REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 66/2013

In the matter between:

1.1.1.1. **OKA INVESTMENTS (PTY) LTD**

APPLICANT

and

THE CHAIR OF THE TENDER BOARD
FOR THE CITY OF WINDHOEK **1st RESPONDENT**

THE MUNICIPAL COUNCIL OF THE CITY
OF WINDHOEK **2nd RESPONDENT**

Neutral citation: *Oka Investments (Pty) Ltd v The Chair of the Tender Board for the City of Windhoek* (A 66/2013) [2013] NAHCMD 89 (5 April 2013)

Coram: Schimming-Chase, AJ
Heard: 22 March 2013
Delivered: 5 April 2013

Flynote: Interpretation of Regulations – Conflicting provisions – Regulation 6 of the Local Authorities Tender Board Regulations dealing with powers and functions of Tender Boards providing that Tender Board may cancel any agreement concluded by the Tender Board on behalf of a local authority, but

that the local authority must take the final decision in respect of the cancellation – Regulation 27 of the Regulations providing that in specific instances of a person's non-compliance with the title of the tender or agreement, or delay in performance or unsatisfactory performance the Tender Board may cancel the agreement – Two conflicting provisions in same Regulation – The established rule of interpretation for resolving such a conflict is that the latter of the two provisions prevails or governs – Accordingly the local Tender Board authorised to cancel agreement if delay or unsatisfactory performance occurs.

Interim interdict pending institution of review, alternatively action proceedings – Prerequisites, *prima facie* right, well grounded apprehension of irreparable harm, balance of convenience favouring applicant, no other satisfactory remedy.

Interim interdict – *Prima facie* right – Degree of proof required restated.

Practice – Applications and motions – Applicant required to make out a case for the relief sought in the founding papers – Applicant cannot remedy paucity of information in founding affidavit in replying affidavit – Such the position also where urgent relief sought.

Summary: The applicant launched an urgent application for an interim interdict preventing respondents from implementing a notice to cancel an agreement with the applicant concluded subsequent to a tender award in terms of which the applicant was to provide fuel, pending the finalisation of proceedings to be instituted against the respondent. The notice was issued by the first respondent on behalf of the second respondent. The applicant was not yet clear at the stage the application was launched whether the proceedings to be instituted were review proceedings or action proceedings, especially in view of the Supreme Court decision of Permanent Secretary of the Ministry of Finance and Others v Ward[1] to the effect that whether an action amounted to an administrative act would depend on the nature of the power exercised, the source of the power, the subject matter, whether it involved the exercise of a public duty and how closely related it was to the implementation of legislation.

[1]2009 (1) NR 314 (SC).

Both parties relied on the provisions of the Local Authorities Tender Board Regulations published in Government Notice 73 of 12 April 2011. Regulation 6 provides that the first respondent may cancel any agreement concluded with the second respondent, but that the second respondent must take the final decision in respect of the cancellation. Regulation 27 provides that the first respondent may, in the event of a person's non-compliance with the title of the tender or agreement or delay in performance or unsatisfactory performance cancel the agreement. No provision is contained in Regulation 27 requiring the second respondent to make the final decision in such an event.

Held, it appeared that Regulation 6 is of general application and Regulation 27 of specific application in the instances therein referred to, but the provisions are also conflicting. Insofar as the conflict is irreconcilable, the principles relating to statutory interpretation set out in R v Brener[2] are to be applied, namely that in the event of a conflict, the later of the two provisions prevails, and the first respondent was authorised to cancel an agreement concluded on behalf of the second respondent.

Held further, in establishing whether the applicant showed a *prima facie* right to specific performance it had to show that the breach of contract was *prima facie* not material, and that cancellation was not warranted. The applicant failed to set out such a case in its founding papers and sought to remedy the paucity of information provided in the replying affidavit. The respondents proved the first respondent's right to cancel on the facts, and the application was accordingly dismissed.

ORDER

The application is dismissed with costs, such costs to include the costs of one instructing and one instructed counsel.

---

[2]1932 OPD 45 at 51.

JUDGMENT

SCHIMMING-CHASE, AJ

(b) This is an urgent application for an order interdicting the respondents from implementing the first respondent's notice to cancel an agreement concluded between the applicant and the second respondent, in terms of which the applicant was to deliver fuel to the second respondent, pending the "outcome of the dispute" regarding the notice to cancel the agreement. I shall refer to the first respondent as the Tender Board, the second respondent as the Municipality and to both of them as the respondents.

