averments made by the applicant are correct then the allegations made by second respondent's deponents in the review application which are at variance with what they had said to the first respondent will be shown to be incorrect and the review application will then be decided on the "true facts".

[10] The first respondent answered this contention by pointing out first respondent can only furnish evidence to a prosecuting authority. The applicant is not a body or authority authorized to conduct inquiries or investigations in relation to corrupt practices and has therefore no *locus standi* to bring this application in terms of section 3(d)(ii) of the Act.

[11] It was stated by the first respondent that the applicant has not provided the date when the answering affidavits were filed and when applicant is expected to file its replying affidavit and that this application lacks in urgency.

[12] First respondent in its answering affidavit stated that it has been advised that applicant's relief does not lie in bringing this application but in compelling the second respondent to furnish the missing documents. If such an application is made the time for the applicant to file replying affidavits does not run.

[13] It was contended by the first respondent that the course of its investigation following a complaint of alleged corrupt practices is totally independent from the relief being sought in the review application.

[14] The first respondent in its answering affidavit stated it has been advised by counsel that in the exercise of this Court's jurisdiction in terms of Rule 53, this Court reviews a record of the *decision* of second respondent and therefore the applicant cannot produce the annexures that it intends to attach to the replying affidavit in order to complete the record.

Points *in limine*

[15] Regarding the first point *in limine* Mr V Soni who appeared on behalf of the applicant submitted that Article 18 of the Namibian Constitution should be read with section 2(3) of the Anti Corruption Commission Act, Act 8 of 2003 and Article 5 of the Namibian Constitution.

[16] Section 2(3) of Act 8 of 2003 provides that the Commission is an agency in the Public Service as contemplated in the Public Service Act, Act 13 of 1995 and Article 5 of the Constitution requires all organs of the Government and *its agencies* to uphold the fundamental rights set out in the Constitution which rights shall be enforceable by the Courts.

Article 18 of the Constitution requires that administrative bodies and officials shall act fairly and reasonably and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or tribunal. It was submitted that in view of these constitutional provisions and that of section 2(3) of Act 8 of 2003 it is untenable that the Commission cannot be sued.

Regarding the issue of *locus standi* it was submitted that the applicant is an aggrieved party in the sense that its right to administrative justice has been violated that the violation of his constitutional right to administrative justice supercedes the provisions of sections 3(d)(i) and (ii) of Act 8 of 2003.

[17] It was submitted by Mr Chanda on behalf of the first respondent that having regard to the statutory and constitutional provisions first respondent was not created with any legal capacity to sue or be sued in its own name and that had the Legislature intended to clothe the Commission with a legal personality of its own, that intention would have been expressly provided for.

I have perused the enabling Act and agree that I could find no provision specifically providing that the Commission may sue or be sued in its own name or that the Commission it is a juristic person. Nevertheless I shall for the purpose of this application accept (without making such finding) that the Commission may be sued.

[18] This then brings me to the second point raised *in limine*.

[19] I have already referred to the submissions made on behalf of the applicant on this point, namely the right to administrative justice. It is not the applicant's case that it is as a matter of direct right entitled to the documents but rather that its right of access to those documents flow from its direct right to administrative justice under Article 18 of the Constitution.

Mr Soni submitted that Article 25(2) of the Constitution reinforces the right of a person who claims that a fundamental right has been infringed to approach this Court to protect that right and Article 25(3) grants to this Court the power to make all such orders as are necessary and appropriate to secure for the person the enjoyment of the fundamental right.

I do not understand the applicant's case to be that it has a constitutional right to compel the first respondent to provide the applicant with those statements obtained by the first respondent.

[20] It was submitted by Mr Chanda that this application does not involve a constitutional challenge but that it is being brought in order to compel the first respondent to exercise its functions under section 3 of the Act.

[21] The applicant in its founding affidavit stated that the main purpose of this application is to secure an order directing the Commission to make available to the Registrar of this Court a list of documents it has seized in the course of its investigations into the award of a tender by the second respondent *and* to hand over to the Registrar copies of statements made to the Commission by certain officers of the second respondent.

The applicant pointed out in his founding affidavit incorrectly to the provisions of section 3(d)i\(ii) of the Act. I shall accept that this was a bona fide mistake and that it meant the provisions of section 3(d)(i) which permits the Director of first respondent to furnish to an appropriate authority statements obtained by the first respondent in the course of its investigation.

In its replying affidavit the applicant confirmed that it relies on the provisions of section 3(d)(i) of the Act for the purposes of this application.

I shall therefore consider the second point *in limine* on this basis.

[22] It was submitted on behalf of the applicant that this Court is an appropriate authority to whom evidence obtained by first respondent may be furnished. I disagree. In my view section 3(d)(i) qualifies "appropriate authority". My interpretation of section 3(d)(i), read with section 3(c), is that "appropriate authority" refers to an authority which is

"authorised to conduct inquiries or investigations in relation to corrupt practices". This Court or the Registrar is certainly not such an authority.

Furthermore in terms of section 3(d)(i) "evidence obtained in the course of its functions" refers to *"evidence which may be admissible in the prosecution of a person for a criminal offence or which may otherwise be relevant to the functions of that authority"*.