(c) The applicant as part of its interdictory relief seeks an order forcing the Municipality to comply with its obligations in terms of the agreement (concluded between the parties on 2 December 2010), and in particular to continue ordering fuel from the applicant as it did prior to the "purported" cancellation of the agreement. The applicant also informed the court that it would institute proceedings within 20 days from the date the order was made, and also applied for an order to that effect.

(d) In essence, this is an application for specific performance, pending the finalisation of proceedings the applicant intends instituting against the respondent for the aforesaid relief. The parties agreed that the matter was urgent, and the court finds that the applicant has made out a case for urgency.

(e) In short, the background to this application is as follows. Subsequent to the applicant's response to a tender application, the applicant was informed by the Tender Board that part of its tender for the supply and delivery of fuels, oil lubricants, brake fluids and freeze compound was awarded to it. This application only relates to the fuel component of the tender. The letter of the chairperson of the Tender Board, confirming the award of the tender, together with the tender documentation lodged by the applicant during the tender

proceedings represented the terms of the agreement between the applicant and the Municipality.

(f) The material terms of the agreement were:

(a) the applicant would supply all four items at agreed prices stipulated in the tender when ordered by the Municipality for the next 5 years;

(b) the fuel ordered must be delivered within 48 hours of receipt of a written order. Failure to comply with the delivery time could result in fuel being ordered from alternative suppliers and the applicant would be liable for the difference in costs if any;

(c) payment for each delivery had to be made to the applicant within 7 days from delivery. (This is alleged by the applicant to have been agreed orally), and is not disputed by the respondents.

(g) The agreement contains no breach or cancellation clause. The provisions regarding cancellation are contained and provided for in Regulation 6(1)(f) read with Regulation 6(4) of the current Tender Board Regulations published in Government Notice 73 of 12 April 2011 ("the Regulations"). The respondents do not dispute these allegations, but pointed out that all tenders awarded by the Tender Board are subject to the conditions of tender and the provisions of the Regulations, and that Regulation 6, containing the Tender Board's powers to cancel agreements must be read together with Regulation 27, which authorises the Tender Board to cancel agreements in certain instances. I deal with the Regulations in more detail later in this judgment.

(h) The applicant alleged that subsequent to the conclusion of the agreement, it supplied the Municipality with fuel when it was ordered and that "the only incidence of 'late supply of fuel" was raised by the Municipality's senior buyer in 2012 in writing and responded to by the applicant. Since then

"everything continued as normal and no further late deliveries occurred. There was never any further indication that the Municipality had any complaints about or was dissatisfied with applicant's performance in terms of the agreement". (emphasis supplied)

(i) The applicant further alleged that "out of the blue, and as a total surprise …" it received a letter from the Tender Board on 25 February 2013 which letter informed the applicant that "… the local Tender Board at its extra-ordinary meeting on 20 February 2013, had resolved to terminate the contract with your organisation for the supply of fuel as per items 1 and 2 respectively of Tender M38/2010 with immediate effect. The reason for the termination is due to poor performance on your part. In that, despite our numerous requests to you to adhere to your promised delivery period as stipulated in your tender proposal, your organisation had on a continuous basis failed to deliver the fuel on time to the City of Windhoek."

(j) The applicant stated in the founding papers that apart from the fact that it was never given a hearing in respect of this decision, it denied that any "numerous requests were made in relation to alleged late deliveries or that there were any unjustified late deliveries". I point out at this stage that the allegation that there were no unjustified late deliveries is in direct contrast to the earlier allegation that no further late deliveries occurred.

(k) It is common cause that the applicant did not make any formal representations to the Municipality and in particular the Tender Board before the agreement was cancelled in the manner set out above.

(l) In support of the interdictory relief sought the applicant alleged that the cancellation by the Tender Board wass invalid because:

(a) (a) it must take all its decisions at meetings and keep minutes thereof in terms of Regulation 10(2);

(b) Regulation 6(1)(f) authorises the Tender Board to cancel agreements on behalf of the Municipality, but Regulation 6(4)

requires the Municipality to take the final decision on such cancellation and in this instance, the Municipality did not take the final decision;

(c) the applicant was entitled to a hearing when the decision was taken, the applicant was not informed of the intended decision, nor invited to make a representation. The applicant was thus denied its right to be heard and to make representations to the Tender Board resulting in a breach of Article 18 of the Constitution;

(d) the cancellation was actuated by ulterior motives which the applicant referred to as "strong arm tactics" to compromise its claim for outstanding monies against the Municipality in order to bully the applicant and deprive it of the opportunity to earn a living, which also breaches Article 18 of the Constitution;

(e) the respondents are in any event not entitled to cancel the agreement for late delivery (assuming it occurs), because the additional conditions of tender stipulate that fuels must be delivered within 48 hours of written order, and failure to comply with the delivery requirements within the stated time can result in fuels being ordered from alternative suppliers and the difference in cost, if any, shall be for the account of the applicant. The applicant stated in this regard that the Municipality's remedy for the "so called" breach would be to order fuel from an alternative supplier after the 48 hours have elapsed ;

(f) in any event, the Tender Board could not and has no reason to cancel the agreement with immediate effect.

(m) The applicant submitted that the interim interdictory relief should be granted because the Tender Board representing a public authority was acting unlawfully, and the applicant has a clear right to preserve the status *quo ante* until the dispute about the cancellation is resolved. Furthermore the applicant

alleged that the total value of the contract is about N$180 million over 5 years with each periodic order – which occurs roughly every week – worth approximately N$400,000.00. This, the applicant alleged, is the loss it would make. If the contract were to be cancelled now, the applicant would never recover the money, and it should be allowed to perform in terms of the contract on a legitimate and *bona fide* basis until it is clear it can be cancelled legitimately.

(n) The applicant further alleged that this is its only financially viable contract. The applicant is a recent start-up and will not be able to survive financially to challenge this unlawful action if this application is to be heard in the normal course which may only be at the end of this year assuming then that judgment is given immediately. The applicant stated that this is exacerbated by the fact that there is already about N$2,5 million (although this amount is disputed) owing to applicant by the Municipality which creates serious cash flow problems for the applicant. The applicant submits that there is no inconvenience for the respondents if the Municipality is forced to maintain its obligations in the meantime. This is because the terms of the tender are clear and if the applicant does not deliver within 48 hours, fuel can be ordered from alternative suppliers and the difference in cost would be for the applicant's account. Finally the applicant reiterated that its right is clear (as opposed to a *prima facie* right) because of the glaring flaws in the purported cancellation based on a reading of Regulation 6 read with Regulation 6(4).

(o) As regards the dispute, the applicant submitted that in order to challenge this purported cancellation of the agreement, its options will have to be carefully considered because as a rule the decision to cancel should be reviewed, but there is some uncertainty as to whether the cancellation of agreements by public bodies are generally reviewable actions. The applicant's legal practitioners would make a final decision on the correct procedure to challenge the purported cancellation of the agreement once the *status quo ante* is preserved through this application.

(p)

(q) The respondents pointed out that the Municipality is responsible for providing municipal services to the City of Windhoek. The services include the supply of water, maintaining the sewerage system, providing refuse removal services and the supply of electricity to the residents of Windhoek. The Municipality also maintains the police force in order combat crime in the city. Further responsibilities include providing an ambulance service, a traffic service and the fire brigade as well as a public transport system.

(r) The respondents further alleged that the Municipality has to maintain an efficient system of service delivery in order to cater for the many and diverse needs of the residents of the City of Windhoek. Many of the services so provided are critical for the safe and proper functioning of the city, and would broadly speaking be viewed as essential services. Critical to the service delivery is the establishment and maintenance of a fleet of vehicles to carry out these duties. The Municipality's fleet includes approximately 2000 vehicles – from sedan vehicles to various trucks used in its operations – and approximately 100 buses used for public transport. In order to keep these vehicles running, it has to obtain fuel, and it is very important that it has a reliable supply of this product. Should there be any breakdown in the supply it has serious consequences for the City of Windhoek and the services which it is required to perform, and more especially the essential services such as policing, emergency services and ambulance services. A disruption in these services also has serious consequences for the residents of the city. For instance, many residents, and particularly the poor residents of Windhoek, rely heavily on public transport provided by the Municipality in the form of the bus service.

(s) The respondents also alleged that the applicant had difficulties in delivering fuel on time and it became apparent that the applicant did not have the capacity to provide an efficient and timeous service to the Municipality. It was pointed out that it was at times extremely difficult for the Municipality's employees to contact the applicant in order to discuss problems with the supply of fuel. Mostly this could only be done by contacting the managing director of the applicant on his cellular phone and at times when the Municipality tried to contact him, the cellular phone was turned off and this was a general problem.