I must at this stage mention that it appears from the papers that the file of documents referred to as "File No.: 2" that were seized from the offices of second respondent, has prior to the hearing of this application, been returned to the second respondent, and that only the statements obtained by the first respondent during the course of its investigations regarding the alleged corrupt practices by the second respondent are the subject matter of this application.

In regard to the provisions of section 3(d)(i) the evidence required by the applicant is not being sought in this application for the purpose of prosecuting a person for a criminal offence. It is being sought by the applicant to provide material to be used in the replying affidavit in the review proceedings regarding the alleged irregular conduct by officials of the second respondent in awarding the tender to Damen. In these circumstances, I hold the view that the applicant has no *locus standi* to bring this application in terms of the provisions of section 3(d)(i) of the Act. These second point *in limine* is accordingly upheld and the urgent application should be refused for this reason alone.

However the first respondent also opposed this application on the basis of non-compliance with the provisions of Rule 6(12) and lack of urgency. Mr Paulus Kalohmo Noa deposed to the answering affidavit on behalf of the first respondent in which he *inter alia* stated that the applicant has failed to set out as required by Rule 6(12) explicitly the circumstances which it avers render the matter urgent and the reasons why it claims that it could not be afforded substantial redress at a hearing in due course.

[23] It is apparent from paragraphs 35 of the founding affidavit that the basis of urgency is that the applicant is required to file its replying affidavit to the second respondent's answering affidavit (in the review application).

The first respondent in its answering affidavit (denying that urgency in this basis has been established) stated that the applicant is silent regarding when the answering affidavit in the review application had been filed and when the applicant is expected to file its replying affidavit.

[24] The applicant in response filed a "supplementary affidavit" In this supplementary affidavit Mr April pointed out that an express prayer ought to have been included in the notice of motion in respect of non-compliance with the requirements relating to service and time periods and the hearing of this application as one of urgency as envisaged in Rule 6(12) and prayed that the notice of motion be amended.

He further submitted that the reasons for applicant's failure to comply with all the requirements relating to service and time periods and for the hearing of the application as one of urgency are adequately set out in the founding affidavit and that what was omitted was an express prayer in the notice of motion for such relief.

[25] The applicant filed its notice of motion on 10 February 2012 in which the respondents were required to deliver their answering affidavits by no later than 17 February 2012 at 12h00. First respondent filed its answering affidavit on 16 February 2012 at 11h30. On 20 February 2012 the applicant filed this "supplementary affidavit".

First respondent in a document titled "First Respondent's Note on Applicant's Supplementary Affidavit" stated that a new issue was raised in the supplementary affidavit to which first respondent was unable to deal with and this in turn severely prejudiced the first respondent.

[26] A Court has a discretion in allowing more than three sets of affidavits. Every case should be determined not only according to its circumstances but having due regard to the contents of the further affidavit(s) and especially whether some reasonable explanation has been given or is apparent for its late filing.

(See *Parow Municipality v Joyce & McGregor (Pty) Ltd* 1973 (1) Sa 937 (CPD) at 939 A).

The applicant gave no explanation for the late filing of this supplementary affidavit but deals with two errors in its founding affidavit namely the reference to section 3(d)(ii) in the founding affidavit, instead of section 3(d)(i), which I have found to be a *bona fide* error and secondly the issue of the amendment of the notice of motion to include the following as a new paragraph:

> "Condoning the non-compliance by the applicant of the Rules of this Honourable Court relating to service and time periods and hearing this application as one of urgency as envisaged in Rule 6(12)."

[27] In my view the second error is of a technical nature which cannot in any conceivable manner prejudice the first respondent. In any event even if this supplementary affidavit is allowed, the applicant in my view has failed in its founding affidavit to address the issue of non-compliance with the provisions of Rule 6(12)(b).

Rule 6(12)(b) requires of an applicant in its founding affidavit to set out explicitly the circumstances which it avers render the matter urgent *and* the reasons why it claims it could not be afforded substantial redress at a hearing in due course.

Although the applicant in its founding affidavit dealt with the issue of urgency it was dealt with in broad terms without such particularly which could have placed this Court in a position to properly assess the circumstances why it was necessary to approach this Court on an urgent basis.

An applicant must deal with both legs contained in Rule 6(12)(b) in order to succeed with an urgent application. The applicant in this matter did not deal with the second leg, namely, the reasons why it claims that it could not be afforded substantial redress at a

hearing in due course. This in my view was a fatal omission. The non-compliance with any one the requirements set out in Rule 6(12)(b) is bound to result in the failure of an urgent application.

I am of the view that the application should for this additional reason also be refused.

[28] The applicant in its notice of motion did not ask for any cost order neither did counsel appearing on behalf of the applicant address the Court on the issue of costs. Similarly the first respondent did not raise the issue of costs in its answering affidavit neither was this Court addressed on the issue by counsel appearing on behalf of the first respondent.

[29] In the result the following orders are made:

1. This application is dismissed.
2. No costs order is made.

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HOFF, J

ON BEHALF OF THE APPLICANT: **ADV. VASANTRAI SONI SC**

Instructed by: **MURORUA & ASSOCIATES**

ON BEHALF OF THE 1ST RESPONDENT: **MR C CHANDA**

Instructed by: **GOVERNMENT ATTORNEY**

ON BEHALF OF THE 2ND RESPONDENT: **NO APPERANCE**