(t) It was stated that the applicant's non-compliance with the terms and conditions of the agreement relating to the supply of fuel was a persistent and ongoing problem. A summary showing the numerous instances of late delivery (more than 48 hours) supported by records was annexed to the answering papers, from which it is apparent that the late delivery of fuel occurred on a regular basis, contrary to what was stated in the founding affidavit. It was apparent that late delivery of fuel took place over a period of 15 months. It was also apparent from the supporting documentation that late deliveries occurred approximately 55 times between 8 January 2011 and 20 February 2012. On 15 occasions, the fuel was delivered 1 day late; on 10 occasions the fuel was delivered 2 days late; on 8 occasions the fuel was delivered 3 days late; and on 7 occasions the fuel was delivered 4 days late. Between 27 December 2012 and 8 January 2013 fuel was delivered on one occasion more than 8 days late.

(u) The respondents alleged that two of the Municipality's employees had numerous meetings with the applicant, in particular its managing director to discuss these problems, and made numerous telephone calls to discuss non-performance. They emphasised that timeous performance was absolutely essential and that it became clear that the applicant was simply not able to effectively perform in terms of the agreement. Over the 15 months or so of late deliveries, the applicant always promised to improve the situation but this never happened. Given the long period of non-compliance, the respondents submitted that the Municipality had been more than accommodating in allowing the situation to continue despite no real improvements.

(v)

(w) The respondents pointed out that more recently the Municipality had entered into correspondence with the applicant concerning the continuing breaches. Some of the more recent correspondence was annexed to the answering papers and included an email dated 16 October 2012 to the applicant where specific mention was made that fuel should be delivered within 48 hours and that if there were problems, a back-up plan had to be in place. In a further email dated 17 October 2012, the Municipality's employees warned the applicant that due to late delivery by the applicant the Municipality's fuel tanks had started to run dry and requested urgent delivery in compliance with the

procurement orders. In an email dated 14 November 2012, the applicant was reminded that the fuel supply had reached critical levels and a request was made as to when delivery could be expected. In an email dated 22 November 2012 the Municipality noted that the applicant had failed to deliver fuel on time on several occasions and reminded the applicant of its contractual obligations. The applicant was further reminded in this mail that late deliveries led to the shortage of fuel which grounded vehicles, thereby negatively affecting the operations of the City of Windhoek. The following was *inter alia* stated in this email:

> "Failure to deliver on time, which is a breach of your contractual obligations, will leave us with no alternative but to approach the Tender Board to review your tender, which could ultimately lead to the cancellation of your tender.
>
> Also take note that should we be forced to purchase fuel from another supplier because of non-delivery, you could be held liable for the difference in price."

(x) A further email from Mr Mouton of the Municipality dated 30 November 2012 pointed out that an order was placed on 26 November 2012 but that no delivery had yet taken place. It was specifically stated in that email that the situation had now become unacceptable as it seriously hampered the operations of the City of Windhoek, and the applicant was further informed that the Municipality indicated that it had no choice but to report the matter to the Tender Board for further action. A further email dated 1 February 2013 again enquired about late fuel delivery. In email dated 18 February 2013, the applicant was informed that "our petrol tanks had now run dry. When can we expect fuel delivery. You leave us with no alternative but to order fuel from somewhere else, which will result in you not being able to deliver our tanks in full."

(y)

(z) All these emails were annexed to the answering affidavit. In this regard it was stated in the answering papers that the allegation in the applicant's founding papers to the effect that the only incidents of late supply of fuel were raised in the email of 22 November 2012 was patently false in light of the emails annexed, and that it was also patently untrue that no further late deliveries

occurred after 22 November 2012. The respondents alleged that it was also false for the applicant to state that there was never any further indication that the Municipality had any complaints about or was dissatisfied with the applicant's performance in terms of the agreement.

(aa)

(bb) This, the respondents alleged was an active attempt to mislead the court in suppressing the true facts especially with regard to the applicant's allegations to the effect that there was only one incident of late supply of fuel, that there were no late deliveries either prior to or after 22 November 2012 and that the Municipality had no complaint and was not dissatisfied with the applicant's performance. The respondents made it clear that the cancellation letter did not come out of the blue and as a total surprise, but that it was a culmination of verbal admonitions over 15 months, written complaints and requests to comply with the agreement. The respondents submitted that on this basis alone the application should be dismissed given the conduct of the applicant, and that the applicant should be mulcted with punitive costs.

(cc) The respondents submitted that the cancellation by the Tender Board was not an administrative action. They submitted that the Tender Board did not exercise a public power when it cancelled the agreement with the applicant. It simply exercised its common law rights to cancel the agreement on the basis of the applicant's repeated breach of its obligations. It was further submitted that it was irrelevant to the determination whether such grounds for termination are incorporated into the regulations governing the operation of the Tender Board. In this regard the respondents denied that the applicant was entitled to a hearing before the Tender Board and that the Tender Board's decision to terminate the agreement because was a purely commercial decision, taken in the best interest of proper service delivery and on the basis of repeated breaches of the agreement by the applicant. It was further submitted that the cancellation was lawful, and there was nothing in the nature of the decision which elevated it to a reviewable administrative action which entitled the applicant to be given a hearing either at common law in terms of Article 18 of the Constitution.

(dd)

(ee) As regards the interdictory relief sought, the respondents submitted that the applicant had not complied with the requisites for the granting of an interim interdict. They further alleged that they would be severely prejudiced should an interim order be granted because it is by no means clear how long the interdict would be in effect, which would force the respondents to continue with an agreement which the applicant has consistently breached.

(ff) In reply, the applicant mainly dealt with the allegations of the respondents concerning the material non-disclosure of the applicant of the actual situation pertaining to the dispute between the parties, and in particular, that contrary to what was stated in its founding papers mentioned above, the issue of the late delivery of fuel was an ongoing problem. The applicants denied that they misrepresented any facts and stated that there was a justifiable explanation for each and every late delivery since 22 November 2012 as well as for dates prior thereto. The explanations were set out in detail in the replying affidavit.

(gg) In light of the above facts I now proceed to consider whether the applicant has made out a case for the relief sought.

(hh) At the outset counsel for the applicant, Mr Coleman, submitted that an urgent application to maintain the *status quo* is a common phenomenon and that this court has ruled that an inference of unreasonable delay may be drawn from a failure to seek urgent relief to maintain the *status quo*, and it is not only possible but also the most effective remedy in the context of administrative decision making. [3] Mr Coleman further submitted that it has been accepted that the stronger the right established by the applicant " … the less important the other matters become …". [4] The so-called rule that a decree of specific performance – or an interdict – should not be granted where an applicant could be

[3] Kleynhans v Chariperson of the Council for the Municipality of Walvis Bay and Others 2011 (2) NR 437 (HC) at par [56].

[4] Alpine Caterers Namibia (Pty) Ltd v Owen and Others 1991 NR 310 (HC) at 313H.

(ii) compensated by an award of damages is an impermissible curtailment of the court's discretion. [5]

(jj) In this regard, Mr Coleman submitted that the core question to be determined is whether or not the Tender Board had authority to cancel the agreement in terms of the Regulations, and *ex facie* the Regulations, the Tender Board had no right to cancel the agreement. Thus, since the Tender Board exceeded its powers because it had no authority, the cancellation was invalid and unlawful, and the applicant had made out a clear right in respect of the interdictory relief sought. It was also submitted that the issue regarding whether or not performance occurred justifying cancellation is not to be determined by the court in light of the unlawful cancellation of the Tender Board.

(kk)

(ll) Considering that both parties rely on different Regulations, it is necessary to determine whether or not the Tender Board had authority to cancel the agreement. I am mindful of the fact that whilst there may be situations where a court having to decide on an interim interdict has sufficient time and assistance to arrive at a final view on the disputed legal point (in which event it probably ought to express a firm view in order to save costs), situations of urgency arise when decisions on legal issues have to be made without the judicial officer concerned having had the time to arrive at a final considered view. In such a situation the judicial officer is placed in a position to express only a *prima facie* view. The expression of such a view and the grant of interim relief only would not conflict with the principles of *res judicata* and there is no embarrassment in a judge in an urgent application for an interim interdict being overrideen by a trial judge because the interlocutory decisions of judicial officers are not binding at later stages of the proceedings.[6] I also hold that the converse would apply in instances where a judge is faced with the position where, without having had time to arrive at a final view expresses a *prima facie* view on the disputed legal point resulting in the refusal of the interim relief sought.

---

[5] Candid Electronics (Pty) Ltd v Merchandise Buying Syndicate (Pty) Ltd 1992 (2) SA 459 (C); Prest: The Law and Practice of Interdicts 1996 at 78.

[6] Tony Rahme Marketing Agencies SA (Pty) Ltd and Another v Greater Johannesburg Transitional Metorpolitan Council 1997 (4) SA 213.

(mm) Regulation 6 of the aforesaid Regulations provides the following:

"**Powers and functions of local tender boards**

6. (1) A local tender board is solely responsible, unless otherwise provided in the Act or in any other law, for the procurement of goods and services for a local authority council, and, subject to the Act or any other law, for the arrangement of the letting or hiring of anything or the acquisition or granting of any right for or on behalf of a local authority council, or for the disposed of property of a local authority council, and for that purpose but subject to subregulations (2) or (3), may –

(a) on behalf of a local authority council enter into an agreement with any person within or outside Namibia for the furnishing of goods or services to a local authority council or for the letting or hiring of anything or the acquisition or granting of any right for or on behalf of a local authority council or for the disposal of property of a local authority council;

(b) …

(e) take steps or cause steps to be taken to enforce any agreement entered into under paragraph (a);

(f) on behalf of a local authority council withdraw from or cancel any agreement entered into under paragraph (1) and, if appropriate, claim and recover damages;

(g) …

(2) The local authority council concerned may issue general policy, reporting, monitoring directives or directives in respect of levels of authority to the local tender board relating to the procurement of goods and services for the local authority council and for the cancellation or settlement of agreements entered into in respect of such goods and services and any matter ancillary thereto.

(3) No exemption, condonation, settlement or amendment which may be to the prejudice of a local authority council may be granted, negotiated or made under paragraph (g) or (h) of subregulation (1) without the prior approval of the local authority council concerned.

(4) A local authority council must take the final decision under paragraphs (e), (f) of subregulation (1) or in respect of any matter referred to them under regulation (3).

(5) …".

(nn) Regulation 27 provides the following:

"**Non-compliance with title of tender or agreement, or delay in performance of agreement**

27. (1) Unless otherwise provided, but subject to this regulation –

(a) …

(b) in an agreement, a local tender board may -

(i) if the contractor concerned fails or has failed to comply with any of the terms and conditions of the agreement or performs

or has performed unsatisfactorily under the agreement, in addition to any other legal remedy it may have, cancel the agreement;

(ii) if the contractor concerned fails to furnish any goods or services within the period of time stipulated in the agreement –

(aa) act in accordance with subparagraph (i); or

(bb) make arrangements for the furnishing of goods or services of similar quality and up to the same quantity in lieu of the goods or services not furnished or rendered under the agreement,

(cc) in the case of the late delivery of goods or services levy a penalty as determined by the local tender board and contained in the tender title or contract,

and recover any expenses, loss or damages incurred or suffered by the local authority council from that contractor in accordance with subregulation (2).

(2) If –

(a) an agreement is cancelled under subregualtion (1)(b)(i) or (ii), the contractor concerned is liable to compensate the local authority council concerned in accordance with regulation 26(2);

(b) ...

but if the contractor satisfies the local tender board or the local authority concerned, as the case may be, in terms of subregulation (4) that the delay in the furnishing of goods or services is the direct result of strikes, lockouts, riots, accidents in connection with machinery, natural disasters or storms or other circumstances which could not have been foreseen or prevented by the contractor, is not so liable to compensate the local authority council."

(oo) As previously stated Mr Coleman on behalf of the applicant relies on the provisions of Regulation 6(4) which provides that the local authority must take the final decision in the event that the Tender Board cancels any agreement in terms of Regulation 6(1)(f). Mr Corbett on behalf of the respondents relies on Regulation 27 which he submits is a specific regulation giving the Tender Board authority to cancel an agreement, without the Municipality having to take the final decision, in instances of non-compliance with title of tender or agreement, or a delay in performance of the agreement.

(pp)

(qq) Unfortunately the court was not provided with any authorities relating to the principles governing the interpretation of the relevant regulations. On the face of it, there is a conflict between the provisions of Regulation 27 and the provisions of Regulation 6. Regulation 6 also appears at first blush to be of general application and Regulation 27 of specific application in instances of non-compliance or delay in performance of the agreement.

(rr) It is a rule of statutory interpretation that the language of every part of a statute should be so construed as to be consistent, so far as possible, with every other part of that statute and with every other unrepealed statute enacted by the same legislature. [7] In Principal Immigration Officer v Bhula[8] Wessels JA summarised the rule as follows:

"The legislature is presumed to be consistent with itself. … Where there are two

[7] Chotabhai v Union Government and Another 1911 AD 24.

[8] 1931 AD 345.

> sections in an Act which seem to clash, but which can be interpreted so as to give full force and effect to each, then such an interpretation is to be adopted rather than one which will partly destroy the effect of one of them."

(ss) In R v Brener [9] it was held that where two inconsistent sections or provisions appear in a statute, the established rule of interpretation for resolving such a conflict is that the latter of the two provisions prevails or governs.

(tt) In Entabeni Hospital Ltd v Van der Linde; First National Bank of SA Ltd v Puckriah [10] the court had occasion to deal with two conflicting rules of court namely Rules 31(2)(a) and 31(5)(a). Rule 31(5)(a) provided that in circumstances there stipulated, the plaintiff seeking a default judgment was required to always apply to the Registrar, whereas Rule 31(2)(a) authorised the plaintiff to obtain the same default judgment from the court. The court found that there appeared to be an irreconcilable conflict between the provisions of these two sub-rules. The court applying the above-mentioned established rules of interpretation, held at 424B-E that it followed that it was no longer competent for a plaintiff who seeks to obtain judgment by default in the circumstances stipulated in Rule 31(5)(a) to set the action down for hearing in order to obtain such judgment from the court.

(uu)

(vv) It appears to me that Regulation 6 is interpreted to be a general application and Regulation 27 of specific application, such an interpretation would give force and effect to each regulation. In the event that the regulations do conflict in an irreconcilable manner, which *prima facie* also appears to be the case, the provisions of Regulation 27 would still prevail based on the rule set out in R v Brener *supra.* Thus in my opinion, the Tender Board has the authority to cancel an agreement in the circumstances set out in Rule 27, without the Municipality having to take the final decision.

(ww) The next issue to be determined is whether the cancellation by the Tender Board amounts to an administrative decision. In Permanent Secretary of

---

[9] 1932 OPD 45 at 51; Steyn, Die Uitleg van Wette, 5th ed at 190.

[10] 1994 (2) SA 422 (NPD) at 424B-E.

the Ministry of Finance and Others v Ward [11] the Supreme Court had occasion to determine whether or not a cancellation by the Ministry of Finance of an agreement in terms of which a doctor would render professional services to members of PSEMAS at a prescribed professional tariff for which he would be remunerated, was a purely administrative or commercial act.

(xx) At paragraph 29 of that judgment the court found that in order to determine whether the cancellation of the agreement was done purely in terms of the agreement or whether it was an administrative act was not easy. After a thorough discussion of the various decisions of the South African courts, the court held that the principles to be considered in determining whether an action amounted to an administrative act would depend on the nature of the power exercised, the source of the power, the subject matter, whether it involved the exercise of a public duty and how closely related it was to the implementation of legislation.

(yy) Applying the principles laid down in the Ward decision, it is clear that the Tender Board is indeed a public authority and has the power to on behalf of the Municipality to conclude agreements with any person for the furnishing of goods and services. However, I had the view that after an agreement is concluded subject to a tender procedure, the actual implementation of the terms and conditions of the agreement (set out in the tender document) are commercial and not administrative in nature. The Municipality pays for services rendered on a contractual basis. It involves proper performance on both sides. The agreement concluded in this matter contains no provisions governing breach (contrary to the facts in Ward). Those provisions are instead set out in Regulation 6 read with Regulation 27, which I have found authorises the Tender Board to cancel the agreement in instances of non-compliance with the title of the tender or in this case, delay in performance.

(zz)

(aaa) In my view the regulations simply set out the common law rights of the Municipality which are implemented or exercised through its agent, the Tender Board, which has been authorised to perform certain functions on its behalf.

[11] 2009 (1) NR 314 (SC).

The cancellation in this instance thus did not amount to an administrative act, but rather a commercial one.

(bbb)

(ccc) Mr Coleman correctly submitted that in regard to cancellation of contracts, it is trite that the innocent party may cancel an agreement in instances of material breach, in the absence of a specific clause governing the breach. Where no material breach occurred, and in the absence of a breach and cancellation clause in an agreement, the party wishing to cancel an agreement must put the party in *mora* by way of a clear notice. Only after the other party persists with the non-performance amounting to repudiation can the agreement be cancelled. If this does not happen, the cancellation is unlawful. [12]

(ddd)

(eee) Mr Corbett on behalf of the respondents submitted that the applicant was indeed placed in *mora* in particular in the email dated 22 November 2012 (mentioned above) in which the applicant was advised that the failure to deliver on time was a breach of the contractual obligations, which could ultimately lead to cancellation of the tender, as well as the email of 30 November 2012 where it was indicated that the situation had become unacceptable as it seriously hampered the operation of the City of Windhoek. I am inclined to agree with Mr Corbett that the applicant was properly placed in *mora*.

(fff) What the court must now decide is whether it should grant an interim interdict for specific performance of the agreement pending finalisation of proceedings to be instituted by the applicant, and in this regard to determine whether the requisites for an interim interdict have been properly set out. In this regard, it is to be noted that it has been found that the Tender Board has authority to cancel the agreement, and that the notice of cancellation was a commercial and not an administrative act.

(ggg) In order to succeed in an application for an interim interdict, the applicant would ordinarily be required to establish, firstly, a *prima facie* right to the relief sought, even if it is open to some doubt; secondly, a well-grounded apprehension of irreparable harm if the interim interdict is refused and the

[12]Christie's: The Law of Contract in SA 6th ed at 527ff; Flugel v Swart 1979 (4) SA 493 (E) at 502A-503B and the cases cited.

ultimate relief is ultimately granted; thirdly, that the balance of convenience favours the granting of an interim interdict; and fourthly, that the applicant has no other satisfactory remedy. [13] To these must be added the fact that the remedy is a discretionary remedy and that the court has a wide discretion.

(hhh)

(iii) In order to establish a *prima facie* right the applicant would need to show that it has a right to specific performance even if that right is open to some doubt. The degree of proof to establish a *prima facie* right was dealt with by Smuts, J in Nakanyala v Inspector General of Namibia and Others[14] applying the summary by Justice Harms, in the Law of South Africa[15] as follows:

> "The degree of proof required has been formulated as follows: The right can be *prima facie* established even if it is open to some doubt. Mere acceptance of the applicant's allegations is sufficient but the weighing up of probabilities of conflicting versions is not required. The proper approach is to consider the facts set out by the applicant together with any facts set out by the respondent which the applicant cannot dispute, and to decide whether, with regard to the inherent probabilities and the ultimate *onus*, the applicant should on those facts obtain final relief at the trial. The facts set out in contradiction by the respondent should then be considered and if they show serious doubt on the applicant's case the latter cannot succeed. …". (emphasis supplied)

(jjj) It is apposite at this stage to reiterate the well established principle that an applicant is required to make out a sufficient case in the founding papers, and an applicant cannot remedy the paucity of information in the founding affidavit in the replying affidavit.[16]

(kkk) I already found, based on the interpretation of the Regulations that the applicant does not have a clear right. It remains to be established whether the applicant has made out a *prima facie* right for the relief it seeks. At the very least the applicant must prove, *prima facie* that cancellation was not warranted.

---

[13] Sheehama v Inspector-General, Namibian Police 2006 (1) NR 106 (HC) at 117A-C.

[14] 2012 (1) NR 200 at 213 para [46].

[15] Vol 11, 2nd ed at 420.

[16] TransNamib Ltd v Imcor Zinc (Moly-Copper) Mining and Exploration Corporation (SWA) Ltd and Another 1994 NR 11 (HC).

In this regard, one cannot escape the fact that the applicant in its founding papers painted itself as a completely innocent party when it came to the performance of the terms of the agreement. The applicant made it clear in its founding papers that the only incidence of late supply of fuel was raised by the Municipality's senior buyer in November 2012. Furthermore, the deponent to the affidavit stated that "since then everything continued as normal and no further late deliveries occurred. There was never any further indication that second respondent had any complaints about or was dissatisfied with the applicant's performance in terms of the agreement". The applicant then says that "out of the blue and as a total surprise the applicant received a letter."

(lll)

(mmm) What is clear from the respondents' allegations, is that delivery was consistently late and that the Municipality pointed out to the applicant that it was having serious problems to execute its mandate as a local authority because of the constant late deliveries of fuel. I refer to the emails above. The applicant in its founding papers clearly failed to take the court into its confidence to at the very least inform that there were issues regarding the performance of the agreement, and to explain them. I say this simply because on the applicant's own papers it alleges that there were no problems with delivery and that the letter of cancellation came as a total surprise.

(nnn) The applicant only dealt with the issues of late performance, and that the late performance was justifiable in most instances in its reply. These facts should have been set out in the founding papers. Apart from this, what is stated in reply is irreconcilable with the picture presented in the founding papers. As such based on the test set out by Justice Harms in the Nakanyala case, together with the principles set out in the TransNamib case, the applicant has failed to make out a *prima facie* case for the relief sought.

(ooo)

(ppp) In light of the above it is not necessary for me to consider whether the applicant has made out the other requisites for interim relief.

(qqq) The respondents sought a special costs order based on the applicant's material non-disclosure. I believe that in view of the order I make, the applicant has already suffered the consequences of failing to make out a *prima facie* case in its founding papers. In light of the foregoing the following order is made:

(a) The application is dismissed with costs, such costs to include the costs of one instructing and one instructed counsel.

_____

EM SCHIMMING-CHASE

Acting Judge

APPEARANCES

APPLICANT:	GB Coleman (with him E Angula) Instructed by AngulaColeman
RESPONDENTS:	AW Corbett Instructed by Muluti & Partners